

ATTACHMENT A

THE PROPOSED DECISION

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

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

JONATHAN RUSH,

Respondent,

and

CITY OF AZUSA,

Respondent.

Agency Case No. 2024-0328 (Statement of Issues)

OAH No. 2024110416

PROPOSED DECISION

Thomas Heller, Administrative Law Judge, Office of Administrative Hearings,
State of California, heard this matter by videoconference on May 5, 2025.

Bryan Delgado, Esq., represented the California Public Employees' Retirement
System (CalPERS).

Christopher C. Saldaña, Esq., Shewry & Saldaña, LLP, represented respondent Jonathan Rush (Rush).

Tristan G. Pelayes, Esq., Law Office of Pelayes & Bolander, APC, represented respondent City of Azusa (City).

Oral and documentary evidence was received, and the record was held open at the end of the hearing for the filing of closing briefs. The closing briefs were marked for identification as exhibits I and J (Rush's brief and reply brief), exhibit 20 (CalPERS's brief), and exhibit K (City's brief). The record was closed after the completion of briefing, and the matter was deemed submitted for decision on June 3, 2025.

SUMMARY

Rush was an employee of the City Police Department from 2013 until June 30, 2023, the effective date of his resignation from his position as a Police Officer. Rush resigned pursuant to a settlement agreement with the City that resolved two pending disciplinary actions against him, one of which was for his termination. Just before his resignation became effective, CalPERS received an application from Rush for industrial disability retirement. CalPERS determined Rush was ineligible to apply for disability retirement benefits because he separated from City employment for reasons that were not related to a disabling medical condition. Rush appeals CalPERS's determination to the Board of Administration (Board); the City does not appeal and supports CalPERS's determination. For the reasons explained below, Rush's appeal is denied.

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FACTUAL FINDINGS

Background and Procedural History

1. The City hired Rush to serve on its police force in 2013. As of 2022, he held the position of Corporal in the City Police Department. As a City police officer, Rush was a “local safety member” of CalPERS. (Gov. Code, §§ 20420, 20425.) “‘Local safety member’ includes all local police officers, local sheriffs, firefighters, safety officers, county peace officers, and school safety members, employed by a contracting agency who have by contract been included within this system.” (Gov. Code, § 20420.)

2. On December 22, 2022, Interim Police Captain Leonard McCray (McCray) notified Rush of the City’s intent to suspend Rush without pay for five days and demote him from Corporal to Police Officer. The notice followed an administrative investigation identifying alleged deficiencies in crime reports Rush prepared in five cases assigned to him in late 2021 and 2022. After a pre-disciplinary *Skelly* hearing with Rush about the charges (see *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194), McCray determined to impose the discipline and served a notice of discipline on Rush on February 23, 2023. The City Council adopted the proposed discipline on March 20, 2023.

3. Rush denied wrongdoing, filed a government tort claim with the City, and appealed the disciplinary action to the City’s Personnel Board. On April 10, 2023, before the government tort claim and appeal were decided, McCray served Rush with a notice of intent to terminate him from the position of Police Officer. The notice was based on a second administrative investigation identifying alleged untruthful and misleading statements of Rush about another police officer in 2022. McCray also

alleged Rush failed to prepare crime reports in two cases in a timely manner. Rush denied wrongdoing.

4. Rush and the City reached a settlement before the notice of intent to terminate Rush became final. In late May 2023, Rush and the City signed a "Settlement Agreement and Release of All Claims" to "finally settle and compromise all disputes and controversies" between them. (Exhibit 12, p. A128.) As relevant here, Rush agreed he would irrevocably resign effective June 30, 2023; waive any right to appeal the notice of intent to terminate him or his suspension and demotion; waive any right to reinstatement to his position; release his government tort claim against the City; and waive any right to a "name-clearing" or "liberty-interest" hearing (see *Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340). Rush also agreed he would not seek or maintain employment, independent contractor status, volunteer status, or any similar relationship with the City in the future. In return, the City agreed not to impose the termination; to accept Rush's resignation; to pay him \$25,000, plus amounts for unused sick leave, compensatory time, and vacation time; and to issue him an identification card with a carrying concealed weapon endorsement under the federal Law Enforcement Officers Safety Act. (Exhibit 12.) Neither Rush nor the City admitted wrongdoing or liability.

5. On June 26, 2023, CalPERS received an application from Rush for industrial disability retirement dated May 11, 2023. An "industrial disability" refers to a disability resulting from an "injury or disease arising out of and in the course of [the employee's] employment." (Gov. Code, § 20046.) In the application, Rush claimed he was disabled due to a "right shoulder torn labrum with surgical repair" arising from his City employment. (Exhibit 3, p. A44.)

