

**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  
Disability Retirement of:

MICHAEL F. SWANEY,

Respondent,

and

CALIFORNIA DEPARTMENT OF FOOD  
AND AGRICULTURE,

Respondent.

Case No. 2016-0580

OAH No. 2016070550

**PROPOSED DECISION**

This matter was heard before Karen J. Brandt, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on September 6, 2016, in Sacramento, California.

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

Michael F. Swaney (respondent) represented himself.

There was no appearance by or on behalf of the California Department of Food and Agriculture (CDFA). CalPERS established that it duly served CDFA with a Notice of Hearing. Consequently, this matter proceeded as a default hearing against CDFA pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and this matter was submitted for decision on September 6, 2016.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM

FILED 9/13 20 16  
Debra Wooten

## ISSUE

Is respondent precluded from filing an application for disability retirement in light of his voluntary resignation after being served with a notice of adverse action dismissing him from state service?

## FACTUAL FINDINGS

### *Respondent's Disability Retirement Application*

1. Respondent was employed by CDFA as an Assistant Information Systems Analyst. On May 27, 2015, CalPERS received respondent's Disability Retirement Election Application (Application). In his Application, respondent designated his application type as "Service Pending Disability Retirement." The Application indicated that respondent's last day on the payroll was February 25, 2015, and that the effective date of his retirement was February 26, 2015.

2. In his Application, respondent described his disability as "Post Traumatic Disorder." He stated that his disability occurred in "2010" as a result of "undue stress in work environment." He described his limitations/preclusions as:

Unable to perform job duties due to hostility in work environment.

He stated that his disability affected his ability to perform his job as follows:

I am unable to work with continued harassment, hostility – hypersensitivity & hyperawareness.

3. By letter dated February 17, 2016, CalPERS notified respondent that he was not eligible for disability retirement because he was "dismissed from employment for reasons which were not the result of a disabling medical condition" and his dismissal did "not appear to be for the purpose of preventing a claim for disability retirement." Consequently, CalPERS cancelled respondent's Application.

4. By letter dated March 10, 2016, respondent appealed from CalPERS's cancellation of his Application.

5. Respondent retired for service effective February 26, 2015, and has been receiving his service retirement allowance from that date. Respondent is currently 53 years old.

*Notice of Adverse Action and Stipulation for Settlement*

6. On February 13, 2015, CDFA served a Notice of Adverse Action (NOAA) on respondent, dismissing him from his position as an Assistant Information Systems Analyst, effective the close of business on February 25, 2015. The NOAA stated that adverse action was being taken against him under the following subdivisions of Government Code section 19572:

- (e) Insubordination
- (f) Dishonesty
- (m) Discourteous treatment of the public or other employees
- (o) Willful disobedience
- (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

These legal causes for discipline were based upon allegations that respondent: (1) after being served with a prior notice of adverse action on January 23, 2015, walked into his supervisor's office, exclaimed, "this is bullshit," placed his fingers into his mouth with his hand in the shape of a gun, and imitated the firing of a gun; and (2) told another employee that he had "weapons stashed all over this department and they don't even know it." The NOAA further alleged that respondent had "continued to make statements that make your co-workers fear for their safety despite numerous verbal warnings and a prior adverse action," and that his behavior "violated CDFA's workplace violence prevention policy."

7. On October 15, 2015, respondent entered into a Stipulation for Settlement and Release (Stipulation) with CDFA to settle both the dismissal and the earlier adverse action against him.<sup>1</sup> Respondent was represented by counsel when he entered into the Stipulation. In the Stipulation respondent agreed to: (1) voluntarily resign from his position as an Assistant Information Systems Analyst with CDFA, effective the close of business on February 25, 2015; (2) not contact CDFA's employees and stay away from CDFA's offices; (3) withdraw his appeals from both notices of adverse action; and (4) release CDFA from all claims and legal actions, including claims under the California Fair Employment and Housing Act and the Americans with Disabilities Act. Respondent also agreed to the following provision included as paragraph 7 in the Stipulation (Paragraph 7):

