

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

FRANK PERDOMO, Respondent

and

**CALIFORNIA STATE PRISON CENTINELA, CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondent**

Case No. 2021-1055

OAH No. 2022030981

PROPOSED DECISION

Adam L. Berg, Presiding Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on December 1, 2022.

Austa Wakily, Senior Attorney, California Employees' Retirement System (CalPERS) represented complainant, Keith Riddle, Chief, Disability and Survivor Benefits Division, CalPERS.

Frank Perdomo, respondent, represented himself.

There was no appearance by or on behalf of respondent California State Prison, Centinela (CSP), California Department of Corrections and Rehabilitation (CDCR), and the matter proceeded as a default against this respondent pursuant to Government Code section 11520.

Oral and documentary evidence was received, and the matter was submitted for decision on December 1, 2022.

ISSUE

Is Mr. Perdomo precluded from filing an application for industrial disability retirement due to his resignation from CDCR pending termination?

FACTUAL FINDINGS

Background

1. Respondent was employed as a correctional officer with CDCR effective February 13, 1999. By virtue of his employment, Mr. Perdomo is a state safety member of CalPERS.

2. On September 7, 2021, CalPERS received an application for industrial disability retirement (IDR), signed by Mr. Perdomo on August 18, 2021, based on

orthopedic (left knee and back); concussion and traumatic brain injury; and psychological (post-traumatic stress disorder) conditions.

3. By letter dated October 26, 2021, CalPERS cancelled Mr. Perdomo's IDR application stating that he was ineligible for disability retirement benefits because he resigned from employment while adverse action was pending against him. Mr. Perdomo appealed this decision and requested an administrative hearing.

4. On March 21, 2022, complainant filed the Statement of Issues in his official capacity, seeking to uphold CalPERS's determination that Mr. Perdomo is not eligible for IDR due to his resignation from CDCR in lieu of termination.

Mr. Perdomo's Employment History

5. On January 19, 2021, Mr. Perdomo was served with a Notice of Adverse Action by CSP's warden, stating that effective January 26, 2021, he was to be dismissed from his position as a correctional officer at CSP.

The factual basis for the adverse action is summarized as follows: On August 28, 2020, an Investigative Services sergeant informed Mr. Perdomo that he had been randomly selected to participate in drug and alcohol testing. Mr. Perdomo told the sergeant that he was concerned he would test positive for marijuana, because over the previous two weeks, he had been applying a paste containing marijuana to his wife's feet, to soothe foot pain. Mr. Perdomo provided a test sample that was positive for amphetamine and methamphetamine.

On September 9, 2020, a medical review officer contacted Mr. Perdomo and requested that he provide any prescriptions or medications that could have resulted in the positive results. Mr. Perdomo did not disclose any medications or prescriptions,

and the medical review officer determined there were no acceptable explanations for the positive results.

CSP issued the adverse action against Mr. Perdomo based on the positive biological fluid test for illegal drugs while he was on duty, which violated Health and Safety Code provisions, California Code of Regulations, and agency policies. The violations constituted cause for dismissal from employment based on inexcusable neglect of duty, and other failure of good behavior of such nature as to cause discredit to the appointing authority. (Gov. Code, § 19572, subds. (d) & (t).)

6. On January 22, 2021, Mr. Perdomo submitted a letter to his employer stating he was resigning from his position effective at the close of business.

7. On January 22, 2021, CSP issued a letter confirming receipt of Mr. Perdomo's resignation letter, with a determination that the resignation was under "unfavorable circumstances."

Mr. Perdomo's Testimony

8. Mr. Perdomo's relevant testimony is summarized as follows: He was a correctional officer for 22 years. In 2018, he suffered an orthopedic injury at work, but he continued to work because he loved his job, even though he was in pain. He worked for approximately a month, but because he continued to be in pain, he decided to stop working and file a workers' compensation claim. Over the course of a year, he went to numerous treatments. He was later allowed to return to work on a trial basis. However, during this period, he began to "self-medicate," including taking amphetamines. He accepts full responsibility for the situation and his abuse of drugs. After his positive drug test, he went into a rehabilitation program and has been sober for two years. Since leaving CDCR, he has worked at various positions, including at

Starbucks and Lowes, but was unable to keep up with the physical demands of those jobs. He is currently working as a security guard.

9. Mr. Perdomo's testimony was sincere and credible.

LEGAL CONCLUSIONS

1. Government Code section 21151, subdivision (a), provides that a state safety or state peace officer 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."

2. Government Code section 21152 provides, in part, that an application for disability retirement may be made by the member or the head of the office or department in which the member is or last employed.