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6. CalPERS asked the City for more information about the circumstances surrounding Rush's separation from service. In September 2023, the City provided a completed "Employer Information for Disability Retirement" form certifying: (1) "The member [i.e., Rush] has an adverse action pending against him/her;" and (2) "The member signed an agreement to waive his/her reinstatement rights (i.e. Employment Reinstatement Waiver)." (Exhibit 14, p. A144.) Item (1) was incorrect since Rush and the City had already settled the adverse actions against Rush. Item (2) was correct since Rush waived his reinstatement rights in the settlement agreement with the City.

7. CalPERS reviewed this information and determined Rush was not eligible for disability retirement benefits. On March 13, 2024, CalPERS notified Rush of the determination, explaining, "We have determined that your employment ended for reasons which were not related to a disabling medical condition. Therefore, you are not eligible for disability retirement. For that reason, CalPERS cannot accept your application for disability retirement. [¶] Your application has been cancelled." (Exhibit 4, p. A57.) In support of its determination, CalPERS cited three court cases (*Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*); *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*); and *Martinez v. Public Employees Retirement System* (2019) 33 Cal.App.5th 1156 (*Martinez*)), and two precedential Board decisions (*In the Matter of Accepting the Application for Industrial Disability Retirement of Robert Vandergoot* (2013) CalPERS Precedential Dec. No. 13-01 (*Vandergoot*); and *In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip MacFarland* (2016) CalPERS Precedential Dec. No. 16-01 (*MacFarland*)).

8. CalPERS informed Rush of his right to appeal the determination within 30 days and copied the City on the letter. On April 1, 2024, Rush appealed CalPERS's

determination. The City did not appeal. On October 9, 2024, CalPERS filed a Statement of Issues "limited to the issue of whether [Rush] may file an application for industrial disability retirement, or whether his application and eligibility is precluded by operations of *Haywood, Smith, Vandergoot, MacFarland, and Martinez.*" (Exhibit 1, p. A7.)

Hearing

CALPERS'S CASE

9. CalPERS called Greg Neill (Neill), a CalPERS Associate Governmental Program Analyst, and Talika Johnson (Johnson), the City's Director of Administrative Services, to testify in support of CalPERS's determination. Neill testified that CalPERS cancelled Rush's disability retirement application because Rush's employment with the City ended for reasons other than a disability. Johnson testified that the City's investigations and disciplinary notices to Rush did not pertain to his alleged disability. In CalPERS's view, Rush's resignation under these circumstances with no right to reinstatement precludes Rush's application and eligibility for disability retirement.

RUSH'S CASE

10. Rush testified he had "zero use of his right shoulder" after a surgery in July 2022 for a workplace injury. He knew after the surgery he could not continue to perform his duties as a police officer. Rush first requested a disability retirement allowance estimate from CalPERS in December 2022, which was before he knew about the City's investigation underlying the notice of intent to terminate his employment. Rush testified he only learned of that investigation when he received the notice of intent to terminate his employment on April 10, 2023.

11. Regarding the settlement agreement with the City, Rush testified he agreed to resign because he could not trust the City administration and could no longer stand to work there. Rush denied the City's allegations of wrongdoing and feels the City retaliated against him "for telling the truth" about another police officer's alleged misconduct. After Rush resigned, the state Commission on Peace Officer Standards and Training also reviewed the City's allegations of dishonesty against Rush. Following that review, the commission closed the case with "No Further Action." (Exhibit 15, p. A145.)

12. As part of his settlement with the City, Rush was provided with an identification card with a carrying concealed weapon endorsement under the federal Law Enforcement Officers Safety Act. Rush contends the City's agreement to approve the endorsement necessarily means the City agrees he was "honorably retired," which is inconsistent with the City's allegations of wrongdoing against him. (Exhibit I, p. B82.)

CITY'S POSITION

13. The City supports the determination of CalPERS that Rush is ineligible for disability retirement. The City did not call additional witnesses or offer additional exhibits.

ANALYSIS OF EVIDENCE

14. The evidence supports CalPERS's determination that Rush's employment ended for reasons that were not related to a disabling medical condition. Rush agreed to resign to resolve the City's adverse actions against him for alleged acts of misconduct, none of which had any discernible relationship to Rush's shoulder injury. Rush's evidence does not prove his separation from service was the ultimate result of that injury.

15. Rush contends he knew in July 2022 that he could not continue to perform his duties as a police officer due to his shoulder injury, and he agreed to resign as of June 2023 due to that fact. But Rush's settlement agreement with the City includes 11 recitals of the circumstances underlying the settlement, and none of them reference Rush's injury or claimed disability. (Exhibit 12, pp. A127-129.) In addition, Rush did not apply for disability retirement until after he learned of the City's intent to dismiss him for alleged misconduct unrelated to his claimed disability. While Rush requested a disability retirement allowance estimate from CalPERS in December 2022, he did not apply for disability retirement at that time.

