

ATTACHMENT E

THE PROPOSED DECISION

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BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Appeal of Accepting the)	CASE NO. 2022-0720
Application for Disability Retirement of)	OAH NO. 2023040589
)	
PATRICIA R. MOSS,)	DECISION
)	
Respondent,)	
)	
and)	
)	
DEPARTMENT OF FOOD AND)	
AGRICULTURE, 22ND DISTRICT)	
AGRICULTURAL ASSOCIATION - DEL MAR)	
FAIRGROUNDS,)	
)	
Respondent.)	
)	

RESOLVED, that the Board of Administration of the California Public Employees' Retirement System, pursuant to Government Code section 11517, subdivision (c)(2)(C), which authorizes the Board to "make technical or other minor changes in the proposed decision," hereby modifies the Proposed Decision by correcting the spelling error of "against" with "again" in the quotation on page 9, paragraph 22, of the Proposed Decision; and adding the word "Respondent" after "Here," at the beginning of the last sentence on page 24, paragraph 17 of the Proposed Decision, and hereby adopts as its own Decision the Proposed Decision dated April 25, 2024, as modified, concerning the appeal of Patricia R. Moss; RESOLVED FURTHER that this Board Decision shall be effective 30 days following mailing of the Decision.

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1 I hereby certify that on June 12, 2024, the Board of Administration, California Public
2 Employees' Retirement System, made and adopted the foregoing Resolution, and I certify
3 further that the attached copy of the Administrative Law Judge's Proposed Decision is a true
4 copy of the Decision adopted by said Board of Administration in said matter.

5 BOARD OF ADMINISTRATION, CALIFORNIA PUBLIC
6 EMPLOYEES' RETIREMENT SYSTEM
7 MARCIE FROST
8 CHIEF EXECUTIVE OFFICER

9 Dated: 6/12/24

BY


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11 KIMBERLY A. MALM
12 Deputy Executive Officer
13 Customer Services and Support
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**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

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

**PATRICIA MOSS and DEPARTMENT OF FOOD AND
AGRICULTURE, 22ND DISTRICT AGRICULTURAL
ASSOCIATION – DEL MAR FAIRGROUNDS,**

Respondents.

Agency Case No. 2022-0720

OAH No. 2023040589

PROPOSED DECISION

Jami A. Teagle-Burgos, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on March 25, 2024.

Cristina Andrade, Senior Attorney, represented petitioner, Keith Riddle, Chief, Disability and Survivor Benefits Division, California Public Employees' Retirement System (CalPERS).

Patricia Moss, respondent, represented herself.

No one appeared on behalf of respondent Department of Food and Agriculture, 22nd District Agricultural Association – Del Mar Fairgrounds (22nd DAA).

The record was held open until March 26, 2024, in order for petitioner to upload documents for official notice to Case Center. The documents were timely uploaded by petitioner. The record was closed, and the matter was submitted for decision on March 26, 2024.

ISSUE

Is respondent Moss¹ eligible to apply for disability retirement or is she otherwise precluded by applicable law?

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent had been employed by respondent 22nd DAA as a Security Guard. By virtue of her employment, respondent became a state miscellaneous member of CalPERS subject to Government Code sections 20380, 21152, 21154 and 21156.

2. On December 22, 2021, CalPERS received a disability retirement election application signed December 18, 2021, by respondent with a blank effective retirement date and a claim for disability because of "left foot, neck, shoulder, upper back, lower

¹ Hereafter, "respondent" refers to respondent Moss.

back” conditions. In a letter, dated December 23, 2021, CalPERS returned respondent’s application because a notary or CalPERS authorized representative signature was required and there was neither.

3. On January 12, 2022, CalPERS received a disability retirement election application signed and notarized by respondent on January 5, 2022, with an effective retirement date of December 31, 2021. Respondent asserted a claim for disability and wrote, “Cannot perform the duties of my position.” In a letter, dated January 13, 2022, CalPERS requested that respondent provide additional information and documents to process her disability retirement election application. On February 10, 2022, CalPERS notified respondent that her disability retirement election application was cancelled because the requested application information had not been received.