[Respondent] agrees he will never again apply for or accept any employment position with [CDFA], or any of [CDFA's] current or future constituent entities. [Respondent] hereby waives all

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<sup>1</sup> A copy of the January 23, 2015 notice of adverse action served on respondent was not offered into evidence. From the information set forth in the Stipulation, that adverse action reduced respondent's salary by 10 percent for six months. There was no evidence regarding the allegations against respondent included in that earlier adverse action.

rights of return to [CDFA] regardless of how such permissive or mandatory return rights or privileges are derived. If [CDFA] or any of its current and future constituent entities hires or inadvertently hires [respondent], and [respondent] accepts the position, such action by [respondent] shall be considered a breach by [respondent] of this Stipulation, and [respondent] will be terminated from the position at such time as is convenient to [CDFA] or any of [CDFA's] current and future constituent entities. [Respondent] waives any right he might otherwise have had to appeal, in any forum, of that termination. Nothing herein prohibits [respondent] from applying for or accepting employment with any state entity except [CDFA].

8. In the Stipulation, CDFEA agreed to: (1) withdraw both notices of adverse action, and remove them and all supporting documentation from respondent's personnel file; (2) "not to contest or in any way hinder [respondent's] application for or receipt of disability retirement"; and (3) pay respondent \$75,000.

9. On November 3, 2015, the State Personnel Board (SPB) issued a Decision Approving Stipulation for Settlement, which adopted the Stipulation as its decision in the two adverse action cases against respondent.

#### *CalPERS's Challenge to Respondent's Application*

10. At hearing, CalPERS challenged respondent's Application, arguing that he was precluded from seeking disability retirement under the holdings of the court decisions in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*), and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*), and the precedential decision issued by CalPERS's Board of Administration (Board) in *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (October 16, 2013) Precedential Decision 13-01, Case No. 2012-0287, OAH No. 2012050989 (*Vandergoot*).

11. As set forth in the Legal Conclusions below, the courts in *Haywood* and *Smith* held that civil service employees may not apply for disability retirement if they have been dismissed from their civil service employment. These courts recognized two exceptions to this preclusion: (1) when the employee establishes that the dismissal was the ultimate result of a disabling condition; and (2) when the employee establishes that the dismissal preempted the employee's otherwise valid claim for disability retirement.

12. In *Vandergoot*, the Board determined that a stipulated settlement agreement in which an employee settled a dismissal action by agreeing both to resign and to give up all return rights was tantamount to a dismissal for purposes of applying the *Haywood* and *Smith* criteria. CalPERS argued that, by agreeing to Paragraph 7, respondent was precluded by *Vandergoot*, *Haywood* and *Smith* from applying for disability retirement.

## *Respondent's Testimony and Evidence*

### Respondent's Testimony

13. Respondent began working for the State of California in 1985 or 1986 as a Correctional Officer. In 1999, he began working for CDFA as a student assistant. His last position at CDFA was as an Assistant Information Systems Analyst.

14. In March 2011, while respondent was working a second job as a security officer at Arco Arena, he was trampled by a number of people after a fight broke out at a heavy metal concert. As a result of this incident, respondent sustained a traumatic brain injury and began suffering from post-traumatic stress disorder (PTSD). After he was injured, he was off work until November 2013. While he was off work, he received disability insurance benefits through the Social Security Administration (SSA). In November 2013, he returned to work for CDFA through the SSA's Ticket to Work program.

15. Before respondent sought to return to work in November 2013, he told CDFA about his PTSD and sought reasonable accommodations. According to respondent, although CDFA reasonably accommodated his physical condition, it did not accommodate his psychological condition, including his requests to be allowed to leave work when he felt anxious, to lower the lighting, and to go to therapy and doctors' appointments. Respondent asserted that after he returned to work in November 2013, he felt ostracized by his coworkers. He was able to perform his job duties, but could not successfully interact with his fellow employees. He felt that his coworkers were discriminating against him because of his mental health condition. As a result of his PTSD, respondent became easily agitated and irritable, and was hypervigilant. His coworkers made "snide remarks" and "continually harassed" him. He filed a disability discrimination complaint regarding the treatment he received in the CDFA workplace.