3. In *Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292, the court held that an employee's termination for cause rendered him ineligible for disability retirement: "[W]e 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.) The court elaborated:

[W]hile nothing in the PERS law restricts an employer's right to fire an unwilling employee, the Legislature has precluded an employer from terminating an employee because of

medical disability if the employee would be otherwise eligible for disability retirement. (§ 21153.) In such a case, the employer must instead apply for the disability retirement of the employee. (*Ibid.*) In addition, while termination of an unwilling employee for cause results in a complete severance of the employer-employee relationship (§ 19583.1), disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled. Until an employee on disability retirement reaches the age of voluntary retirement, an employer may require the employee to undergo a medical examination to determine whether the disability continues. (§ 21192.) And an employee on disability retirement may apply for reinstatement on the ground of recovery. (*Ibid.*) If an employee on disability retirement is found not to be disabled any longer, the employer may¹ reinstate the employee, and his disability allowance terminates. (§ 21193.)

¹ In *Dept. of Justice v. Bd. of Administration of California Public Employees' Retirement System* (2015) 242 Cal.App.4th 133, the court explained that an employer's duty of unconditional reinstatement under Government Code section 21193 is mandatory "when a recipient of disability retirement is no longer incapacitated by the condition for which she was retired." (*Id.* at p. 142.)

(*Id.* at pp. 1304-1305.)

4. In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, the same appellate court explained its rationale for the exception that applies when an employee is fired because he has a disabling medical condition, or his termination preempts an otherwise valid claim for disability retirement. The court held: "This caveat flows from a public agency's obligation to apply for a disability retirement on behalf of disabled employees rather than seek to dismiss them directly on the basis of the disability [citations] or indirectly through cause based on the disability [citation]." (*Id.* at p. 205.)

Smith involved a firefighter who filed a backdated application for disability retirement on the effective date of the termination of his employment. Focusing on the latter part of the exception articulated in *Haywood*, the appellate court explained that even a dismissal based solely for a cause unrelated to the employee's disability "cannot result in the forfeiture of a matured right to a pension absent express legislative direction to that effect." (*Id.* at p. 206.) The right to a disability pension does not mature until the pension board has concluded the applicant is substantially incapacitated for the performance of his usual duties. (*Ibid.*) However, the court considered the possibility that there might be an equitable exception to this matured disability requirement:

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." The court provided two examples: (1) If an employee "had an impending ruling on a claim for a disability pension that was delayed, through no fault of his own, until after his dismissal" or (2) if there is undisputed

evidence that the employee “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).” Firefighter Smith came within neither of these situations.

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

5. The CalPERS Board of Administration (board) extended the rule articulated in *Haywood* and applied in *Smith* to a state employee who voluntarily resigned his employment after he had been given notice of his termination and his appeal was pending before the State Personnel Board in *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot, Respondent, and California Department of Forestry and Fire Protection, Respondent* (2013) CalPERS Precedential Bd. Dec. No. 13-01 (*Vandergoot*). Concluding that *Haywood’s* holding applies whether Vandergoot was terminated for cause or voluntarily resigned his employment and waived any reinstatement rights, the board explained:

In deciding this case, bright line distinctions need not be made in determining when and under what circumstances a resignation becomes a termination for cause for purposes of applying *Haywood*. This is because *Haywood* makes it clear that a necessary requisite for disability retirement is the potential reinstatement of the employment relationship with the District if it ultimately is determined that respondent is no longer disabled. (*Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at pp. 1296-1297.) Such is not possible here. The employment

relationship has not only been severed, but the terms of the Stipulation and Settlement Agreement expressly lock respondent out from being reinstated. Such a circumstance must be viewed as wholly inconsistent with the policy behind and rationale for disability retirement

(Id. at p. 7.)

The board then turned its attention to *Smith*.

Smith recognized that even when there has not yet been a determination of eligibility [for disability], there may be facts which a court, applying principles of equity, will deem an employee's right to a disability retirement. [Citation.] *Smith* then went through a number of situations where equitable principles might apply. They are also considered here. As in *Smith*, this is not a case where [Vandergoot] had an impending ruling on a claim for a CalPERS disability pension that was delayed through no fault of his own. [Citation.] Here, [Vandergoot] did not even initiate the process for receiving an industrial disability retirement allowance until after he received the NOAA and after he received the adverse Skelly determination [i.e., the denial of his administrative appeal of his termination by the State Personnel Board]. Nor was there "undisputed evidence" that [Vandergoot] 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).” [Citation.] In short, Vandergoot failed to establish that his termination was “the ultimate result of a disabling medical condition” exception mentioned in *Haywood*, or that he had a matured right to a disability retirement as allowed by *Smith*.