4. On February 23, 2022, CalPERS received respondent’s disability retirement election application signed and notarized on February 15, 2022, with an effective retirement date of December 31, 2021. Respondent asserted a claim for disability and wrote, “Cannot perform the duties of my position.”

5. In a determination letter signed on June 24, 2022, CalPERS notified respondent that it found she was not eligible for disability retirement benefits and further explained:

We have determined that your employment ended for reasons which were not related to a disabling 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.

6. On July 24, 2022, respondent filed an appeal and requested a hearing.

7. Complainant signed the Statement of Issues on April 12, 2023, in his official capacity, alleging respondent is not eligible to apply for disability retirement by operation of *Haywood* and its progeny.

8. This hearing followed.

CalPERS's Evidence

9. The following is a summary of the testimony of Melinda Carmichael and documentation associated with respondent's employment at 22nd DAA.

10. Ms. Carmichael has been employed by 22nd DAA for four years. She has been the Chief Administrative Officer of 22nd DAA since October 2021. Her duties include public safety, facilities, compliance, and environmental issues. She previously served as the Human Resources Director where she oversaw employment records, staffing, hiring, medical leave, and reasonable accommodations.

11. A Notice of Personnel Action, dated May 21, 2014, indicated respondent initiated her employment on that date as a full-time security guard.

12. Ms. Carmichael is familiar with respondent's case because she managed it when she was the Human Resources Director. There had been a previous Human Resources Director, Kim Minick, who initially worked on respondent's case, but she retired and Ms. Carmichael took over the case. She explained the reasonable accommodation process is an "interactive process" where there is a meeting with the employee to find them a suitable job that they can do. It is an ongoing process. There is a possibility that the employer cannot offer an accommodation, but an accommodation may be offered at a later date.

13. In early 2017, 22nd DAA granted medical leave to respondent due to a foot injury and was not able to offer her an accommodation. Ms. Carmichael reported it is unknown if 22nd DAA could have provided respondent an accommodation at a later date because respondent stopped participating in the interactive process.

14. In addition, 22nd DAA received a Maximum Medical Improvement Report on February 25, 2020, by Sharp Rees-Stealy Medical Center, Occupational Health, which stated that respondent had "resolving symptoms associated with plantar fasciosis left heel." Based on this report, 22nd DAA believed there could have been an accommodation and perhaps other work available for respondent.

15. On December 18, 2020, Ms. Minick sent an "options letter" to respondent stating that 22nd DAA was in receipt of a report by "Dr. Murphy," a qualified medical evaluator (QME), indicating she could not perform her current duties as a security guard and assigning her the following restrictions: no standing, walking, sitting, bending, climbing, twisting, reaching, crawling, or pushing/pulling with the bilateral hands more than six hours and no lifting/carrying more than 30 pounds at a height of five feet for more than four to six hours. Ms. Minick asked respondent to engage in the

interactive process and contact her by December 30, 2020, and provided her with the following options to consider:

- Separation from state service through disability retirement, service retirement, or voluntary resignation.
- If respondent does not respond, 22nd DAA may pursue disability retirement or medical termination.

16. In a letter dated January 22, 2021, Ms. Minick wrote to respondent indicating they had a telephone meeting on that day to discuss respondent's options. Respondent had chosen to not return to work and expressed that she wanted to apply for disability retirement. Ms. Carmichael testified that 22nd DAA offered to submit a disability retirement application on behalf of respondent, but it did not because respondent expressed in writing that she did not want 22nd DAA to apply on her behalf.

17. 22nd DAA issued a Notice of Personnel Action - Report of Separation on February 12, 2021, approving a leave of absence for respondent that was scheduled to expire on November 25, 2021. The notice states, in pertinent part:

The reason for your separation is illness. Your approved absence expires 11/25/21. You must return to work immediately thereafter. If conditions exist which prevent your return at this time, contact your departmental personnel office. Failure to return or contact your personnel office may jeopardize your return to your job or result in an AWOL (absence without leave) separation. . . .