16. Respondent asserted that he did not know the legal ramifications of agreeing to Paragraph 7 in the Stipulation. He believed that CDFA was going to help him attain his disability retirement. Respondent wanted to return to work in 2013 so that he would be a productive citizen, although his doctor questioned whether he would be successful. Given his PTSD and CDFA's failure to grant his reasonable accommodation requests, he was not successful. Respondent believes that if he had not tried to return to work in November 2013, he would have been approved for disability retirement at that time.

### Testimony of Tammie Davis

17. Tammie Davis is respondent's fiancée. She was present when respondent submitted his Application to CalPERS. Ms. Davis testified that respondent stated on his Application that his disability occurred in 2010 because he had "lots of issues" at that time with hostility and anger, and went on leave to address these mental health issues. But Ms. Davis testified that respondent did not have PTSD until after his March 2011 injury. According to Ms. Davis, respondent could perform the work that his job required, he just

could not handle the personal work relationships. During the approximately 15 months between when respondent went back to work in November 2013 until his last day on the payroll on February 25, 2015, Ms. Davis estimated that respondent was off work due to stress for about a total of six months. According to Ms. Davis, respondent experienced a “substantial change” in his personality as a result of his March 2011 injury. She believes that his dismissal was the ultimate result of his mental health disability.

#### Respondent’s Exhibits

18. During the hearing, respondent offered into evidence documents regarding his SSA disability insurance benefits, evaluations by healthcare providers, requests for reasonable accommodation and a State Disability Insurance (SDI) medical leave of absence, and performance evaluations from 2009 and 2010.<sup>2</sup> These documents were admitted as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d).<sup>3</sup>

19. SSA Documentation. On November 21, 2011, the SSA issued a Notice of Award, which stated that respondent was “entitled to monthly disability benefits beginning October 2011.” The Notice of Award stated further that respondent’s “present workers’ compensation benefits” were not affected by his Social Security benefits. The documentation described the SSA’s Ticket to Work program, and explained that an individual’s participation in the program began when he signed “an agreement with an employment network or state vocational rehabilitation agency.” With their help, the individual developed an “employment plan.” While the individual was in the Ticket to Work program, the SSA would review his “progress in achieving the goals” in his employment plan every 12 months.

20. Respondent submitted SSA documents listing the disability insurance payments he received in 2014 and 2015. He also submitted a letter from the SSA dated June 6, 2016, which stated that his disability insurance payments “continued during your period of 9 trial work months while you tested your ability to work. Your trial work period ended September 2014. You are entitled to payments for months beginning March 2015 because you are no longer doing substantial work.” The letter stated further that respondent was not entitled to disability insurance payments for the months of January and February 2015 “because of substantial work.”

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<sup>2</sup> In order protect respondent’s privacy, his exhibits have been place under a protective order.

<sup>3</sup> Government Code section 11513, subdivision (d), in relevant part, provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

21. Respondent offered three evaluation reports into evidence: (1) a July 5, 2011 Neuropsychological Evaluation Report from Estee S. Cohen, Ph.D.; (2) a December 21, 2011 Neurology Report from Daniel Shalom, M.D.; and (3) a September 30, 2014 Psychological Initial Consultation Report from Luigi Piciucco, Ph.D.

22. July 5, 2011 Neuropsychological Evaluation Report. The purpose of Dr. Cohen's July 5, 2011 evaluation and report was to "assess the nature and extent of [respondent's] neuropsychological difficulties, and to sort out psychological vs. neuropsychological symptoms" as they related to his March 2011 injury at Arco Arena. In her report, Dr. Cohen described the circumstances surrounding that injury and the changes that respondent reported in his personality. Since the injury, respondent had "no tolerance or patience." It bothered him to "hear others in conversation." He was "angry all of the time." He had "road rage to the point that on three occasions the police had to be involved." He was "more angry, irritable, and reactive," and "more agitated and jumpy than he was before his injury." Dr. Cohen's report indicated that respondent went back to work at CDFA one week after he was injured, but went out on disability in April 2011.

