

**ATTACHMENT A**

**THE PROPOSED DECISION**

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

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

**SEAN F. GOTTS and**

**CALIFORNIA HIGHWAY PATROL, Respondents**

**Agency Case No. 2021-0042**

**OAH No. 2021040322**

**PROPOSED DECISION**

Danette C. Brown, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by telephone and video on July 23, 2021, from Sacramento, California.

Charles H. Glauberman, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Sean F. Gotts (respondent) represented himself.

No appearance was made by or on behalf of respondent California Highway Patrol (CHP). Proper service of the Statement of Issues and Notice of Hearing was

made. The matter proceeded as a default against respondent CHP, pursuant to Government Code section 11520.

Evidence was received, the record closed and the matter was submitted for decision on July 23, 2021.

## **ISSUE**

This appeal is limited to the issue of whether respondent is eligible to apply for industrial disability retirement, or whether his eligibility is precluded by operation of *Haywood, Smith, Martinez, and MacFarland*.<sup>1</sup>

## **FACTUAL FINDINGS**

### **Official Notice**

1. Pursuant to Government Code section 11515, official notice was taken of the following: *Haywood v. American River Fire Protection District* (1999) 67 Cal.App.4th 1292 (*Haywood*); *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*); *Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156 (*Martinez*); and *In the Matter of Accepting the Application for Disability Retirement of Phillip D. MacFarland* (2016) CalPERS Precedential Dec. No. 16-01 (*MacFarland*).

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<sup>1</sup> Official notice of these cases and their citations are set forth in Factual Finding 1 below.

## **Jurisdictional Matters**

2. On June 4, 2020, respondent signed and thereafter filed an application for service pending industrial disability retirement. He identified his disabilities as "Injuries to Cervical, Thoracic, and Lumbr [*sic*]. Nerve Damage, Neuropathy and Sciatica Pain." CalPERS acknowledged receipt of the application by letter dated December 7, 2020. The letter explained respondent was not eligible for disability retirement because his employment ended for reasons not related to a disabling medical condition.

3. On December 17, 2020, respondent timely appealed CalPERS's determination that he was not eligible for disability retirement. On April 9, 2021, Keith Riddle, Chief of CalPERS's Disability and Survivor Benefits Division, signed and thereafter filed the Statement of Issues in his official capacity.

## **Employment History**

4. On March 4, 2002, respondent began his employment with CHP as a CHP Officer, and continued in that position until he retired effective June 19, 2020, as discussed below. By virtue of his employment, respondent became a state safety member of CalPERS subject to Government Code section 21154.

5. On June 1, 2020, CHP filed a Notice of Adverse Action (NOAA) against respondent, seeking his dismissal from state service. The NOAA alleged that on November 6, 2019, upon request by a state-designated physician, respondent submitted to a routine urinalysis test due to his long-term use of prescription narcotics. The test indicated the presence of cannabinoids. Respondent's measured result was indicative of chronic long-term marijuana usage. Respondent admitted that he made the decision on his own to self-medicate with marijuana on a daily basis

beginning in August 2019. Respondent understood that he was employed in a “sensitive position” job classification and that his marijuana use was prohibited and in violation of the CHP’s Inconsistent and Incompatible Activities Statement. Respondent admitted that his treating physician did not suggest the use of marijuana, and he was not prescribed marijuana in any form by any doctor. The NOAA informed respondent of his right to respond to the NOAA, and his right to appeal to the State Personnel Board (SPB). Respondent did not respond to the NOAA or appeal to SPB. His dismissal was to be effective on June 22, 2020.

6. In his June 9, 2020 letter to respondent, CHP Captain J.L. Jacobs, Commander of the Office of Internal Affairs, confirmed respondent’s retirement from the CHP effective on June 19, 2020. In addition, he wrote:

I have reviewed the circumstances present at the time of your retirement and have determined that it was “under unfavorable circumstances.” At the time of your [retirement], the [CHP] was in the process of taking adverse action against you. Should you return to the CHP, this adverse action will be pursued. The adverse action is based on [the] allegation that, while employed as a uniformed member of the [CHP], you tested positive for having consumed cannabinoids.

## **Respondent’s Testimony**

7. Respondent injured his neck and back on December 3, 2018, while attempting to arrest a fleeing suspect. He waited nine months to receive a surgical consultation due to delays beyond his control and turned to marijuana to help him

sleep through the pain of a "dislocated neck." He finally received neck surgery 12 months after the injury. He tested positive for marijuana during a routine drug screen. He believed that his marijuana use was legal. The urinalysis results were turned over to the CHP, who initiated an NOAA with a proposed dismissal date of June 22, 2020. After being served with the NOAA, respondent service-retired pending industrial disability retirement effective June 19, 2020. He asserted that he submitted his service pending industrial disability retirement application (application) "weeks before retiring from the CHP." He would have applied for industrial disability retirement despite the NOAA, as there was a "possibility that [he] might have been able to return to duty at some point."

