

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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

DANIEL HUMPHREYS,

Respondent,

and

CITY OF ALHAMBRA,

Respondent.

Case No. 2015-0960

OAH No. 2015120403

PROPOSED DECISION

Administrative Law Judge Michael A. Scarlett, State of California, Office of Administrative Hearings, heard this matter on August 25, 2016, and December 1, 2016, in Los Angeles, California.

Kevin Kreutz, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS) on August 25, 2016, and John L. Shipley, Senior Staff Attorney, represented CalPERS on December 1, 2016.

Traci I. Park and Scott M. Nenni, Attorneys at Law, Burke, Williams & Sorensen, LLP, represented the City of Alhambra (respondent Alhambra).

Dann L. Duncan, Attorney at Law, represented Daniel Humphreys (respondent Humphreys) who was present at the hearing.

Oral and documentary evidence was taken and the record was held open for submission of written closing briefs, and reply briefs if any. On January 3, 2017, the parties submitted closing briefs. CalPERS' closing brief was marked as CalPERS Exhibit 12, respondent Alhambra's closing brief was marked as City Exhibit 25, and respondent Humphreys' closing brief was marked as Exhibit FF. On January 17, 2017, respondent

CALIFORNIA PUBLIC EMPLOYEES
RETIREMENT SYSTEM

FILED Feb. 23 2017

[Signature]

Alhambra submitted a closing reply brief which, was marked as City Exhibit 26. The matter was submitted for decision on January 17, 2017.

FACTUAL FINDINGS

1. Anthony Suine, Chief Benefits Services Division, CalPERS, made and filed the statement of issues in his official capacity.

2. Respondent Humphreys was employed by respondent Alhambra as a police officer/detective. By virtue of his employment, respondent Humphreys was a local safety member of CalPERS subject to Government Code sections 21154 and 21156.

Respondent Humphreys' Disability Application

3. On December 18, 2014, respondent Humphreys signed an application for disability retirement (application), received by CalPERS on December 18, 2014. Respondent Humphreys' application did not state a basis for his claimed disability or when the disability occurred.

4. On February 4, 2015, CalPERS requested respondent Alhambra to determine whether respondent Humphreys was substantially incapacitated from the performance of his job duties due to a physical or mental condition. Respondent Alhambra informed CalPERS that respondent Humphreys was terminated for cause from employment effective June 8, 1999.

5. On July 17, 2015, CalPERS notified respondent Humphreys of its determination that his disability application would be cancelled because he had been dismissed from employment with respondent Alhambra for cause, not based on a disabling medical condition or for the purpose of preventing a claim for disability retirement, citing *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292; *Smith v. City of Napa* (2004) 120 Cal.App.4th 194; and CalPERS' Precedential Decision: *In the Matter of the Application for Disability Retirement of Robert C. Vandergoot and California Dept. of Forestry and Fire Protection, respondents*, Case No. 2012-0287, OAH Case No. 2012050989. Thus, CalPERS informed respondent Humphreys that he was ineligible for disability retirement and that his application for disability retirement could not be accepted.

6. On August 14, 2015, respondent Humphreys appealed CalPERS' determination to cancel his disability retirement application and requested an administrative hearing. In his appeal, respondent Humphreys claimed that work-related mental stress was the cause for his industrial disability claim.

Employment History

7. Respondent Humphreys was hired by respondent Alhambra as a police officer on May 11, 1989. He worked full-time as a police officer/detective for over 10 years until his termination on June 8, 1999. In December 1995, respondent Humphreys was also hired as a part-time police officer with the Glendale Community College Police Department. Respondent Humphreys worked for the Glendale Community College Police Department until October 27, 1998.

