

ATTACHMENT A

THE PROPOSED DECISION

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

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

**JOSÉ M. GUERRA and CORRECTIONAL TRAINING FACILITY,
CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION, Respondents**

Agency Case No. 2023-0260

OAH No. 2023080238

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on August 27, 2024, in Sacramento, California. All parties and witnesses appeared in person except Ashely Johnson Baggett, who testified by videoconference.

Mehron Assadi, Staff Counsel, represented the California Public Employees' Retirement System (CalPERS).

Respondent José M. Guerra represented himself (respondent).

No one appeared for or on behalf of respondent Correctional Training Facility, California Department of Corrections and Rehabilitation (CDCR). Its default was entered. This matter proceeded as a default proceeding pursuant to Government Code section 11520 as to CDCR only.

Evidence was received, and the record was left open to allow: (1) respondent to produce additional documents; (2) CalPERS to object to respondent's additional documents; and (3) the parties to submit written closing arguments. Respondent submitted numerous documents, which were marked as Exhibits J through Z. Most of the documents were duplicative. CalPERS objected to the additional documents on the grounds that they were submitted after the deadline for doing so, not relevant, lacked foundation, and constituted hearsay. CalPERS's objections are overruled, and Exhibits J through Z are admitted as administrative hearsay. CalPERS's closing argument, marked as Exhibit 11, and respondent's closing argument, marked as Exhibit AA, were both admitted as argument.

The record was closed and the matter submitted for decision on October 7, 2024.

FACTUAL FINDINGS

Respondent's Employment with CDCR

1. Respondent began working for CDCR as a Correctional Officer on June 16, 2014. He became a state safety member of CalPERS by virtue of such employment.

Termination of Employment

2. On March 10, 2020, CDCR issued respondent a Notice of Adverse Action (NOAA) advising him he was “dismissed from [his] State civil service position as a Correctional Officer with the California Department of Corrections and Rehabilitation (CDCR), at the Correctional Training Facility (CTF) in Soledad, California.” Respondent was personally served with the NOAA two days later, and his dismissal was effective seven days after that.

3. The gravamen of the NOAA arose out of respondent’s misconduct while working December 12, 2018, and during a subsequent investigation into such conduct. The NOAA alleged:

[Respondent] permitted inmate showers, in violation of a modified program in effect; failed to secure cell doors after releasing inmates from their cells; endangered the safety and security of the institution when inmates [he] had released entered the cell of a rival gang member, attacked, and injured him; and, [*sic*] made dishonest statements when questioned about the incident.

4. The NOAA alleged cause to dismiss respondent from employment based on his: (1) inexcusable neglect of duty; (2) insubordination; (3) dishonesty; (4) willful disobedience; (5) other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to his appointing authority for employment; and (6) violation of and/or failure to comply with applicable laws, rules, regulations, and/or departmental manuals.

5. Respondent appealed the NOAA to the State Personnel Board (SPB). An administrative law judge with SPB conducted an administrative hearing on the appeal and issued a proposed decision finding the allegations in the NOAA true, concluding cause existed to dismiss respondent from employment, and sustaining his dismissal. On January 7, 2021, the SPB issued a Board Resolution and Order adopting "the findings of fact, determination of issues, and Proposed Decision of the ALJ." Respondent did not appeal the Board Resolution and Order.

6. Ashley Johnson Baggett works for CDCR as an employee relations officer. She reviewed respondent's employment file with CDCR, including the NOAA, proposed decision, and Board Resolution and Order. She saw no records indicating respondent's employment was terminated due to a physical or mental disability.

7. Ms. Johnson Baggett confirmed respondent's last day on payroll was March 20, 2020. The prior week, the warden of the facility at which respondent worked issued a memorandum to all staff advising that he "*shall not* be allowed on institutional grounds, without the approval of the Warden, or designee, via the Employee Relations Office (ERO)." (Italics original.)

Application for Industrial Disability Retirement

8. On June 25, 2022, respondent signed a Disability Retirement Election Application seeking service pending industrial disability retirement, which CalPERS received two months later. He identified his last day on payroll as March 20, 2020, and requested a retirement date of the following day.

9. Respondent claimed disability due to the cartilage in both knees being "worn down to bone to bone" and a bone spur and muscle damage in his left heel. He alleged his disability was due to "cumulative trauma," and prevented him from

kneeling on either knee, squatting, climbing stairs, walking, running in response to emergency alarms, and performing his daily work duties. Additionally, he indicated he could not disarm or subdue an inmate, protect himself from an attack, or perform household chores.