18. In an email on April 26, 2021, Ms. Carmichael informed respondent that Ms. Minick retired and she would be taking over respondent's case along with April Roque. The email also confirmed the interactive process had been completed with Ms. Minick, and respondent had elected to apply for disability retirement and 22nd DAA offered to assist with that application. Respondent was also reminded that she had reached Maximum Medical Improvement, effective November 25, 2020, although Dr. Murphy, the QME evaluator, had adopted the effective date of February 25, 2020, based on the treatment records of a primary treating physician, "Dr. Wendt." Respondent was no longer on temporary disability and she was now responsible for her monthly premiums for health care, vision, and dental.

19. In a letter on July 13, 2021, Ms. Carmichael attempted to reengage respondent in the interactive process. She had reached out via email to respondent on three occasions on April 26, 2021, May 11, 2021, and May 19, 2021, and respondent had yet to respond to a question regarding her intention to apply for disability retirement. As such, 22nd DAA was unsure of respondent's plans and wanting to reengage the interactive process to assist respondent to "develop an appropriate plan." Respondent was informed that she was using her leave balances and her leave credits would exhaust on August 5, 2021. Ms. Carmichael asked respondent to respond by July 28, 2021, in order to set up a meeting to discuss respondent's following options:

- Return to work through full duty, reasonable accommodation, or medical transfer/demotion.
- Temporary leave through the Family Medical Leave Act (FMLA) and California Family Rights Act (CFRA), pregnancy disability leave, medical leave

of absence, leave balance, temporary assignment, State Disability Insurance (SDI), or Temporary Total Disability/Industrial Disability Leave.

- Separation from state service through disability retirement, service retirement, or voluntary resignation.

The letter further stated:

You must remain in contact with me in regard to any absence from work. Failure to report may result in the department invoking the Absence without Leave (AWOL) provisions of Government Code Section 19996.2. Absence without leave, whether voluntary or involuntary, for five consecutive working days is an automatic resignation from state service, as of the last date on which the employee worked. (Bold in original.)

20. In an email on July 29, 2021, Ms. Carmichael responded to an email from respondent on July 27, 2021. Respondent asked that her service credits and years of service be corrected with CalPERS before she filed a disability retirement application, and she informed Ms. Carmichael that she could not return to her position as a security guard because of her work restrictions. Respondent also asked that 22nd DAA not submit a disability retirement application on her behalf, as she would do it on her own once her service credits and years of service were corrected with CalPERS. Ms. Carmichael replied and ensured respondent that she would contact CalPERS to verify respondent's service credits and years of service, and invited respondent to continue the interactive process to determine if there was a vacant position for which respondent was qualified with her restrictions. Ms. Carmichael preemptively extended respondent's approved leave to August 13, 2021, in order to have more time to

engage in the interactive process. Respondent was also reminded that she must obtain approval for any time off, as of August 13, 2021, otherwise her absence may result in separation from service under AWOL.

21. In a letter on August 26, 2021, Ms. Carmichael reminded respondent that her leave status expires on November 25, 2021, and she was expected to return to work on November 26, 2021. Respondent was asked, again, to reengage in the interactive process before returning to work. The letter reconfirmed that respondent expressed in January 2021 that she intended to apply for disability retirement, which she had not yet done. Ms. Carmichael also confirmed that she verified respondent's correct service credits and years of service with CalPERS.

22. In a letter sent by certified mail and email on November 10, 2021, Ms. Carmichael reminded respondent that her leave was "coming to an end" on November 25, 2021, and she was expected to return to work on November 26, 2021. The letter again reminded respondent of her other options and to reengage in the interactive process, and that she had not yet applied for disability retirement, and stated:

Further, please be advised against that your approved absence will end November 25, 2021, and you are expected to return to work November 26, 2021. You must remain in contact with me in regard to any absence from work, and you are responsible to obtain approval for any absences in accordance with department policy and procedure.

