ATTACHMENT C

RESPONDENT'S ARGUMENT

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Re *In the Matter of the Appeal of Accepting the Application for Industrial Disability Retirement of Jose S. (Steve) Carrera, Respondent, and City Of Bell, Respondent*
Board Hearing Date: February 19, 2025

Respondent's Argument

Introduction

A resignation resulting from the settlement of a whistleblower complaint, where no disciplinary action was pending at the time of separation, is distinct from the circumstances that bar disability retirement under existing precedent. *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 established that termination for cause prevents disability retirement only when the termination neither results from a disabling condition nor preempts a valid disability claim. *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 further clarified that disability retirement rights must have "matured" before termination to survive, absent equitable considerations. *Martinez v. Public Employees Retirement System* (2019) 33 Cal.App.5th 1156 extended these principles specifically to resignations made to avoid imminent termination. CalPERS precedential decisions in *Vandergoot* (2013) CalPERS Precedential Dec. No. 13-01 and *MacFarland* (2016) CalPERS Precedential Dec. No. 16-01 similarly address situations involving pending discipline or attempts to preempt termination through retirement.

Unlike these cases, where the separations were direct terminations or tactics to evade pending disciplinary actions, a resignation under a whistleblower settlement represents the resolution of a distinct legal claim. The employee's separation in such circumstances is not "tantamount to a dismissal" as contemplated by *Vandergoot*, nor an attempt to get around legitimate discipline as in *MacFarland*. When no disciplinary action is pending or contemplated, the central concern of

Haywood—preventing employees from evading the consequences of misconduct through disability retirement—is not implicated. Instead, the resignation represents a legitimate settlement of independent legal claims, leaving intact the employee's right to pursue disability retirement if otherwise eligible under the law.

The proposed decision upholding CalPERS's cancellation of Sergeant Jose S. (Steve) Carrera's industrial disability retirement (IDR) application rests on a fundamental misapplication of the law. By equating the mere existence of a murky internal affairs investigation with formal disciplinary action, the decision eviscerates the procedural protections afforded peace officers and creates a dangerous end-run around the requirements for a punitive termination. If allowed to stand, the decision would set a troubling precedent letting an employing agency constructively dismiss an employee without adhering to due process safeguards and then rely on that improper dismissal to deny earned disability benefits. The substantial prejudice to Carrera's rights and wellbeing cannot be overstated.

The record is clear that Carrera voluntarily resigned from the City of Bell with no misconduct charges pending against him. His resignation under the settlement of his whistleblower lawsuit was unrelated to any disciplinary allegations. Carrera also presented substantial evidence that his right to IDR benefits fully matured before his separation from employment. The proposed decision's conclusion that Carrera is ineligible for IDR under *Haywood* and similar cases ignores these dispositive facts and is legally incorrect.

To prevent a serious injustice and ensure the integrity of the Public Employees' Retirement Law (PERL), the Board of Administration should grant Carrera's appeal, reverse CalPERS's cancellation of his IDR application, and order CalPERS to accept and process the application immediately. Anything less would reward an employer's circumvention of the law and deprive a dedicated public servant who had successfully sued his employer for whistleblower retaliation of his hard-earned right to a disability retirement.

Factual Background

The City of Bell employed Carrera as a police officer from September 30, 2002, until his resignation on May 11, 2019. (Proposed Decision, p. 3.) In 2018, Carrera brought a civil action against the City alleging whistleblower retaliation, Fair Employment and Housing Act violations, and failure to prevent discrimination and retaliation. (Resp. Ex. A [First Amended Complaint].)

On March 18, 2019, the City made a Code of Civil Procedure section 998 offer to settle Carrera's lawsuit for $450,000, conditioned on Carrera "permanently separat[ing] from City employment" and "not seek[ing] future employment with the City." (Resp. Ex. B [998 Offer]; Proposed Decision, p. 4.) Carrera accepted the offer the same day. (Resp. Ex. B; Proposed Decision, p. 5.) The section 998 offer does not mention any pending disciplinary charges or allegations of misconduct against Carrera. (Resp. Ex. B.) And it makes no mention that the City could not rehire him or order him back to work later. (Resp. Ex. B.)