16. Rush also contends he did nothing wrong and that the City's attempt to terminate his employment reflected improper whistleblower retaliation, which the City denies. But resolving this dispute is beyond the scope of this case and immaterial to its outcome. For purposes of a disability retirement application, CalPERS does not assess whether an employer's actions against an employee were correct or justified; it only assesses the outcome of those actions. Therefore, Rush's evidence about the closure of the Commission on Peace Officer Standards and Training investigation of his alleged misconduct has no bearing on the outcome of this case. Likewise, Rush's post-employment concealed carry weapon privileges are not relevant to the outcome.

LEGAL CONCLUSIONS

Legal Standards

1. "A member incapacitated for the performance of duty shall be retired for disability pursuant to this chapter if he or she is credited with five years of state service, regardless of age," unless the person has elected to receive a service

retirement allowance under Government Code section 21076, 21076.5, or 21077. (Gov. Code, § 21150, subd. (a).) "The application shall be made only (a) while the member is in state service, or (b) while the member . . . 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." (Gov. Code, § 21154.) "Disability" and "incapacity for performance of duty" mean "disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion." (Gov. Code, § 20026; see also Gov. Code, § 21156, subd. (a)(2).)

2. "Government Code section 21156 . . . has always equated disability with a state employee being 'incapacitated physically or mentally for the performance of his or her duties.' And ordinarily, a governmental employee loses the right to claim disability benefits if terminated for cause." (*Martinez, supra*, 33 Cal.App.5th at p. 1161.)

3. "A pair of decisions from the Third Appellate District carved out three exceptions to this general rule. First, under [*Haywood*], a terminated-for-cause employee can still qualify for disability retirement when the conduct which prompted the termination was the result of the employee's disability. Second, under [*Smith*], a terminated employee may qualify for disability retirement if he or she had a 'matured right' to a disability retirement prior to the conduct which prompted the termination. Third, *Smith* further recognized that there might be instances where '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.' [Citation.]" (*Martinez, supra*, 33 Cal.App.5th at p. 1161.)

4. "Applying *Haywood* and *Smith*, the Board . . . adopted a precedential decision that, when an employee settles a pending termination for cause and agrees not to seek reemployment, this is 'tantamount to a dismissal,' thus precluding a disability retirement. [*Vandergoot, supra*, CalPERS Precedential Dec. No. 13-01.]" (*Martinez, supra*, 33 Cal.App.5th at p. 1161.) In *Martinez*, the court held that "'*Vandergoot* is a reasonable extension of *Haywood* and *Smith*,' and, moreover, [is] entitled to 'substantial weight' due to 'the agency's area of expertise.'" (*Martinez, supra*, 33 Cal.App.5th at pp. 1161-1162.) Like *Vandergoot*, *Martinez* involved CalPERS's denial of a disability retirement application of an employee who settled a termination for cause action against her and agreed never to return to her former job. The court rejected the employee's challenges to *Vandergoot's* logic and applicability, stating, "[t]he Legislature and the Board have decided that resignation effects a 'permanent separation' from state service. [Citations.] Which is exactly what Martinez did when she agreed to leave state service and 'never again apply for or accept any employment' with [the Department of Social Services]. Notwithstanding the theoretical possibility of reinstatement [at another state agency], Martinez was not going to return to her former job. From this perspective, *Vandergoot* is eminently logical: resignation in these circumstances does indeed appear to be 'tantamount to a dismissal for purposes of applying the *Haywood* criteria.'" (*Martinez, supra*, 33 Cal.App.5th at p. 1176.) Therefore, *Vandergoot's* extension of *Haywood* and *Smith* applied to the employee's disability retirement application. (*Ibid.*)

5. The Board has also adopted another precedential decision that, when an employee retires just before a termination for cause becomes effective to avoid the

termination, the employee is ineligible for a disability retirement unless the employee qualifies for one of the exceptions carved out in *Haywood* and *Smith*. (*MacFarland, supra*, CalPERS Precedential Bd. Dec. No. 16-01.) In *MacFarland*, a California Department of Corrections and Rehabilitation (CDCR) psychologist received a Notice of Adverse Action (NOAA) that his employment would be terminated for cause. After receiving the NOAA, the psychologist notified CDCR he would retire just before the effective date of dismissal and apply to CalPERS for disability retirement. CalPERS declined to accept the psychologist's application for industrial disability retirement, and the psychologist appealed to the Board.