8. On October 29, 1998, a complaint of misconduct was filed with the Alhambra Police Department against respondent Humphreys by a female college student at Glendale Community College. The female student's complaint incorporated an October 29, 1998, temporary restraining order (TRO) filed against respondent Humphreys alleging excessive use of force during an incident on October 27, 1998, and sexual assault/misconduct by respondent Humphreys during a two month period from August to October 1998. Based on the female student's complaint, the Alhambra Police Department initiated an administrative investigation. On October 29, 1998, respondent Humphreys was placed on paid administrative leave pending a determination after an administrative investigation into the female student's allegations. He was working full-time, full duty as a police detective when he was placed on administrative leave.

9. On March 21, 1999, the Alhambra Police Department completed its administrative investigation. The investigation report recommended that respondent Humphreys be terminated on the ground that he engaged in sexual misconduct with the female student while on duty at Glendale Community College, and that he untruthfully denied the sexual relationship during the administrative investigation. The investigation report also determined that respondent Humphreys had lied about using his Alhambra Police Department service revolver while performing his duties for the Glendale Community College Police Department. The administrative investigation report determined that respondent Humphreys' misconduct warranted termination on several grounds, including dishonesty, causing discredit to respondent Alhambra and the Alhambra Police Department, disgracing himself, and willful concealment of pertinent information. On May 31, 1999, the Alhambra Police Department notified respondent Humphreys that it was taking disciplinary action to terminate his employment. On June 8, 1999, respondent Humphreys was terminated.

10. On July 6, 1999, respondent Humphreys filed a request for reinstatement of his employment as a police detective with the Civil Service Commission (Commission) of respondent Alhambra. On October 12, 1999, the Commission upheld the decision by respondent Alhambra to terminate respondent Humphreys' employment. Respondent Humphreys did not appeal the Commission's decision.

Respondent Humphreys' Disability Evidence

11. Respondent Humphreys does not, and cannot in this proceeding, dispute that he was terminated for cause on June 8, 1999, by respondent Alhambra. Respondent Humphreys' sole contention is that he had a claim for industrial disability retirement, based upon his disabling medical condition, which vested or matured before the date of his termination. He contends that he was incapacitated for the performance of his usual and customary duties as a police officer/detective as a result of injuries that occurred in July 1993, November 1998, and April 1999. He offered evidence of his workers' compensation appeal claims to support these assertions. Respondent Humphreys specifically cites two injuries: a July 20, 1993, injury resulting from an on-duty motorcycle accident, and a February 27, 1998, psychological injury resulting when he investigated the stabbing death of a 12 year-old child, that he contends resulted in his disability. Respondent Humphreys also claims that respondent Alhambra should have submitted an application for his industrial disability retirement on January 6, 1995, because his eligibility for a disability pension vested or matured on that date because of his inability to return to full duty within six months after being released for limited duty in July 1994.

12. On July 20, 1993, respondent Humphreys was involved in an on-duty motorcycle accident which caused injuries to his right forearm, shoulder, back, and left shoulder. He returned to work on July 6, 1994, in a limited-duty assignment in the detective bureau of the Alhambra Police Department.¹ According to respondent Humphreys, he remained in this limited-duty assignment until June 8, 1999, when he was terminated. He argues that respondent Alhambra's policies prohibited a police officer from remaining in a limited-duty for more than six months. Thus, because he was unable to return to full duty work within six-months, respondent Humphreys asserts that respondent Alhambra was required to submit a disability retirement application on his behalf, effectively forcing him to retire based upon his disability on July 6, 1995, which they did not. On May 15, 1995, by virtue of a stipulated award in his Workers' Compensation Appeals Board case, respondent Humphreys was granted a 15.3 percent permanent disability award for the injuries incurred in the July 20, 1993 accident.

13. Richard M. Bacio, Assistant City Manager and Director of Risk Management for respondent Alhambra, credibly testified that on October 29, 1998, when respondent Humphreys was placed on paid administrative leave, he was working full-time, full-duty as a police detective without restrictions. In October 1998, Bacio was the Personnel Director for respondent Alhambra. He confirmed that respondent Humphreys had been working without restrictions as a police detective since 1995. Although respondent Humphreys asserts that he remained in a limited-duty assignment in the detective bureau for almost five years, from July 1994 until October 1998, this was not supported by the evidence. He initially worked

¹ Conflicting workers' compensation insurance documentation indicated that respondent Humphreys returned to work in a limited-duty capacity on January 4, 1994, and on July 6, 1994.

limited-duty in the detective position, but his detective position ultimately became a permanent, full duty assignment in 1995.