8. Respondent asserted that the applicants in *Haywood, Smith, Martinez* and *MacFarland* either had knowledge of their pending termination or they were terminated and subsequently filed their disability claims. Respondent stated, "If you look at the letter and spirit of the law, the court recognized [that the applicants] were attempting to circumvent the spirit of the law by manipulating the spirit of the law," meaning that the applicants retired/resigned to avoid termination from employment. Respondent asserted that "my case is nothing like these cases," because he did not intend to subvert the spirit of the law by retiring to avoid termination from employment. Moreover, his injuries would have been disabling regardless of the NOAA, indicating that he had a matured right to a disability retirement at the time he separated from employment, as evidenced by his September 17, 2019 UC Davis Health Neurological Surgery Clinic Note related to this worker's compensation claim.

9. Respondent explained that he was injured a year and a half prior to the NOAA, and that the delay in his neurological consult and surgery were "not any fault of mine." He self-medicated with marijuana to manage his worsening pain due to the

delay in his medical care. He would have never been put in the position of using marijuana but for “the delays and pain that this system put me through.” Thus, the NOAA was the result of his injury and delays in his medical treatment.

## **Analysis**

10. As explained in detail in the Legal Conclusions below, the holdings in *Haywood* and its progeny are that the permanent termination of the employer-employee relationship renders the former employee ineligible for disability retirement, so long as termination is neither the ultimate result of a disability nor preemptive of a valid claim for disability retirement. (*Haywood, supra*, 67 Cal.App.4th at pp. 1306-1307.)

11. Respondent established that he was injured on the job on December 3, 2018, then filed a claim with the State Compensation Insurance Fund. On June 4, 2020, respondent signed and thereafter filed the present application. He retired effective June 19, 2020. Respondent’s severance of his employment relationship with CHP rendered him ineligible for industrial disability retirement regardless of whether he timely filed his application, because the severance of his employment by retiring eliminated a necessary prerequisite for disability retirement - the potential for reinstatement to his job. If he chose not to retire, the CHP would have enforced the NOAA, thus barring him from reinstatement.

12. Respondent’s pending worker’s compensation claim is not dispositive here. The worker’s compensation system is wholly different than that of CalPERS industrial disability retirement. Each system has different issues and standards.

13. Respondent claimed that delays in medical treatment for his work-related injury caused him to legally use marijuana to manage his pain. Thus, he is

eligible to apply for industrial disability retirement because the NOAA seeking his dismissal was based on his marijuana use related to his injury. However, there are many ways to control pain caused by an injury, yet respondent chose a remedy of marijuana use, knowing that such use was prohibited by his employer. The basis for the NOAA was respondent's violation of departmental policy demonstrating inexcusable neglect of duty, violation of the prohibitions under Government Code section 19990, and other failure of good behavior causing discredit to his employment. Other than his sole testimony, respondent did not present any evidence that would support a claim that the dismissal was due to behavior caused by his physical condition, nor was there a claim or evidence to support a claim of eligibility for disability retirement that could have been presented before the disciplinary action was taken. (*Haywood, supra*, 67 Cal.App.4th at p. 1306.) Accordingly, respondent is not eligible for industrial disability retirement benefits, and CalPERS properly cancelled his application.

## **LEGAL CONCLUSIONS**

1. CalPERS has the burden of proving respondent's Disability Retirement Election Application is barred by *Haywood* and its progeny. (Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence of nonexistence of which is essential to the claim for relief or defense that he is asserting."].) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Bd. of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)



## **Applicable Statutes**

2. Government Code section 21152, subdivision (d), provides that an application to the board for retirement for disability may be made by the member or any person on his behalf.

3. Government Code section 21154 provides, in pertinent part:

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.

## **Applicable Case Law**

4. In *Haywood*, the appellate court found that:

[W]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.

*(Haywood, supra, 67 Cal.App.4th at p. 1307.)*

The court reasoned:

There is no claim, or evidence which would support a claim, that the termination for cause was due to behavior caused by a physical or mental condition. And there is no claim, or evidence which would support a claim, of eligibility for disability retirement that could have been presented before the disciplinary actions were taken.

[¶] . . . [¶]

[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 employee with the employer] if it is ultimately determined that he is no longer disabled.

*(Id. at p. 1306.)*

[T]he disability provisions of the PERS law contemplate a potential return to active service.

(*Id.* at p. 1307.)

5. *Smith* analyzed the holding in *Haywood*. *Smith* involved a firefighter who filed a backdated application for disability retirement on the effective date of the termination of his employment. *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. (*Smith, supra*, 120 Cal.App.4th at p. 206.) The court explained that a right to disability retirement matures as follows:

A vested right matures when there is an unconditional right to immediate payment. [Citations.] In the course of deciding when the limitations period commenced in a mandate action against a pension board, the Supreme Court noted that a duty to grant the disability pension (i.e., the reciprocal obligation to a right to immediate payment) did not arise at the time of the injury itself but when the pension board determined that the employee was no longer capable of performing his duties. (*Tyra v. Board of Police etc. Commrs.* (1948) 32 Cal.2d 666, 671-672 [197 P.2d 710] ["the right has not come into existence until the commission has concluded that the condition of disability renders retirement necessary."]) [Footnote omitted.] In the present case, a CalPERS determination of eligibility did not antedate the unsuccessful certification on the ladder truck.

