

ATTACHMENT E

THE PROPOSED DECISION

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

In the Matter of the Statement of Issues Against:

DAVID MOORE,

Respondent,

and

CITY OF FONTANA,

Respondent.

Agency Case No. 2023-0514

OAH No. 2023110803

PROPOSED DECISION

Ji-Lan Zang, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter by videoconference on August 22, 2024.

Austa Wakily, Senior Attorney, represented Sharon Hobbs (complainant), Chief, Disability and Survivor Benefits Division, Board of Administration (Board), California Public Employees' Retirement System (CalPERS).

David Moore (respondent) appeared and represented himself.

David J. Thomas, Attorney at Law, represented respondent City of Fontana (City).

FACTUAL FINDINGS

Background

1. Complainant filed the Statement of Issues in her official capacity.
2. CalPERS is the state agency responsible for the administration of the Public Employees' Retirement Law (PERL), Government Code section 20000 et seq.
3. Respondent was employed by the City as a Police Corporal. By virtue of this employment, respondent became a local safety member of CalPERS subject to Government Code sections 21151, 21154, and 21156.
4. The City is a local agency that contracts with CalPERS for retirement benefits for its eligible employees. The City is subject to the provisions of the PERL.

Respondent's Termination from the City

5. On January 26, 2017, the City's Police Department (Department) served respondent with a Notice of Proposed Termination (January Notice). The January Notice informed respondent of the Department's proposal to terminate him from the position of Police Corporal. The January Notice alleged respondent violated Department policies and City rules and regulations by falsifying on an official document that he was still married to his ex-wife, when in fact, he had been divorced from her for over six months. (Ex. 11, p. A101.) Respondent allegedly falsified the document to obtain City-subsidized health insurance for his ex-wife. (*Ibid*)

6. On January 27, 2017, respondent requested a *Skelly* meeting, pursuant to *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, to contest the January Notice. The *Skelly* meeting occurred on February 2, 2017.

7. On February 28, 2017, the Department served respondent with a Notice of Proposed Termination (February Notice). The February Notice notified respondent that after the *Skelly* meeting, the Department was still proposing to terminate him from his position based on the same allegations stated in the January Notice. (Ex. 13.)

8. On March 27, 2017, the City notified respondent by letter that it upheld the Department's recommendation to terminate him from his position, effective March 27, 2017. (Ex. 14.)

9. On March 28, 2017, the City transmitted a Personnel Action Form to CalPERS, reflecting that respondent was terminated effective March 27, 2017. (Ex. 15.)

10. On June 14, 2018, respondent sued the City for wrongful termination (Wrongful Termination Suit), alleging discrimination, harassment, and retaliation. (Superior Court, County of San Bernardino, Case no. CIVDS1610471.) In February 2024, respondent and the City settled the Wrongful Termination Suit. (Ex. 18.) The settlement did not reverse respondent's termination, and respondent was not reinstated to his position as Police Corporal with the Department. (*Ibid.*)

Respondent's Application for Retirement Benefits with CalPERS

11. On February 14, 2022, respondent applied for service retirement. (Ex. 3.) He retired for service, effective February 19, 2022. (Ex. 4.)

12. On June 13, 2022, CalPERS received respondent's application for industrial disability retirement (IDR), based on his orthopedic (cervical spine, knee, and

shoulder) and hypertension conditions. (Ex. 5, pp. A36-39.) In the application, respondent requested IDR retroactive to March 27, 2017. (*Ibid.*)

13. On April 11, 2023, in a letter to respondent, CalPERS denied respondent's IDR application. CalPERS asserted that respondent's IDR application is barred by operation of law based on *Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292 (*Haywood*), *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*), *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (2013) CalPERS Precedential Decision 13-01 (*Vandergoot*), and *In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip D. MacFarland* (2016) CalPERS Precedential Decision 16-01 (*MacFarland*). The denial letter stated in relevant part:

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.

(Ex. 19, p. A183.)

14. On April 20, 2023, CalPERS received respondent's letter requesting an appeal of the denial of his IDR application. (Ex. 20.)