Cancellation of Application

10. On February 1, 2023, CalPERS sent respondent correspondence notifying him his application for industrial disability retirement was canceled, but he “will continue to receive [his] service retirement benefits.” CalPERS explained:

We have determined that your employment ended for reasons which were not related to a disabling medical condition. When an employee is separated from employment as a result of disciplinary action or the employee enters into a settlement agreement where the employee chooses to voluntarily resign in lieu of termination, and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, termination and/or a mutual understanding of separation from employment due to a pending adverse action renders the employee ineligible to apply for disability retirement.

11. Greg Neill is an associate governmental program analyst in CalPERS's Disability and Survivor Benefits Division. His duties include reviewing applications for industrial disability retirement to determine the threshold issue of eligibility to apply for such retirement. He explained an applicant is ineligible to apply for industrial

disability retirement if his or her employment was terminated for a cause unrelated to a mental or physical disability. An exception exists if he or she had a vested right to an industrial disability retirement when terminated.

12. Mr. Neill reviewed respondent's application. In doing so, he looked at the application, NOAA, proposed decision, and Board Resolution and Order. He explained at hearing that he saw nothing in the latter three documents indicating CDCR terminated respondent for any reason related to a mental or physical disability. Furthermore, the exception when an applicant has a vested right was not applicable because respondent did not submit his application until more than two years had elapsed since his termination.

13. Respondent timely appealed CalPERS's cancellation of his application for industrial disability retirement. On August 7, 2023, Sharon Hobbs, Chief of CalPERS's Disability and Survivor Benefits Division, signed the Statement of Issues solely in her official capacity. The sole issue on appeal is whether respondent is eligible to apply for industrial disability retirement due to orthopedic (bilateral knee, left heel, and low back) conditions and muscle damage.

Respondent's Evidence

14. Respondent testified at hearing that his alleged disabilities arose out of injuries he sustained on April 21, 2018, when he and his partner were attacked while attempting to search an inmate's cell. He fell on both knees during the attack. Respondent reported his injuries to CDCR, filed a claim for workers' compensation benefits, and received medical treatment through the workers' compensation system.

15. Respondent sought treatment for his injuries from David Cui, a physician assistant, on January 28, 2020. Mr. Cui performed a physical examination, after which

he imposed restrictions on respondent's ability to return to work. The following day, CDCR supposedly asked respondent to: (1) sign a memorandum disagreeing with the medical necessity for Mr. Cui's restrictions and affirming respondent was "ready, willing, and able to return to work;" or (2) resign his employment.

16. Respondent did not agree with the memorandum and refused to sign it. He estimated his last day of work was January 28, 2020.

17. Respondent explained he delayed applying for industrial disability retirement because no one told him he could apply for disability retirement. He never contacted CalPERS to ask about industrial disability retirement either. Respondent did not explain what prompted him to finally submit his application. He said he never thought he was eligible for industrial disability retirement, but he "just applied."

18. Respondent introduced a plethora of medical records from his workers' compensation treatment providers. None constitute undisputed evidence that his disabilities are of such a nature that his application would undoubtedly be granted but for his termination.

Analysis

19. The persuasive evidence established CDCR terminated respondent's employment as a Correctional Officer due to serious misconduct in December 2018 and dishonesty during a subsequent investigation. There was no credible evidence his termination was due to a mental or physical disability from which he suffered.

20. The persuasive evidence further established respondent did not apply for industrial disability retirement until more than two years after his termination. Therefore, it was impossible for his termination to have preempted a valid claim for

industrial disability retirement. The cause for the delay in respondent's application is irrelevant.

21. Finally, the evidence did not indisputably establish respondent's eligibility for industrial disability retirement such that CalPERS's Board of Administration would necessarily grant his application. As the appellate court in *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 explained:

At best, the record contains medical opinions of a permanent disability for purposes of the prior and pending workers' compensation claims. But 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.

(*Id.*, at p. 207.)

22. Respondent's closing arguments did not establish otherwise. He produced no evidence CalPERS had an obligation to voluntarily provide him information about industrial disability retirement simply because he was receiving workers' compensation benefits. Respondent conceded he never contacted CalPERS to ask about industrial disability retirement.

23. Respondent misinterpreted Mr. Neill's testimony and information on his application. He is not entitled to industrial disability retirement simply because he has at least five years of service credit with CalPERS and suffered an injury while working. Although suffering an on-the-job injury is required for industrial disability retirement, a minimum number of years of service credit is not. Such requirement applies only to non-industrial disability retirement. But an applicant is not entitled to either type of

disability retirement unless and until CalPERS's Board of Administration determines he is substantially incapacitated for the performance of duty due to a mental or physical disability.