23. Dr. Cohen described the "pre-existing employment issues and work stress" that respondent experienced prior to his March 2011 injury. In or about 2010, after respondent did not get a promotion, he was required to train other employees, who he believed would be promoted over him. He "was angry towards his employers and had thoughts of harming them, which he would not act upon." He also "experienced chest tightness, wanted to isolate himself, and suffered from sleep problems and nightmares." He was on stress leave from CDFA from October 2010 to January 2011.

24. Dr. Cohen noted that the first report of occupational injury issued for respondent after his March 2011 injury diagnosed him with "Post head contusion with loss of consciousness, postconcussion syndrome, acute lumbosacral strain, cervical strain, thoracic strain, left ankle sprain." He was taken off work for one day, and thereafter allowed to return to work on modified duty. Dr. Cohen also described a May 25, 2011 neurological evaluation of respondent, which diagnosed him with "Post Concussive Syndrome, Possible single post-traumatic seizure, Possible post traumatic stress disorder, Depression and Anxiety, Possible Axis II NOS, Chronic back pain, Medical marijuana, Probable small renal calculus, right."

25. Dr. Cohen administered a number of psychological tests to respondent. Based on these tests and her evaluation, Dr. Cohen diagnosed respondent under the DSM-IV-TR as follows:<sup>4</sup>

Axis I:	294.9	Cognitive Disorder, Not Otherwise Specified
	309.28	Adjustment Disorder with Mixed Anxiety and Depressed Mood

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<sup>4</sup> The DSM-IV-TR is the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision.



316 Psychological Symptoms Affecting  
Chronic Pain and Cognitive Symptoms

Axis II: Rule Out Personality Disorder Not  
Otherwise Specified, with Paranoid  
Features

Axis III: Chronic Pain Secondary to Industrial  
Injury (Neck, Shoulder, Low Back, Leg)

Axis IV: Employment issues, pre-dating injury  
Lack of social support, with recent split  
from fiancée

26. In her July 5, 2011 report, Dr. Cohen concluded that, based on what respondent reported to her, “there is no doubt that he experienced a mild traumatic brain injury” in March 2011. The results of her evaluation “point[ed] to mild cognitive changes secondary to the mild traumatic brain injury.” Areas of reduced functioning were “centered around attention, concentration, and impulsivity.” While respondent’s cognitive problems were “explained in part by the nature of his brain injury,” they were “further effected [*sic*] by his psychological difficulties, in the form of anxiety and depression.” Dr. Cohen found that respondent’s “depression started prior to the injury, back in October 2010 following heightened work stress, but has been exacerbated by the most recent injury.” Dr. Cohen also found that he had suicidal ideation and anxiety, which were present at times before the March 2011 injury, but these symptoms had increased since his injury.

27. December 21, 2011 Neurology Report. On October 24, 2011, Dr. Shalom took a history and performed a neurological examination of respondent as an Agreed Medical Examiner in respondent’s workers’ compensation case. Dr. Shalom also reviewed respondent’s medical records, and issued his report dated December 21, 2011, and signed on January 6, 2012. Dr. Shalom diagnosed respondent as follows:

Closed head injury with concussion and post-traumatic headache, with possible history of immediate post-traumatic seizure.

Aggravation of pre-existent chronic spinal strains and radiculitis.

Psychological issues, acute and chronic.

28. September 30, 2014 Psychological Initial Consultation Report. Respondent was referred to Dr. Piciucco for assessment and evaluation. On September 23, 2014, respondent underwent a battery of psychological tests. On September 29, 2014, respondent was administered a psychodiagnostic interview. Dr. Piciucco prepared a Psychological

Initial Consultation Report dated September 30, 2014. According to the report, the psychological testing was “utilized to objectively assess [respondent’s] current emotional status, as well as longer-term personality traits and conditions.” It was also used to evaluate the “credibility of [respondent’s] symptom presentation” and to assist with formulating “effective treatment planning and implementation.”