If you are not able to report to work for any reason on November 26, 2021, or any day thereafter, you must call or email me at the phone number listed below. Failure

to do so may result in the department invoking the Absence without Leave (AWOL) provisions of Government Code Section 19996.2. Absence without leave, whether voluntary or involuntary, for five consecutive working days is an automatic resignation from state service, as of the last date on which the employee worked. (Bold in original.)

23. In a letter sent by certified mail and email on November 30, 2021, Ms. Carmichael notified respondent that her leave expired on November 25, 2021, and if she did not return to work that she would be subject to being AWOL. Respondent also did not reengage in the interactive process for reasonable accommodation. There had been five consecutive days of respondent being absent from work since November 26, 2021, and she had not received approval for these absences. Respondent was asked to submit documentation from a medical provider that demonstrated why she needed more time off from work. Ms. Carmichael testified that, in response to this letter, respondent did not provide documentation other than a "screenshot with some sort of medical documentation that was partial." Respondent had also provided a work "excuse slip" from a treating physician, Sydney Levine, M.D. Ms. Carmichael explained that 22nd DAA will submit a disability retirement application on behalf of an employee if it has medical documentation of the employee being disabled, and she did not believe 22nd DAA had that information for respondent. In addition, respondent had not submitted an application for disability retirement with CalPERS.

24. In a letter, dated December 9, 2021, delivered by a process server on December 10, 2021, Ms. Carmichael informed respondent that she failed to return to work for more than five consecutive working days and failed to submit any medical documentation to extend her leave. 22nd DAA intended to invoke AWOL status for

respondent, effective December 16, 2021, and respondent was informed of her right to request an informal hearing. Upon delivery of the letter, the process server appeared at the front door of respondent's residence and noted there was noise in the residence and cars in the driveway, but no one answered the door. The process server left the package with the letter at the door of respondent's residence.

25. In a letter sent by certified mail and email on December 16, 2021, Ms. Carmichael notified respondent that a letter, dated December 9, 2021, was left at her door by process server on December 10, 2021. She was informed that her absences from November 26, 2021, through December 9, 2021, were not approved, and 22nd DAA intended to invoke AWOL status for respondent, effective December 16, 2021. Respondent was given the contact information for Bianca Kulback of the 32nd District Agricultural Association to request hearing, and to file an appeal with the California Department of Human Resources (CalHR).

26. In an email on December 16, 2021, respondent wrote Ms. Kulback and requested an informal hearing, known as a Skelly² hearing. Ms. Kulback emailed

² In *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215, the California Supreme Court held that in order to satisfy due process, an agency considering disciplinary action against a public employee must accord the employee certain "pre-removal safeguards," including "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." The Supreme Court's directive gave rise to an administrative procedure known as a Skelly hearing, in which an employee has the opportunity to respond to the charges upon which the proposed discipline is based.

respondent on December 20, 2021, asking her to coordinate to schedule the Skelly hearing. On December 27, 2021, respondent replied to Ms. Kulback by email and repeated that she was requesting a Skelly hearing. Ms. Kulback replied by email on the same day – December 27, 2021, and on December 28, 2021, and December 29, 2021, asking respondent for her dates of availability to conduct the hearing by person, phone, or Zoom. Respondent was informed that if she did not provide her availability for an informal hearing by December 31, 2021, that Ms. Kulback would make a determination regarding her personnel status based on the information provided to her by respondent.

27. On January 3, 2021, Ms. Kulback emailed Ms. Carmichael informing her that she had served as the Skelly Officer for respondent's case regarding respondent's AWOL dismissal, and that respondent had not responded to several attempts to schedule a Skelly Hearing. Ms. Kulback made her determination with the information emailed to her by respondent, and sustained respondent's AWOL dismissal.

28. A Payroll Authorization, approved on November 7, 2022, indicates that respondent's personnel status was changed to "voluntarily termination," effective November 25, 2021.

29. A 22nd DAA document captioned "Separation for Permanent Employees," approved on November 7, 2022, indicates that respondent permanently separated from her employment due to AWOL status, effective November 25, 2021.

30. A Notice of Personnel Action – Report of Separation, issued on January 14, 2022, indicates that respondent separated from employment due to AWOL status, effective November 25, 2021.