15. The sole issue on appeal is whether respondent is eligible to apply for IDR.

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Respondent's Testimony

16. At the hearing, respondent testified on his own behalf. Respondent insisted his termination from the City was without cause. According to respondent, he is a whistleblower, but the Department fabricated events to retaliate against him. However, respondent did not dispute that he settled the Wrongful Termination Suit with the City. Respondent asserted he asked the City to reinstate him to his job during settlement negotiations, but the City refused to do so.

LEGAL CONCLUSIONS

1. In an administrative hearing concerning retirement benefits, the party asserting the claim has the burden of proof, including both the initial burden of going forward and the burden of persuasion, by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) In this case, respondent has the burden of establishing by a preponderance of the evidence that he is eligible to apply for IDR. He has not met this burden.

2. Government Code section 21152 specifies the parties that may apply for disability benefits, stating, in pertinent 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.

3..... Government Code section 21154 sets forth the time-frame required for applications, stating: an IDR application “[s]hall 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 ”

4. The issue here is whether respondent is eligible to file an IDR application based on orthopedic (cervical spine, knee, and shoulder) and hypertension conditions. Complainant contends respondent is precluded from filing an IDR application under the holdings of *Haywood*, *Smith*, *Vandergoot*, and *McFarland*.

5. Under *Haywood* and *Smith*, the termination of a member’s employment for cause, where the dismissal is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, renders the member ineligible for disability retirement. (*Haywood*, *supra*, 67 Cal.App.4th at pp. 1306-1307 [“[A] firing for cause constitute[s] a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement — the potential reinstatement of [the employment relationship] if it is ultimately determined that he no longer is disabled”]; *Smith*, *supra*, 120 Cal.App.4th at p. 208 [employee’s “dismissal for cause..... extinguished his right to a disability retirement”].)

6. In addition, *Smith* involved a firefighter who filed a backdated application for disability retirement on the effective date of the termination of his employment. The court in *Smith* held that a termination for cause extinguishes the right to disability retirement, except if an employee were able to prove that the right to disability

retirement matured before the date of the event giving cause to dismiss. (*Id.* at p. 206.) Where an employee did not initiate the process of filing for disability retirement until after his dismissal, his right to a disability retirement was immature, and the dismissal for cause defeated any such rights. (*Id.* at pp. 206-207.)

7. In *Vandergoot*, the Board held an employee's resignation was tantamount to a dismissal for cause when the employee resigned pursuant to a settlement agreement entered into to resolve a dismissal action and 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*, CalPERS Precedential Decision 13-01 at p. 7, ¶ 18.)

8. In *McFarland*, the employee retired two days before his termination for cause became effective. He subsequently filed an application for disability retirement. CalPERS denied the employee's disability retirement application, asserting that the employee had been terminated for cause. The Board upheld CalPERS's denial, noting that the employer-employee relationship had been severed upon the service of a Notice of Adverse Action, prior to the filing of the employee's disability retirement application. (*MacFarland, supra*, CalPERS Precedential Decision 16-01 at p. 8, ¶ 29.)

9. In this case, the City terminated respondent from his position effective March 27, 2017. Although respondent insisted his termination was wrongful, he admitted he settled the Wrongful Termination Suit with no right of reinstatement. Thus, as in *Vandergoot*, respondent's settlement with the City with no right of reinstatement to his position is tantamount to a dismissal for cause, constituting a complete severance of the employer-employee relationship. Thus, under *Haywood*,

respondent's potential for reinstatement if it is ultimately determined that he no longer is disabled, a necessary requisite for disability retirement, is lacking.

10. Additionally, there is no evidence that the City severed respondent's employment because of a disabling medical condition or to prevent him from filing a valid IDR application. Respondent also did not apply for IDR until June 13, 2022, more than five years after the City had terminated him. Respondent had no unconditional right to immediate payment of a disability pension at the time he was terminated. Therefore, under *Smith*, respondent's right to a disability retirement was not mature at the time of his dismissal, and the termination for cause by the City extinguished that right, rendering him ineligible to apply for IDR.

ORDER

The determination of CalPERS that respondent David Moore is ineligible to apply for disability retirement is affirmed. Respondent David Moore's appeal is denied.

DATE: 09/19/2024



JI-LAN ZANG

Administrative Law Judge

Office of Administrative Hearings