(*Id.* at p. 9.)

6. In *Martinez v. Public Employees’ Retirement System* (2019) 33 Cal.App.5th 1156, 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. (*Id.* at p. 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:

The 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 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.”

(*Id.* at p. 1176.)

7. Finally, in *In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip D. MacFarland, Respondent, and California State Prison, Sacramento, California Department of Corrections and Rehabilitation, Respondent* (2016) CalPERS Precedential Bd. Dec. No. 16-01 (*McFarland*), the board held that when an employee retires just before a termination for cause becomes effective, in order to avoid termination, the employee is ineligible for a disability retirement unless the employee qualifies for one of the exceptions carved out in *Haywood* and *Smith*.

Evaluation

8. On January 22, 2021, Mr. Perdomo resigned from his position as a correctional officer with CDCR after his employer provided notice of adverse action indicating that he would be terminated for cause on January 26, 2021. Approximately seven months later, Mr. Perdomo submitted his IDR application to CalPERS.

9. *Haywood, Smith, and Vandergoot* make clear that a prerequisite to granting a disability retirement is the applicant's *ability to be reinstated to his or her former position* should it subsequently be determined that he or she is no longer disabled. However, the *Haywood* court recognized two conditions that an employee, who is fired for cause, can seek disability retirement: (1) if the discharge was the ultimate result of a disabling medical condition, or (2) preemptive of an otherwise valid claim for disability retirement. If the termination was the result of either of these two possibilities, then the termination of the employment relationship does not render the employee ineligible for disability retirement.

10. Mr. Perdomo does not qualify for any of the exceptions. The *Haywood* court recognized that through Government Code section 21154, the Legislature has

precluded an employer from terminating an employee because of medical disability if the employee would be otherwise eligible for disability retirement. (*Haywood, supra*, at p. 1305.) In such a case, the employer must instead apply for the disability retirement of the employee "believed to be disabled." (Gov. Code, § 21154.) The same court in *Smith* recognized a public agency's "obligation to apply for a disability retirement on behalf of disabled employees rather than seek to dismiss them directly on the basis of the disability" or "indirectly through cause based on the disability [citation]." (*Smith, supra*, at p. 205.)

11. Mr. Perdomo's separation from service was not the ultimate result, nor an indirect result, of his alleged disability. The evidence supports a finding that CDCR's notice of termination, and Mr. Perdomo's subsequent resignation, were the result of him testing positive for controlled substances while on duty, not a disabling medical condition. While illicit drug use can be associated with post-traumatic stress disorder, the notice of termination was based on Mr. Perdomo's failure to abide by law, regulations, and department policy, requiring him not to use illegal substances. CDCR expects its correctional officers to be free from illicit drug use, and Mr. Perdomo failed to abide by this requirement; this failure is a legitimate and justifiable reason for termination. Thus, the termination was not the indirect result of a disability, rather, it was the illegal use of drugs, which is incompatible with a correctional peace officer position.

12. Additionally, Mr. Perdomo did not have a "matured right" to a disability retirement prior to the positive drug test that led to his separation from CDCR. Therefore, the separation was not preemptive of an otherwise valid claim for disability retirement. (*Smith, supra*, at pp. 205-206; *Haywood, supra*, at p. 1307.) When CDCR notified Mr. Perdomo that it would be terminating his employment, Mr. Perdomo had

not applied for a disability retirement, much less received a determination from CalPERS that he was eligible for one. Indeed, CalPERS did not receive his disability retirement application until over seven months after his resignation. Nor, for that matter, is there undisputed evidence that Mr. Perdomo was eligible for a disability retirement, such that a favorable decision on his claim would have been a foregone conclusion, such as with the example of a loss of limb. (*Smith, supra*, at p. 207.) Therefore, Mr. Perdomo's alleged right to a disability retirement had not matured prior to the conduct that led to his separation from service.

13. Finally, Mr. Perdomo has not identified any principle of equity that supports deeming his right to a disability retirement to be matured and surviving his separation from state service. (*Martinez, supra*, at p. 1161; *Smith, supra*, at pp. 206-207.) No equitable considerations support that result on these facts.

14. In conclusion, Mr. Perdomo is not eligible for an industrial disability retirement due to his resignation from employment while a notice of termination was pending.

ORDER

Mr. Perdomo's appeal is denied. The decision by CalPERS to cancel his application for industrial disability retirement is affirmed.

DATE: December 21, 2022


Adam Berg (Dec 21, 2022 13:53 PST)

ADAM L. BERG

Presiding Administrative Law Judge

Office of Administrative Hearings