31. A handwritten note by respondent, dated February 17, 2022, indicates she returned the following to 22nd DAA: employee badge; parking permit; "FOBS" – never issued; keys; radio; money order for a lost flashlight; Allen wrench; and uniforms.

32. In summary, Ms. Carmichael testified that respondent did not reengage with 22nd DAA; respondent separated from employment in an AWOL status; and, other than reapplication for a position with the state, there is nothing respondent can do to reinstate her employment with 22nd DAA.

Respondent's Evidence

33. The following is a summary of the testimony of respondent and her supporting documentation.³ Respondent asserted that she was injured while at work at 22nd DAA, and she had an employment relationship because she still had time available for leave. She contended that she submitted a timely application for disability retirement for which she was eligible because she submitted medical evidence that included doctors' notes and a report by a QME. She stated the QME report determined she was "disabled to work," and this determination was prior to her being considered AWOL, and she did not return to work because she was not cleared to do so by a doctor.

34. Respondent argued that after she received a letter from CalPERS on January 13, 2022, she called CalPERS and was told they "only needed the job description, duty statement, and they would make a determination once that was received." She contacted Ms. Roque at 22nd DAA on January 26, 2022, who provided

³ Respondent cited to and read into the record the text for several statutes during her testimony, all of which was considered in the decision herein.

these items to CalPERS on the same day. She also contended that her employer, 22nd DAA, could have filed an application for disability retirement on her behalf and not wait for additional documentation that was requested by CalPERS.

35. Respondent was asked if she was contacted by her employer, 22nd DAA, on multiple occasions to engage in the reengagement process. She acknowledged that she had indeed been contacted several times by 22nd DAA. She denied that she ignored their requests to reengage in the interactive process. She engaged with 22nd DAA when she was initially placed on medical leave. When asked why she did not engage with 22nd DAA upon their subsequent attempts to reengage in the interactive process with her, she replied, "I believed the first interaction was sufficient."

36. Respondent was asked if 22nd DAA had informed her that if she did not reengage in the interactive process, report to work on November 26, 2021, or apply for disability retirement, then she would be deemed AWOL. She responded that she did not report to work on November 26, 2021, but "this didn't mean [she] voluntarily resigned per AWOL."

37. Respondent was asked when she signed her disability retirement election application on December 18, 2021, if she had already received her employment notice that she would be separated due to AWOL, effective December 16, 2021. She replied, "I submitted the application once I was informed the District acknowledged it received its employer section."

38. Respondent was also asked about a partial email correspondence between her and her counsel for workers' compensation that she submitted, which briefly explains that a workers' compensation claim is different from other labor issues surrounding retirement, CalPERS, reasonable accommodations, leave, and AWOL. Her

counsel for workers' compensation wrote that he could not provide legal advice or consultation on such matters. Respondent testified that she was "confused and just reaching out to others to help explain things" and she did not understand if she had been deemed permanent and stationary, why it was that she had to "go through this other process at work."

LEGAL CONCLUSIONS

1. CalPERS has the burden of proving respondent's disability retirement 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.) 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 21151, subdivision (a), states 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."

3. Government Code section 21152 states, in relevant 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.

4. Government Code section 21154 states:

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. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

5. Government Code section 21156 states:

(a)(1) If the medical examination and other available information show to the satisfaction of the board, or in case of a local safety member, other than a school safety member, the governing body of the contracting agency

employing the member, that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability, unless the member is qualified to be retired for service and applies therefor prior to the effective date of his or her retirement for disability or within 30 days after the member is notified of his or her eligibility for retirement on account of disability, in which event the board shall retire the member for service.

(2) In determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process.

(b)(1) The governing body of a contracting agency upon receipt of the request of the board pursuant to Section 21154 shall certify to the board its determination under this section that the member is or is not incapacitated.

(2) The local safety member may appeal the determination of the governing body. Appeal hearings shall be conducted by an administrative law judge of the Office of Administrative Hearings pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of this title.