6. The Board affirmed CalPERS's determination on the grounds that the psychologist "retired to avoid termination from employment. His relationship with his employer had been severed prior to his retirement, when the NOAA was served on him. His severance became irrevocable when he withdrew any appeal [to the NOAA]. Applicant is barred from returning to his former employment and thus the holdings in *Vandergoot* and *Haywood* render him ineligible for disability retirement, unless he meets an exception identified in *Haywood* and *Smith*." (*MacFarland, supra*, CalPERS Precedential Bd. Dec. No. 16-01, p. 8.) The Board found the psychologist did not meet any of those exceptions.

Burden of Proof

7. In an administrative matter involving an application for a disability retirement, the applicant has the burden of proving eligibility for a disability retirement by a preponderance of the evidence. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332; *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 691.) A preponderance of the evidence means "'evidence that has more convincing force

than that opposed to it.' [Citation.]" (*People ex rel. Brown v. Tri- Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Analysis

8. CalPERS determined Rush's application and eligibility for disability retirement are precluded by operation of *Haywood*, *Smith*, *Vandergoot*, *MacFarland*, and *Martinez*. Like the terminations, resignations, and retirement in those cases, Rush's settlement agreement with the City "constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement – the potential reinstatement of [Rush's] employment relationship." (*Haywood*, *supra*, 67 Cal.App.4th at p. 1297.) Rush contends that *Haywood* and *Smith* are distinguishable because the employees in those cases were terminated for cause, but Rush was not. (Exhibit I, pp. B82-87.) But under *Vandergoot* and *Martinez*, Rush's resignation and agreement never to return to his job are "tantamount to a dismissal for purposes of applying the *Haywood* criteria." (*Martinez*, *supra*, 33 Cal.App.5th at p. 1176.)

9. Accordingly, *Haywood*, *Smith*, *Vandergoot*, *MacFarland*, and *Martinez* apply to Rush's resignation. Under those authorities, Rush is ineligible for a disability retirement unless he qualifies for one of the three exceptions carved out in *Haywood* and *Smith*. (*Martinez*, *supra*, 33 Cal.App.5th at p. 1161.)

10. Rush does not qualify for any of the exceptions. First, Rush's separation from service was not the result of his alleged disability. (*Haywood*, *supra*, 67 Cal.App.4th at p. 1307; *Martinez*, *supra*, 33 Cal.App.5th at p. 1161.) Rush agreed to resign to resolve the City's adverse actions against him for alleged acts of misconduct that were unrelated to a disabling medical condition. The allegations of misconduct in

the City's adverse actions bear no discernible relationship to Rush's shoulder injury. Rush attributes the separation from service to his alleged disability, but his settlement agreement with the City says nothing about it. Therefore, Rush's contention is unpersuasive.

11. Second, Rush did not have a "matured right" to a disability retirement prior to the conduct underlying his separation from service. (*Martinez, supra*, 33 Cal.App.5th at p. 1161.) Therefore, the separation was not preemptive of an otherwise valid claim for disability retirement. (*Smith, supra*, 120 Cal.App.4th at pp. 205-206; *Haywood, supra*, 67 Cal.App.4th at p. 1307.)

12. The alleged misconduct underlying Rush's separation from service took place in 2021 and 2022. Rush did not sign his disability retirement application until May 11, 2023, and he never received a determination from CalPERS that he was eligible for a disability retirement before (or after) applying. "Nor, for that matter, is there undisputed evidence that [Rush] was eligible. . . , such that a favorable decision on his claim would have been a foregone conclusion (as perhaps with a loss of limb)." (*Smith, supra*, 120 Cal.App.4th at pp. 207.) Absent such evidence, CalPERS would have a basis for litigating whether evidence of Rush's medical condition "demonstrated a substantial inability to perform his duties or instead showed only discomfort making it difficult to perform his duties, which is insufficient. [Citations.]" (*Ibid.*) Therefore, Rush did not have a matured right to a disability retirement at any time prior to his separation from service.

13. Third, Rush has not identified any principle of equity that supports deeming his right to a disability retirement to be matured and surviving his separation from service. (*Martinez, supra*, 33 Cal.App.5th at p. 1161; *Smith, supra*, 120 Cal.App.4th at pp. 206-207.) Rush contends the City's "inequitable conduct" justifies that result

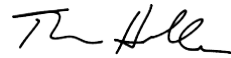
(exhibit I, p. B87), but Rush cites no legal authority supporting the contention, and he settled his claims of inequitable conduct against the City as part of his agreement to resign. No equitable considerations justify deeming Rush's right to a disability retirement to be matured and surviving his separation from service on these facts.

14. Based on the above, Rush is not eligible for a disability retirement.

ORDER

Respondent Jonathan Rush's appeal is denied.

DATE: 06/20/2025



[Thomas Heller \(Jun 20, 2025 16:00 PDT\)](#)

THOMAS HELLER

Administrative Law Judge

Office of Administrative Hearings