29. As set forth in Dr. Piciuccio’s report, respondent indicated that since he returned to CDFA in November 2013, he had been subjected to discrimination because of his psychiatric problems. Respondent stated that he had “*been falsely accused by co-workers of several things such that I was going to kill my co-workers and that I was going to bring a weapon to work ... they started ostracizing me.*” (Italics in original.) He was placed on administrative time off from March to June 2014. Respondent complained that several accusations had been made against him involving workplace violence and sexual harassment, but all the accusations were shown to be unfounded. Respondent filed a claim of discrimination with CDFA’s Equal Employment Opportunity (EEO) office because he believed that he was being discriminated against for having a mental illness. Respondent told Dr. Piciuccio that he had been sent for a psychiatric fitness for duty examination, and was found fit for duty. Dr. Piciuccio also noted that respondent had undergone two agreed medical evaluations in psychiatry before Dr. Piciuccio evaluated him, but Dr. Piciuccio was not given access to either of those evaluations.

30. Dr. Piciuccio diagnosed respondent under the DSM-IV-TR as follows:

Axis I:	309.81	Posttraumatic Stress Disorder
	296.23	Major Depressive Disorder
Axis II:		Personality Traits NOS
Axis III:		Per self report: Pain in his lower spine
		<ul style="list-style-type: none"><li>• Low back pain – Pain radiating to right buttocks. Constant. Pain level rated 2-8/10 on scale of 0 to 10.</li></ul>
		He also reported minimal to none neck and shoulder discomfort rated 0-1/10 on a scale of 0 to 10.
Axis IV:		Chronic pain; alleged cumulative work related stress.
Axis V:		GAF = 50

31. Dr. Piciuccio recognized that, prior to respondent’s March 2011 injury, respondent had suffered from Posttraumatic Stress Disorder and Major Depression, but those

conditions were in “substantial remission” until March 2011. Dr. Piciucco opined that respondent’s “current Posttraumatic Stress Disorder and Major Depression” were “considered predominantly caused by the consequences of” respondent’s March 2011 injury, and that his “current alleged work related stress marked by alleged discrimination for suffering from a mental illness is a contributory factor to his depression and generalized anxiety.” Dr. Piciucco opined further that respondent was then “currently capable of performing the functions of his usual occupation, however, I fear that without treatment his stress tolerance will decrease. This might lead to work disability.”

32. Respondent’s Request for Reasonable Accommodation. Respondent submitted a letter from CDFA dated October 21, 2013, and related communications. In the October 21, 2013 letter, CDFA granted respondent’s reasonable accommodation request to work four hours a day when he returned to work in November 2013. Respondent also submitted a letter dated October 16, 2014, from CDFA, which provided respondent information regarding an SDI Medical Leave of Absence, and a form respondent completed dated October 19, 2014, pursuant to which he requested an SDI Medical Leave of Absence.

33. Respondent’s Performance Evaluations. Respondent submitted performance appraisal summaries from CDFA dated May 6, 2009, and March 24 and 26, 2010, which showed that respondent, in his position as an Assistant Information Systems Analyst, was rated as fully meeting expectations on all performance factors that were evaluated, except “relationships with people,” on which he was rated as consistently exceeding expected standards.

#### *Discussion*

34. As explained in *Haywood, Smith, and Vandergoot*, in determining whether respondent should be allowed to apply for disability retirement, three questions are relevant: (1) whether respondent’s resignation and waiver of his return rights to CDFA was tantamount to a dismissal under *Haywood* and *Smith*; (2) whether respondent’s separation from state service was the ultimate result of his disabling condition; and (3) whether respondent’s separation from service preempted an otherwise valid claim for disability retirement.

35. As set forth in *Haywood* and *Smith*, subject to the two listed exceptions, civil service employees who have been dismissed from their civil service jobs may not apply for disability retirement. In *Vandergoot*, the Board held that a resignation of an employee was tantamount to a dismissal for the purposes of applying the *Haywood* and *Smith* criteria when the employee: (1) resigned pursuant to a settlement agreement entered into to resolve a dismissal action; and (2) agreed to waive all rights to return to his former employer.