Applicable Case Law

6. In *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, the court held that an employee's termination for cause rendered him ineligible for disability retirement benefits. The court explained, "while termination of an unwilling employee for cause results in a complete severance of the employer-employee relationship [citation], disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled." (*Id.* at p. 1305.). The court explained:

[W]e conclude that where, as here, an employee is fired for cause and the discharge is neither the ultimate result of the disabling medical condition or 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.)

7. 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.)

8. *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.)

9. Analyzing the *Haywood* court's qualification that an employer's dismissal may not preempt "an otherwise valid claim for disability retirement," the *Smith* court identified "the key issue [as] thus whether his right to a disability retirement matured before plaintiff's separation from service." (*Id.* at p. 206.) The court then explained that "a vested right matures when there is an unconditional right to immediate payment," and "a duty to grant the disability pension . . . [does] not arise at the time of injury itself but when the pension board determine[s] that the employee [is] no longer capable of performing his duties." (*Ibid.*) But the appellate court also recognized an

equitable exception when there is an impending ruling on an application for disability retirement that is delayed, through no fault of the applicant, until after his employer-employee relationship has been terminated. (*Id.* at pp. 206-207.)

10. The Board of Administration extended the rule articulated in *Haywood* to the termination of an employer-employee relationship caused by an employee's voluntary resignation and irrevocable waiver of any rights to reinstate to his former position in *Vandergoot* (2013) CalPERS Precedential Bd. Dec. No. 13-01. Mr. Vandergoot was a heavy fire equipment operator with the California Department of Forestry and Fire Protection. He was dismissed from his employment for cause and appealed his dismissal to the State Personnel Board (SPB). He ultimately settled his appeal by agreeing to voluntarily resign his employment and waive any rights to reinstate to his former position in exchange for his employer withdrawing his dismissal for cause.

11. Concluding *Haywood* applies whether Mr. Vandergoot was terminated for cause or voluntarily resigned his employment and waived any reinstatement rights, the Board of Administration 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

(*Vandergoot*, supra, at p. 7.)

12. 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.)

13. Finally, *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 (*MacFarland*), 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*.

14. *MacFarland* was employed as a clinical psychologist at California Department of Corrections and Rehabilitation (CDCR). He was served with a Notice of Adverse Action (NOAA) and two days later he notified his employer that he was retiring in two days and he filed for disability retirement, due to his doctor's orders because of injuries he sustained while at work. His employer reviewed the circumstances present at the time of MacFarland's retirement and determined his separation was "under unfavorable circumstances." Two months later, MacFarland and his employer withdrew the SPB appeal of the NOAA because he had service retired prior to the effective date of the adverse action. Thereafter, CalPERS notified MacFarland that it was unable to accept his application for industrial disability retirement because CalPERS applied *Haywood* and its progeny. MacFarland was dismissed from employment for reasons not resulting of a disabling condition, and his dismissal did not appear to be with the purpose of preventing a claim for disability retirement. MacFarland appealed CalPERS decision and argued that he was not terminated because the NOAA was to not take effect until a few days after he retired. The *MacFarland* decision states:

At the time that CCHCS issued the NOAA and severed its employment relationship with applicant, applicant had no unconditional right to immediate payment of a disability retirement. His workers' compensation actions were unresolved, and had no bearing on a determination as to whether he was substantially and permanently incapacitated from his duties under retirement law. CalPERS had no opportunity to evaluate any disability claims; applicant did not even initiate the disability retirement process until after giving cause for his dismissal. Application had no unconditional right to immediate payment of a disability pension at the time he was terminated.

Applicant is ineligible to apply for disability retirement for industrial disability retirement under Government Code section 21151. His eligibility is precluded by operation of the holdings in *Haywood, Smith and Vandergoot*.

15. The holdings in *Haywood* and its progeny are that the permanent severance 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. It does not matter whether termination of the relationship was caused by the former employee's dismissal from employment for cause (*Haywood*), a voluntary resignation and permanent waiver of any right to reinstate to a former position (*Vandergoot* and *MacFarland*), or that there was an impending ruling on a claim for disability pension that was delayed (*Smith*).