Consistent with his 998 acceptance, on April 11, 2019, Carrera submitted a letter resigning from the City effective May 10, 2019, stating he was doing so "to pursue an Industrial Disability Retirement" due to "cumulative injuries [he] sustained while employed as a Police Officer and Police Sergeant" that rendered him "no longer able to physically perform [his] duties." (Resp. Ex. C [Resignation

Letter]; Proposed Decision, p. 5.) On May 9, 2019, the City sent Carrera correspondence accepting his resignation effective May 10. (Resp. Ex. D [City Acceptance]; Proposed Decision, p. 5.)

On May 14, 2019, City officials completed a personnel action form reflecting Carrera's resignation. In response to whether the City would rehire him, the form states "no." The City's human resources manager testified this means if Carrera reapplied to work for the City, he would not be rehired. She confirmed Carrera "was not terminated for cause" (Proposed Decision, pp. 5–6.) Contrary to the proposed decision's findings, though, the City's human resources officer, who was not there in 2019 and only could testify to the City's records, did not testify Carrera "resigned in lieu of termination." (Proposed Decision, p 6.) and neither the 998 offer nor the City's own documents support the proposed decision's claim that Carrera resigned in lieu of termination. (Resp. Exs. B, I, J.)

On June 7, 2019, Carrera submitted his first IDR application to CalPERS. (Resp. Ex. E.) From October to November 2019, CalPERS exchanged emails with the City asking about the reasons for Carrera's separation. (Resp. Ex. F.) Between February and April 2021, CalPERS sent letters first to Carrera then the City asking for the City to provide information about Carrera's separation. (Resp. Exs. G, H.) In May 2020, the City responded it had no records showing Carrera was "terminated for cause" or "resigned in lieu of termination," but an "internal affairs investigation was underway" when he resigned, which was not completed and "no misconduct finding finalized and no discipline, if any, determined." (Resp. Ex. I; see also Resp. Ex. J.)

Apparently satisfied that the City had not terminated Carrera for cause or that he had resigned rather than be terminated, on September 3, 2021, CalPERS let Carrera's application go forward; asking for the City to make a disability determination under Government Code section 21154 and 21156. (Resp. Ex. K.) But despite prodding and a time waiver under Government Code section 21157 signed by Carrera, the City did not make the required disability determination. (Resp. Exs., L, M, N.) So, on September 24, 2021, CalPERS told Carrera it had canceled his IDR application because the City did not make the required determination. (Resp. Ex. O.) Carrera submitted a second IDR application on October 26, 2021, but the process repeated itself and CalPERS again canceled the application due to the City's non-response. (Resp. Exs. P, Q, R, S, T.) Carrera submitted a third IDR application on May 15, 2023. (Resp. Ex. U.) CalPERS again asked the City to make a decision. (Respondent's Exs. V, W). But over four years after he first submitted his IDR application, on September 29, 2023, CalPERS changed course and canceled it, claiming Carrera "left employment for reasons which were not the result of a disabling medical condition" and was "not eligible for disability retirement." (Resp. Ex. Z.)

Argument

I. The proposed decision rests on incorrect factual findings.

The proposed decision's conclusion that Carrera is ineligible for IDR under *Haywood* and its progeny rests on two key factual findings: (1) Carrera settled his lawsuit "while disciplinary charges were pending against him"; and (2) his "separation was tantamount to a termination for cause." (Proposed Decision, pp. 12, 14.) The evidence does not support these findings.

First, the record is clear that the City never brought disciplinary charges seeking termination against Carrera at any point before he resigned. While the evidence shows the City may have started an

internal affairs investigation, the City has affirmed it had not completed its investigation, made any misconduct findings, or imposed any discipline when Carrera separated from employment. (Resp. Ex. I.) The settlement agreement makes no reference to resolving any pending disciplinary matters. (Resp. Ex. B.) The City also never started formal disciplinary proceedings or told Carrera about any intent to terminate him, as the Public Safety Officers Procedural Bill of Rights Act (POBR) requires before taking punitive action against an officer. (Gov. Code, § 3304, subd. (c) see also *Quihuis v. City of Los Angeles* (2008) 159 Cal.App.4th 443, 447 [Gov. Code, § 3304, subd. (d), requires a city to tell the officer about the specific disciplinary action being proposed, not merely to advise the officer that some disciplinary action is being contemplated].) Thus, the proposed decision's finding that "disciplinary charges were pending" against Carrera when he resigned (Proposed Decision, p. 12) has no evidentiary basis.