36. In this case, on February 13, 2015, respondent was served with an NOAA dismissing him from state service, effective February 25, 2015. On May 27, 2015, respondent submitted his Application to CalPERS, which designated his effective date of retirement as February 26, 2015. On October 15, 2015, respondent entered into the

Stipulation with CDFA, by which he voluntarily resigned from CDFA effective February 25, 2015, and waived his right to return to employment at CDFA. By giving up his right to return to CDFA, respondent waived his mandatory reinstatement rights back into state service in the event he ever recovers from his alleged disability. As explained in *Vandergoot*, these facts establish that respondent's resignation was tantamount to a dismissal for cause under *Haywood* and *Smith*.

37. At the hearing, respondent argued that he should be allowed to submit his Application because the first exception identified in *Haywood* applies: his separation from state service was the ultimate result of his disabling condition. As respondent argued, in March 2011 he sustained a traumatic brain injury and began suffering from PTSD, which affected the way he interacted with others. Because he wanted to return to work at CDFA, he did so in November 2013 through the SSA's Ticket to Work program. Although CDFA was aware at that time that he had PTSD which affected his ability to interact with others, CDFA failed to grant him the reasonable accommodations he requested. Respondent asserted that the difficulties he experienced in interacting with his coworkers, as reflected in the NOAA, were a direct result of his traumatic brain injury and PTSD. He asserted further that both before and after his dismissal from CDFA, he was disabled by his traumatic brain injury and PTSD and was receiving treatment from the same doctors. He believes that if he had retired from state service in November 2013, instead of trying to return to work, he would have been granted disability retirement at that time.

38. At the hearing, CalPERS argued that respondent's situation presented similar facts to those presented in *Haywood*. In 1976, the employee in *Haywood* began working as a firefighter for the American River Fire Protection District. In 1992, the employee was assigned to a new captain, who began criticizing the employee's performance for failing to comply with the captain's orders. Effective April 30, 1993, the District terminated the employee for cause for willfully jeopardizing the health and safety of the public and inexcusable neglect of duty. As set forth in *Haywood*, on several occasions prior to termination, the employee had visited a counselor, whose services were paid for by the District's employee assistance program. The employee also filed a workers' compensation claim, and was evaluated by several psychiatrists. These psychiatrists reached different diagnoses about the employee's mental health condition, including "major depression of severe proportions" and "mild severity mental disorder where depression dominates." But as the court explained,

Although the experts were in conflict in the above respects, there were certain things upon which they were in agreement. They agreed that Haywood did not suffer from any underlying disease, defect or disorder, whether or not work-related, that caused his disciplinary problems and his depressive reaction to those problems. They agreed that, by the time relevant to his application for disability retirement, his depressive condition was in remission. And they agreed that Haywood was fully capable of returning to employment, and that he would be fully

capable of performing the duties of his former position if he were to be hired by any other employer. Haywood's claim for disability retirement is based upon the view that he could not return to work for *the District*, as evidenced by the following expert opinions.

(*Haywood, supra*, 67 Cal.App.4th at p. 1300. Italics in original.) *Haywood* made clear that the employee's termination for cause was "unrelated to his alleged medical condition." (*Id.* at p. 1306.)

39. The primary question for determination in this matter is whether, in contrast to *Haywood*, the wrongful conduct alleged in the NOAA was the ultimate result of respondent's mental health condition. At the hearing, there were no experts called to opine about whether the particular behavior alleged in the NOAA was caused by respondent's PTSD. The fitness for duty examination and psychiatric evaluations referred to in Dr. Piciucco's September 30, 2014 report were not offered into evidence. Consequently, there was no evidence to confirm whether, months before CDFA served respondent with the NOAA, it had sent him for a fitness for duty examination because it was contemplating filing for disability retirement on his behalf under Government Code section 19253.5, instead of dismissing him for cause under Government Code section 19574.<sup>5</sup>

40. Both respondent and Ms. Davis asserted that the wrongdoing alleged against respondent in the NOAA was the ultimate result of his PTSD. Respondent sustained a traumatic brain injury and began suffering from PTSD in March 2011. Due to his injury, he was off work for two and one-half years. He was allowed to return to his CDFA employment under an SSA program that monitored his progress. CDFA was aware of his

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<sup>5</sup> Government Code section 19253.5, in relevant part, provides:

(a) An appointing power may require an employee to submit to a medical examination by a physician or physicians designated by the appointing power to evaluate the capacity of the employee to perform the work of his or her position.