14. On February 27, 1998, while investigating the case of a missing 12-year-old girl, respondent Humphreys was present when the child was discovered murdered inside of a closet with multiple stab wounds. Respondent Humphrey testified that he was emotionally affected after seeing the child's body. He informed his supervisor, Captain Templeman, that the child's murder had impacted him. Captain Templeman instructed respondent Humphreys to obtain a psychiatric evaluation and took him off of work. Respondent Humphreys did not inform his supervisor that he had been impacted by this incident until October 27, 1998, almost eight months after the incident. His testimony regarding this incident was not credible, particularly in light of the fact that his first report of the mental stress occurred on the date that the female college student sought the TRO. A subsequent November 2, 1998, "Sick or Injury Investigation Form" also indicated that respondent Humphreys' cause of injury or illness was an "ongoing internal investigation causing mental distress." This was contrary to respondent Humphreys' claim that he suffered emotional and mental stress because of the murder of the child.

15. On November 4, 1998, respondent Humphreys was evaluated for emotional stress at First Med San Gabriel Valley Medical Center (First Med). The First Med employer report indicated that respondent suffered from "work related stress," and he was referred for psychiatric evaluation. On November 25, 1998, Mir I. Ali-Khan, M.D., who had been treating respondent Humphreys since November 4, 1998, released respondent Humphreys to "resume all normal work duties," effective November 30, 1998, "with no limitations or restrictions." At the time of this work release, respondent Humphreys remained on paid administrative leave as a result of the administrative investigation.

16. Respondent Humphreys ultimately filed workers' compensation insurance claims for his 1993 motorcycle injury, his 1998 mental stress claim, and a 1999 claim based on bilateral carpal tunnel syndrome in his wrists. None of these workers' compensation claims established that respondent was permanently disabled from performing his job duties prior to October 1998, when he was placed on paid administrative leave pending investigation into his misconduct with the female college student. Even though respondent Humphreys was determined to have a 15.3 percent permanent disability on May 15, 1995, as stated above, he worked full duty without restrictions as a detective from 1995 until he was placed on administrative leave in October 1998. With regards to the stress claims, as stated above, respondent Humphreys was released to return work full duty without restrictions on November 30, 1998.

17. Regarding the carpal tunnel syndrome claim, the first record of this injury appears to be on April 2, 1999. Respondent Humphreys was not diagnosed with bilateral carpal tunnel syndrome until September 23, 2004, at which time he was deemed permanent and stationary for this condition. Although the Qualified Medical Examination (QME) indicated that 50 percent of the carpal tunnel injury could be attributed to his work as a police officer/detective prior to June 1999, the other 50 percent causation was attributed to

respondent Humphreys' employment as a plumber after he was terminated in June 1999. Significantly, the QME evaluation for this workers' compensation claim was not rendered until September 23, 2004, over five years after respondent Humphreys was terminated by respondent Alhambra.²

18. The workers' compensation claims do not establish that respondent Humphreys was permanently incapacitated for performing his duties as a police detective prior to October 1998. More significantly, as stated above, respondent Humphreys did not apply for industrial disability retirement until December 18, 2014, over 15 years after the termination for cause of his employment by respondent Alhambra.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The applicant for a benefit has the burden of proof to establish the right to the claimed benefit; the standard of proof is a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051; Evid. Code, § 115.)

Eligibility for Disability Retirement

2. By virtue of his employment, respondent is a local safety member of CalPERS subject to Government Code sections 21154 and 21156.³ Eligible CalPERS members, who are incapacitated physically or mentally for the performance of duty, shall be retired for disability. (Gov. Code, §§ 21150 to 21154.)