The mere existence of an internal affairs investigation, without more, cannot be equated with formal disciplinary charges. The POBR draws a clear distinction between investigations and punitive actions. (Gov. Code, § 3303 [setting procedures for investigations]; § 3304, subd. (b) [requiring notice of proposed disciplinary action and opportunity for administrative appeal]; Pasadena Police Officers Assn. v. City of Pasadena (1990) 51 Cal.3d 564, 576 [POBR protects officers' rights while allowing investigations into misconduct].) Treating any investigation as similar to "charges" would defeat these protections. (*San Diego Police Officers Assn. v. City of San Diego* (2002) 98 Cal.App.4th 779, 784 [POBR must be construed to "secure for peace officers the maximum protection available"].) The proposed decision's reliance on a mere investigation to find disciplinary charges were pending is contrary to law.

Second, Carrera's resignation was not a "termination" by the City, let alone a for cause termination. The proposed decision disregards the main difference between a voluntary resignation and involuntary dismissal by finding the distinction between Carrera suing the City and the City starting termination proceedings unimportant. (Proposed Decision, p. 14.) But the proposed decision misstates the record. No evidence supports the finding that Carrera brought his whistleblower complaint in any effort to preemptively avoid disciplinary charges or termination. Neither Carrera nor the City's human resources officer testified to anything to that effect and the City's records do not support that finding. (Resp. Exs., I, J.),

And the courts have repeatedly held an employee's resignation, even if done to avoid potential future termination, does not equal an actual dismissal for the *Haywood* analysis. (*Smith*, *supra*, 120 Cal.App.4th at p. 203 ["[T]he rule in *Haywood* does not apply to an employee who resigns in anticipation that he or she may be fired at some future time"]; accord, *Yancey v. State Personnel Bd.* (1985) 167 Cal.App.3d 478, 483 [resignation one day before termination effective date was not a "dismissal"].)

Here, no evidence shows Carrera's settlement with the City incorporated any finding of misconduct or dismissed him for cause. The settlement agreement made no reference to pending disciplinary charges and had no admission of wrongdoing. (Resp. Ex. B.) The City's own records confirm Carrera "was not terminated for cause" but "resigned." (Proposed Decision, pp. 5-6.) Even if the City administratively decided not to rehire Carrera, that decision does not transform his voluntary resignation into a termination. A decision not to reemploy an employee who willingly left City service does not equal affirmatively discharging that employee for misconduct. The proposed decision erred

in equating the two. (See *Smith*, *supra*, 120 Cal.App.4th at p. 202 [*Haywood* inapplicable where employee "although not fired from his job, left it under the cloud of a disciplinary action"]; *Gonzalez v. Department of Corrections & Rehabilitation* (2011) 195 Cal.App.4th 89, 96-97 [rejecting argument that withdrawal of peace officer powers similar to dismissal under *Haywood*].)

Nor does the City's determination it would not rehire Carrera establish the "complete severance" of the employment relationship on which *Haywood* and its progeny are predicated. (*Haywood*, *supra*, 67 Cal.App.4th at p. 1305.) Those cases turned on the incompatibility between a dismissal for cause—which terminates employment permanently—and the potential for reinstatement if an employee on disability retirement later recovers, as the PERL contemplates. (Gov. Code, § 21192.) While the City said it would not rehire Carrera, that decision was only administrative; nothing suggests it was based on a substantive determination of misconduct that would prevent reemployment even if Carrera were found no longer disabled. And Carrera testified he remains willing to return to work if the City asked. (Proposed Decision, p. 9.) Thus, the employment relationship, while dormant, is not so irreparably severed as to be irreconcilable with potential reinstatement under PERL.

And no merit exists to the argument that severance of the employment relationship, by itself, extinguishes the right to a disability retirement. Government Code section 21154 explicitly lets a member file for retirement after discontinuing service. (See also *Cameron v. Sacramento County Employees' Retirement System* (2016) 4 Cal.App.5th 1266, 1280 [discontinuance of service plainly and ordinarily means a member who has stopped working for a salary from which deductions were made].)