[¶] ... [¶]

(i)(1) If the appointing power, after considering the conclusions of the medical examination provided for by this section or medical reports from the employee's physician and other pertinent information, concludes that the employee is unable to perform the work of his or her present position or any other position in the agency and the employee is eligible and does not waive the right to retire for disability, the appointing power shall file an application for disability retirement on the employee's behalf.

mental health condition before it dismissed him for cause. The types of wrongdoing alleged in the NOAA were virtually identical to the behaviors Dr. Piciuccio identified in his September 30, 2014 report as manifestations of respondent's PTSD. (Compare Findings 6 and 29.) The striking similarities between the behaviors Dr. Piciuccio described as manifestations of respondent's PTSD more than five months before CDFA alleged those same types of behaviors as grounds for dismissal, when evaluated in the context of respondent's injury history, raise significant questions about whether: (1) respondent was disabled by his mental health condition prior to receiving the NOAA and (2) his mental health condition caused him to engage in the wrongdoing alleged in the NOAA. Thus, given the unique facts in this case and the nature of the wrongdoing alleged in the NOAA, respondent submitted sufficient evidence to show that his dismissal may have been the ultimate result of his disabling condition.

41. In sum, respondent established that the first exception identified in *Haywood* applies in this case, i.e., his dismissal may have been the ultimate result of his disabling condition. His appeal from the cancellation of his Application should therefore be granted, and his disability retirement application should be reviewed on the merits to determine whether, before he was dismissed for cause, he was substantially disabled by his mental health condition from performing his usual duties as an Assistant Information Systems Analyst.

## LEGAL CONCLUSIONS

1. 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 explained that the employee's dismissal in that case "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.*)

2. In *Smith, supra*, 120 Cal.App.4th at pp. 203-204, 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 preempted 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.)

3. In *Vandergoot*, the Board held that a resignation of an employee was tantamount to a dismissal for the purposes of applying the *Haywood* and *Smith* criteria when the employee: (1) resigned pursuant to a settlement agreement entered into to resolve a

dismissal action; and (2) 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*, Precedential Decision 13-01 at p. 7, ¶ 18.)

4. Pursuant to the holding in *Vandergoot*, respondent’s resignation from CDFA was tantamount to a dismissal for the purposes of applying the *Haywood* and *Smith* criteria in light of his waiver of his rights of return to CDFA. (Finding 36.)

5. The primary issue raised by respondent was whether the first exception identified in *Haywood* applies, i.e., whether his separation from state service was the ultimate result of his disabling condition. Government Code sections 19253.5, subdivision (i), and 21153, provide that an appointing power may not dismiss an employee because of a disability if that employee may otherwise be eligible to retire for disability.<sup>6</sup>

6. As set forth in Findings 39, 40 and 41, given the unique nature of respondent’s injury history and the wrongdoing alleged in the NOAA, respondent offered sufficient evidence to establish that his dismissal may have been the ultimate result of his disabling condition. Consequently, his appeal from the cancellation of his Application should be granted and his disability retirement application should be reviewed on the merits to determine whether, before he was dismissed for cause, he was substantially disabled by his mental health condition from performing the usual duties of an Assistant Information Systems Analyst.

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<sup>6</sup> Government Code section 21153 provides:

Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions or to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731.

ORDER

The appeal of respondent Michael F. Swaney is GRANTED. CalPERS shall review respondent's disability retirement application to determine whether he should be granted disability retirement.

DATED: September 13, 2016

DocuSigned by:

*Karen Brandt*

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KAREN J. BRANDT  
Administrative Law Judge  
Office of Administrative Hearings