3. 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 a result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

² On January 30, 2015, and March 17, 2016, two workers' compensation insurance physician reports also determined that respondent Humphreys was unable to perform his duties as a police officer/detective based on bilateral carpal tunnel syndrome.

³ All further statutory references shall be to the Government Code unless otherwise specified.

4. Section 21152 provides, in relevant 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. Section 21154 provides:

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 an 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 of 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....

Termination for Cause

6. The issue presented here is whether respondent is eligible to apply for disability retirement after being terminated for cause by respondent Alhambra on June 8, 1999. Where an applicant for CalPERS disability retirement benefits has been terminated for cause and the discharge was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, the applicant is barred from any entitlement to a CalPERS disability retirement. (*Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, 1297.) The employee's dismissal "constitutes a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement – the potential reinstatement of his employment relationship" if it is ultimately determined that the employee is no longer disabled. (*Ibid.*)

7. On May 31, 1999, respondent Alhambra served respondent with a Notice of Implementation of Disciplinary Action informing him that his dismissal would be sought. As stated above, respondent was terminated for cause on June 8, 1999. A hearing before respondent Alhambra's Civil Service Commission was held on October 12, 1999, and a determination was made to uphold respondent Humphreys' termination. Respondent Alhambra terminated respondent for cause based upon misconduct involving a female

college student while he performed his duties as a police officer for the Glendale Community College Police Department. Respondent Humphreys chose not to appeal this termination decision. (See Factual Findings 7 through 10.) Respondent Humphreys' termination on June 8, 1999, constituted a complete severance of the employer-employee relationship, eliminating the possibility of reinstatement of the employment relationship if ultimately respondent Humphreys was determined to be no longer disabled, a necessary prerequisite for disability retirement. (See *Haywood v. American River Fire Protection District*, *supra*, 67 Cal.App.4th at p. 1297.) Thus, CalPERS properly asserts that *Haywood* precludes respondent Humphreys from applying for disability retirement because he was terminated for cause and an employment relationship no longer existed with respondent Alhambra.

Haywood Exceptions

8. Although respondent Humphreys was terminated for cause, he may nevertheless apply for disability retirement if: 1) he establishes that the termination was the ultimate result of a disabling condition; or 2) he establishes that the termination preempted an otherwise valid claim for disability retirement. (*Haywood v. American River Fire Protection District*, *supra*, 67 Cal.App.4th at p. 1297.) Respondent Humphreys does not assert that his termination was the ultimate result of a disabling condition. Rather, his sole contention is that his termination preempted an otherwise matured and vested claim for industrial retirement disability. For the reasons stated below, respondent Humphreys failed to establish that a *Haywood* exception applies in this case.

9. Respondent Humphreys did not establish that his termination preempted an otherwise matured claim for disability retirement. The courts have held that even if an agency dismisses an employee solely for cause unrelated to a disabling medical condition, this will not result in the forfeiture of a matured right to a disability retirement pension. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 206.) In *Smith* the court held 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. [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.*) "A vested right matures when there is an unconditional right to immediate payment." (*Ibid.*) This typically arises at the time the pension board determines that the employee is no longer capable of performing his or her duties. (*Ibid.*)

10. Here, respondent Humphreys was placed on paid administrative leave on October 29, 1998. Thus any claim to disability retirement would have necessarily had to mature or vest on or before that date. There is no evidence that respondent Humphreys' right to disability retirement matured or vested before the date of the event giving rise to the dismissal, here the October 29, 1998 misconduct complaint filed by the female college student. Respondent Humphreys did not file his industrial disability retirement application with CalPERS until December 18, 2014, over 15 years after being placed on leave and ultimately being terminated in June 1999. Consequently, there is no evidence that CalPERS

determined that respondent Humphreys was eligible for a disability retirement prior to October 1998. Respondent Humphreys suggests that the date of injury, not the date that an industrial disability claim matures or vest, is the pertinent date in determining eligibility for disability retirement benefits. However, this argument misinterprets the *Haywood* exception which clearly specifies that the right to disability retirement must have matured before the date of the event giving rise to dismissal. Thus, respondent Humphreys' asserted right to a disability retirement pension could not have matured prior to respondent Alhambra's lawful termination of his employment for cause, because his application was not filed until December 18, 2014.