His right to a disability retirement was thus immature, and his dismissal for cause defeated it.

*(Ibid.)*

6. The court further stated in *Smith* that an equitable exception may exist as to when a right to 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.

*(Id. at pp. 206-207.)*

7. *Martinez* involved an applicant who was served with an NOAA for dismissal. She agreed to voluntarily resign, and to never again apply for or accept any employment position with her employer. Her employer agreed to cooperate with any disability application filed by her within six months. CalPERS cancelled her application, citing *Haywood, Smith*, and a CalPERS decision made precedential *In the Matter of Application for Disability Retirement of Vandergoot*, (2013) CalPERS Precedential Dec.

No. 12-01<sup>2</sup> (*Vandergoot*) [held resignation tantamount to dismissal upon resignation pursuant to settlement agreement agreeing to waive rights to return to former employer]. The applicant sought to:

[O]verule" *Vandergoot* and "disavow" *Haywood* and *Smith* because they "misconstrue and misapply the [CalPERS] retirement law . . . and result in the harsh forfeiture of public employees' disability retirement rights, in contravention of the California Constitution and principles of equity.

(*Martinez, supra*, 33 Cal.App.5th at p. 1163.)

In addition, the applicant argued:

*Haywood* and *Smith* both have been superseded by legislation, are inconsistent with subsequent case law, and [requested the court] declare that *Vandergoot* is no longer precedential authority.

(*Id.* at p. 1169.)

In the alternative, the applicant sought to distinguish her case from *Haywood*, *Smith* and *Vandergoot*, in that her employer agreed to cooperate with her disability application efforts, and that parties similarly situated would be discouraged from

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<sup>2</sup> Official notice is taken of *In the Matter of Application for Disability Retirement of Vandergoot*, (2013) CalPERS Precedential Dec. No. 12-01, pursuant to Government Code section 11515.

settling their cases in a like manner if CalPERS prohibited employees from applying for disability retirement based on *Haywood* and its progeny.

*(Ibid.)*

The court, in upholding the application of *Haywood*, *Smith*, and *Vandergoot*, opined:

The Legislature and the Board have decided that resignation effects a "permanent separation" from state service . . . Which is exactly what Martinez did when she agreed to leave state service and "never again apply for or accept any employment" with DSS. Notwithstanding the theoretical possibility of reinstatement, 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."

8. In *MacFarland*, the applicant withdrew his SPB appeal of his disciplinary action and service-retired prior to the effective date of the NOAA. CalPERS cancelled his service pending industrial disability retirement application on the basis of *Haywood* because he was "dismissed from employment for reasons which were not the result of a disabling medical condition." (*MacFarland, supra.* at p. 6.)

The applicant in *MacFarland* argued, among other things, that *Haywood* and *Smith* did not preclude his application because his resignation letter preceded the effective date of the NOAA, hence he was never terminated. However, the ALJ found:

The record is clear that applicant's employer made its decision to terminate him before it issued the July 17, 2013 [NOAA], advising that his employment would be terminated on July 2[6], 2013. Applicant service-retired from his employment three days before the effective date of his termination for cause. Had applicant not service-retired on July 23, 2013, his employment would have been terminated on July 26, 2013. The evidence is persuasive that should applicant attempt to reinstate with his employer, the [NOAA] would be enforced and he would be barred from reinstatement.

9. The facts of *MacFarland* are similar to the present case. Here, the CHP sought to terminate respondent and filed an NOAA on June 1, 2020, with a termination effective date of June 22, 2020. Respondent service-retired from his employment on June 19, 2020, three days before the effective termination date. Had he not service-retired on June 19, 2020, the CHP would have pursued the NOAA, and he would have been terminated on June 22, 2020, thus barring his reinstatement pursuant to *MacFarland*.

10. Moreover, CalPERS properly cancelled respondent's application, and his eligibility is precluded by operation of the holdings in *Haywood, Smith, Martinez, and MacFarland*. The severance of his employment extinguished any right to file a Disability Retirement Election Application. Respondent did not present any persuasive evidence that would support a claim that the dismissal was due to behavior caused by his physical condition, nor was there a claim or evidence to support a claim of eligibility for disability retirement that could have been presented before the

disciplinary action was taken. As set forth in the Factual Findings and Legal Conclusions, CalPERS properly determined that respondent is ineligible to file a Disability Retirement Election Application.

## **ORDER**

The determination of CalPERS that respondent Sean F. Gotts may not file a Disability Retirement Election Application is AFFIRMED. Sean F. Gotts's appeal is DENIED.

DATE: August 23, 2021

*Danette C. Brown*

DANETTE C. BROWN

Administrative Law Judge

Office of Administrative Hearings