24. Lastly, CalPERS's Board of Administration has no jurisdiction to decide respondent's claim that CDCR violated his rights under the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). He raised such claim in his appeal to the SPB, the claim was rejected, and he failed to appeal the Board Resolution and Order.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. Respondent applied for service pending industrial disability retirement. It is well settled that he has the burden of proving he is substantially incapacitated for the performance of duty due to a disability. (*McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) But respondent's alleged incapacity is not at issue on this appeal, and CalPERS concedes as much in the Statement of Issues. Instead, the sole issue on appeal is CalPERS's contention that respondent is precluded from being granted an industrial disability retirement as a matter of law.

2. CalPERS's contention is akin to an affirmative defense to respondent's application. Therefore, CalPERS has the burden of proving: (1) the complete severance of the employer-employee relationship between CDCR and respondent for reasons unrelated to a disabling medical condition; and (2) the severance of that relationship did not preempt an otherwise valid claim for disability retirement. (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 969 [the party asserting an affirmative defense bears the

burden of proof].) CalPERS must meet its burden by a preponderance of the evidence. (Evid. Code, § 115.) This evidentiary standard requires CalPERS to produce evidence that is more persuasive than respondent's evidence to the contrary. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) In other words, CalPERS must prove it is more likely than not respondent is precluded from being granted an industrial disability retirement. (*Lillian F. v. Super. Ct.* (1984) 160 Cal.App.3d 314, 320.)

3. Once CalPERS meets its burden, the burden shifts to respondent to prove the existence of one of the equitable exceptions articulated in *Smith v. City of Napa* (2004) 120 Cal.App.4th 194. He must meet his burden by a preponderance of the evidence, which requires him to prove it is more likely than not: (1) he had an impending ruling on his application that was delayed until after he was terminated through no fault of his own; or (2) there was undisputed evidence he was eligible for an industrial disability retirement when he was terminated such that a favorable decision on his application was a foregone conclusion.

Applicable Law

4. A state safety member of CalPERS who is "incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability . . . regardless of age or amount of service." (Gov. Code, § 21151, subd. (a).) "Incapacitated for the performance of duty" means "the substantial inability of the applicant to perform his usual duties." (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877.) Such determination must be based on competent medical evidence. (Gov. Code, § 21156, subd. (a)(2).)

5. A “necessary requisite for disability retirement” is the ability for the disabled employee to be reinstated to his former employment if he is later determined no longer disabled. (*Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292, 1306.) This is because “disability retirement laws contemplate the potential reinstatement of [the employer-employee relationship] if the employee recovers and no longer is disabled.” (*Id.*, at p. 1305.) Therefore:

For all the reasons stated above, we conclude that where, as here, an employee is fired for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed.

(*Id.*, at p. 1307.)

6. In *Smith*, the same appellate court that decided *Haywood* analyzed what it meant when it held an applicant’s termination cannot preempt a valid claim for disability retirement. The *Smith* court explained even a termination for a reason unrelated to a disability “cannot result in the forfeiture of a matured right to a pension absent express legislative direction to that effect.” (*Smith v. City of Napa, supra*, 120 Cal.App.4th 194, 206.) The court further explained:

Thus, if a plaintiff were able 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.

(Ibid.)

7. *Smith* identified "the key issue [as] whether [the applicant's] right to a disability retirement matured before [his] separation from service." (*Smith v. City of Napa, supra*, 120 Cal.App.4th at p. 206.) "A vested right matures when there is an unconditional right to an immediate payment." (*Ibid.*) In the context of a CalPERS disability retirement, no such right arises until the Board of Administration determines the applicant is substantially incapacitated based on competent medical evidence.

(Ibid.)

8. *Smith* recognized the possibility of equitable exceptions to the rule when the right to a CalPERS disability retirement matures.

Conceivably, 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. This case does not present facts on which to explore the outer limits of maturity, however.

It is not as if the plaintiff had an impending ruling on a claim for a disability pension that was delayed, through no fault of his own, until after his dismissal. Rather, he did not even initiate the process until after giving cause for his dismissal.

Nor, for that matter, is there undisputed evidence that the plaintiff 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). At best, the record contains medical opinions of a permanent disability for purposes of the prior and pending workers' compensation claims. But 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.)

Conclusion


9. The preponderance of the evidence established CDCR terminated respondent's employment for reasons unrelated to a physical or mental disability. His termination did not preempt a legitimate claim for industrial disability retirement. Respondent did not satisfy his burden of demonstrating an equitable exception to the rules set forth in *Haywood*. Therefore, respondent's appeal should be denied and his application for industrial disability retirement canceled.

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ORDER

Respondent José M. Guerra's appeal from CalPERS's decision to cancel his application for industrial disability retirement is DENIED, and his application for industrial disability retirement is CANCELED.

DATE: October 22, 2024


Coren D. Wong (Oct 22, 2024 14:45 PDT)

COREN D. WONG

Administrative Law Judge

Office of Administrative Hearings