The record simply does not support the proposed decision's conclusion that Carrera's resignation should be treated as a constructive termination for cause under *Haywood*. He was never subject to any formal disciplinary charges and did not separate under the cloud of a disciplinary action. (See *Smith*, *supra*, 120 Cal.App.4th at p. 202.) His voluntary resignation under a settlement of his civil claims had no punitive or disciplinary facet. The proposed decision's contrary findings rest on an unwarranted conflation of an investigation—the mere gathering of facts—with actual adverse disciplinary action. Upholding this reasoning would fatally undermine POBR's protections and create an end-run around the procedures for disciplining peace officers. *Haywood* should not be extended this way. The proposed decision's determination Carrera is ineligible for IDR thus lacks a valid factual or legal basis.

II. The proposed decision fails to consider evidence Carrera's right to IDR matured pre-separation.

The proposed decision also errs in rejecting Carrera's claim that his right to IDR arose before he resigned. Establishing a matured right to IDR pre-separation prevents applying the *Haywood* bar. (*Smith*, *supra*, 120 Cal.App.4th at p. 206.) Here, Carrera presented evidence he had an active workers' compensation claim for disabling work-related injuries when he resigned. (Proposed Decision, p. 6.) His resignation letter stated he was separating from City employment "to pursue an Industrial Disability Retirement" as the "cumulative injuries" he sustained in his police work rendered him "no longer able to physically perform [his] duties." (Resp. Ex. C.)

The proposed decision dismisses this evidence, stating "The fact that he had a workers' compensation case does not establish a right to disability retirement." (Proposed Decision, p. 14.) This misstates the law. An employee need not conclusively establish a right to IDR, only present

"substantial evidence" of qualification of a mature IDR claim pre-separation. (*Hanna v. Los Angeles County Sheriff's Department* (2002) 102 Cal.App.4th 887, 901-902.) Carrera's unrebutted testimony, the existence of his workers' compensation claim, and his contemporaneous statements of disability in his resignation letter are substantial evidence of a matured IDR claim. At minimum, these facts raise a triable issue the administrative law judge should have resolved. By instead discounting this evidence, the proposed decision prejudicially erred.

III. Carrera's service-connected disability retirement further supports his right to IDR.

That Carrera is receiving a service-connected disability retirement from CalPERS (Proposed Decision, p. 9) further supports finding his right to IDR matured before he separated from the City. The criteria for a service retirement and IDR are distinct. (Gov. Code, §§ 20026 [service retirement], 20026.1 [IDR]; *Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 341-342.) By granting Carrera a service retirement, CalPERS determined he met service requirements for that benefit before he resigned. (See Gov. Code, § 20731, subd. (a) [police officer qualifies for service retirement at age 50 with 5 years of service].) This determination is like finding his right to retirement benefits—whether service or disability—vested pre-separation. CalPERS cannot now take the inconsistent position that Carrera had no matured right to IDR at that same point. Further, once an employee has retired for service, the employer can no longer compel their return to work even if the employee is found no longer disabled. (Gov. Code, §§ 21193, 21201.) Carrera's service retirement status thus renders unimportant the proposed decision's reliance on the City's suggestion it would not rehire him.

Conclusion

The Board should decline to adopt the legally and factually flawed proposed decision. Carrera has shown he voluntarily resigned before any charges of misconduct were brought against him, while his whistleblower action against the City was pending. The mere existence of an internal affairs investigation, without formal disciplinary charges, cannot support treating his resignation as a constructive termination for cause. To conclude otherwise would eviscerate the POBR's procedural protections for peace officers facing punitive action.

The evidence further establishes Carrera presented a viable claim of a matured right to IDR before he separated from employment, which the proposed decision improperly discounted. His current receipt of a service-connected disability retirement also undermines the proposed decision's reasoning and conclusions.

The Board should grant this appeal, reverse CalPERS's cancellation of Carrera's IDR application, and direct CalPERS to accept and process the application as required by the PERL. While this analysis has potential instructive value for similar cases, no formal precedential designation is necessary, as the ultimate disposition turns on the specific facts.

Best regards,
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