11. Respondent Humphreys also offered evidence of his workers' compensation insurance claims for multiple injuries to support his contention that he was disabled prior to his dismissal for cause. In *Smith* the court stated that there may be facts under which a court, applying principles of equity, will deem an employee's right to a disability retirement to be matured, and thus survive a dismissal for cause, where "there is undisputed evidence that the employee 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)." (*Smith v. City of Napa, supra*, 120 Cal.App.4th at pp. 206-207.) The court noted, however, that for purposes of the standard for a disability retirement, the employee's medical evidence is not unequivocal. (*Id.* at 207.)

12. First, the courts have held that workers' compensation determinations of permanent disability are insufficient in disability retirement proceedings. "A workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties is different." (*Smith v. City of Napa, supra*, 120 Cal.App.4th at pp. 206-207.) At best, a workers' compensation determination might provide a "basis for litigating whether this evidence demonstrated a substantial inability to perform his duties," but this would be insufficient for claiming a matured right to retirement disability benefits. Thus, respondent Humphreys' reliance on workers' compensation disability claims and determinations to establish that he was disabled prior to his termination for cause is not persuasive.

13. However, even if respondent Humphreys' workers' compensation evidence is considered, this evidence could not establish that he was eligible for a disability retirement pension. Respondent Humphreys workers' compensation injury claims did not constitute "undisputed evidence" that his eligibility for a CalPERS disability pension was a foregone conclusion. In fact, the evidence established that he ultimately returned to work full-time, full-duty without restrictions following his July 1993 injury, and his November 1998 mental stress claim. In September 2004, respondent Humphreys was determined to be permanently disabled in a workers compensation case based on bilateral carpal tunnel syndrome. However, this determination was made well after his termination for cause in June 1999. Consequently, none of these workers' compensation claims established that respondent Humphreys was incapacitated for performing his usual and customary duties as a police detective prior to his termination for cause.

14. Finally, respondent Humphreys asserted that respondent Alhambra was required to file an application for disability retirement on his behalf in January 1995 because he was unable to return to a full duty assignment within six months after returning to work in July 1994. It was not established that respondent Humphreys' position as a police detective remained a limited-duty assignment after January 1995. In fact, Richard Bacio credibly testified that respondent Humphreys worked full-time, full-duty without restrictions as a police detective from 1995 until he was placed on leave in October 1998. Respondent Humphreys also worked 19 hours per week as a police officer for the Glendale Community College Police Department from December 1995 until October 1998. Significantly, on July 6, 1999, respondent Humphreys filed an appeal of the decision by respondent Alhambra to terminate his employment, requesting that he be reinstated to full-duty as a police detective, suggesting that he was not incapacitated for performing his duties as of that date. There is insufficient evidence to conclude that respondent Humphreys was disabled in January 1995. Consequently, there would have been no basis for respondent Alhambra to file a disability retirement application in January 1995, thereby forcing respondent Humphreys into retirement, even though he was not disabled.

15. Based upon Factual Findings 1 through 18, and Legal Conclusions 1 through 14, respondent Humphreys was terminated for cause by respondent Alhambra and failed to establish that either of the two *Haywood* exceptions applied in this case. Consequently, CalPERS correctly determined that he is ineligible to apply for disability retirement. Therefore, respondent Humphreys' appeal is denied.

ORDER

The appeal of respondent Daniel Humphreys is denied.

DATED: February 15, 2017

DocuSigned by:

Michael A. Scarlett

834BAC07732D402...

MICHAEL A. SCARLETT
Administrative Law Judge
Office of Administrative Hearings