Evaluation

16. In this case, respondent resigned on November 25, 2021, which was her last day of approved leave of absence, not due to a disability but because she separated as a result of her AWOL status on December 16 and 27, 2021, respectively. It was not until after these dates that she filed a first disability retirement application with CalPERS on December 22, 2021, which was cancelled because it was not notarized or signed by an authorized representative of CalPERS. She filed a second disability retirement application with CalPERS on January 5, 2022, which was cancelled because it was incomplete as it did not provide required information. She filed a third and final application for disability retirement with CalPERS on February 23, 2022, which was cancelled by CalPERS due to its correct application of *Haywood* and its progeny.

17. Respondent has no reinstatement rights to her position of employment at 22nd DAA following her resignation on November 25, 2021, which occurred because her separation stemmed from her being AWOL. Return rights are a requirement under *Haywood, Smith, Vandergoot, and Martinez*. Respondent resigned under an AWOL status when she essentially refused to return to her job. The court in *Martinez* explained that resignations can be found to be “tantamount to a dismissal.” Here, resigned from her position and she has no return rights, whereby she is ineligible for disability retirement.

18. Moreover, it is noted that respondent unsuccessfully tried to lay blame on 22nd DAA for her delayed and/or incomplete applications for disability retirement when it was she, who – for months – did not submit an application for disability retirement despite stating that was her intent, she was reminded over and over – in writing – by representatives of 22nd DAA to submit an application, and she declined – in writing – 22nd DAA’s offer to submit an application on her behalf.

19. Ultimately, it was respondent who caused her own dismissal when she separated as a result of being AWOL from her job. This resulted after multiple written reminders from 22nd DAA that she would be considered AWOL if she did not take action, after her own inaction to submit a timely application for disability retirement with CalPERS, after her refusal to engage in the interactive process with 22nd DAA, and after her failure to request 22nd DAA to continue to be on an approved leave status. The result of her repeated inaction is that she has no reinstatement rights and she is ineligible for disability retirement.

20. Based on the above, CalPERS met its burden by demonstrating that respondent's disability retirement application is barred by *Haywood* and its progeny.

21. As such, respondent is not eligible to apply for disability retirement benefits, and respondent's eligibility for disability retirement is precluded by operation of *Haywood* and its progeny.

ORDER

The appeal of respondent Patricia Moss to be granted the right to file an application for disability retirement is denied.

DATE: April 25, 2024



JAMI A. TEAGLE-BURGOS

Administrative Law Judge

Office of Administrative Hearings

PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811 (P.O. Box 942707, Sacramento, CA 94229-2707).

On June 12, 2024, I served the foregoing document described as:

DECISION - In the Matter of the Appeal of Accepting the Application for Disability Retirement of PATRICIA R. MOSS, Respondent, and DEPARTMENT OF FOOD AND AGRICULTURE, 22ND DISTRICT AGRICULTURAL ASSOCIATION - DEL MAR FAIRGROUNDS, Respondent. Case No. 2022-0720; OAH No. 2023040589.

on interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Patricia R. Moss
[Redacted]

Office of Administrative Hearings
Emerald Plaza
402 W. Broadway, Ste. 600
San Diego, CA 92101-8511

(Via OAH SECURE e-FILE)

Melinda Carmichael
22nd Department Agricultural Association
- Del Mar Fairgrounds
Department of Food and Agriculture
2260 Jimmy Durante Blvd.
Del Mar, CA 92014-2216

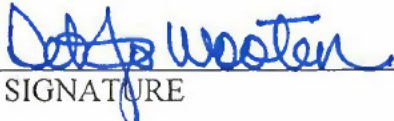
- [xx] BY OVERNIGHT DELIVERY: I caused such envelope(s) to be delivered to the above address(es) within 24 hours by overnight delivery service.
- [xx] BY ELECTRONIC FILING: I caused such documents to be e-Filed via OAH SECURE e-FILE.

Executed on June 12, 2024, at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Deb Jo Wooten

NAME



SIGNATURE