

November 2022

SACRS Attorney Breakout

Disability Retirement Applications Involving Criminal
Convictions and/or Termination for Cause

- Felony Forfeiture under Government Code sections 7522.72 and 7522.74
- *Smith/Haywood* Termination for Cause

Presenter

Frank Boyd

Senior Staff Counsel

LACERA

PEPRA Felony Forfeiture

Government Code sections 7522.72 (employees hired before 1/1/13) and 7522.74 (employees hired after 1/1/13), otherwise known as the felony forfeiture statutes, were passed under the Public Employees' Pension Reform Act of 2013 (PEPRA).

Forfeiture of Benefits under Subsection (b)

Subsections (b)(1) and (c)(1) of these provisions are relevant to this discussion. Subsection (b)(1) states the following in pertinent part:

- (b)(1) If a public employee is **convicted** by a state or federal trial court of any felony under state or federal law **for conduct arising out of or in the performance of his or her official duties**, . . . he or she **shall forfeit all accrued rights and benefits** in any public retirement system in which he or she is a member to the extent provided in subsection (c) and shall not accrue further benefits in that public retirement system, effective on the date of the conviction. (Emphasis added.)

Forfeiture of Benefits under Subsection (c)

(c)(1) A member shall forfeit all the rights and benefits earned or accrued from the earliest date of the commission of any felony described in subdivision (b) to the forfeiture date, inclusive. The rights and benefits shall remain forfeited notwithstanding any reduction in sentence or expungement of the conviction following the date of the member's conviction. Rights and benefits attributable to service performed prior to the date of the first commission of the felony for which the member was convicted shall not be forfeited as a result of this section. (Emphasis added.)

“Forfeiture date” means the date of the conviction.
(Section 7522.72(c)(3)).

Incapacity

“Permanent incapacity” for the performance of duty is the substantial inability of a member to perform his or her usual duties.

Mansperger v. Public Employees' Retirement System (1970) 6 Cal.App.3d 873, 876; *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 694-696

Under Subsections (c) and (b), the right to a disability retirement is forfeited **unless** the evidence establishes that the member became permanently incapacitated before the earliest date of commission of the felony.

Timing of Incapacity is a Factual Issue

It may be difficult for the member to prove incapacity before the first commission of the crime because the member most likely was performing his or her usual duties while committing a felony that arose out of and the course of the employment.

However, the member may be successful if he or she was performing temporary light-duties based on a valid medical condition on the date of first commission.

Hypothetical 1

8/1/10: Deputy Sheriff injures right knee while making an arrest and goes off work.

2/1/10: Has right knee surgery

3/1/11: Returns to light duty

8/1/11: Returns to full duty

6/1/12: First Commission of job-related felony

1/2/13: Knee goes out while on duty, falls down stairs, and becomes permanently incapacitated

3/1/13: Arrested

6/1/13: Terminated based on job-related felony.

1/2/15: Convicted of job-related felony

Hypothetical 2

Same Deputy Sheriff. Same fact pattern. Except the member enters a plea and is convicted of a job-related misdemeanor.

Felony Forfeiture is not applicable.

But the member was still terminated for cause.

Termination for Cause *Haywood/Smith*

Haywood v. American River Fire Protection District
(1998) 67 Cal.App.4th 1292.

A terminated-for-cause employee is ineligible to apply for a disability retirement but can qualify to apply when the conduct which prompted the termination was the result of his or her disability.

- **Psychiatric Conditions** (example): non-industrial psychiatric condition causes behavior that leads to termination. Member is eligible to apply.

Smith v. City of Napa (2004) 120 Cal.App.4th 194.

Applying principles of equity, the court determined that the discharge cannot be *preemptive of an otherwise valid claim for disability retirement*.

A terminated employee may qualify for disability retirement if he or she had a '**matured right**' to a disability retirement prior to the conduct which prompted the termination.

The court gave two examples:

Smith – Equitable Exceptions for Maturity Date

Example 1: Delay of Application Filed Before Dismissal

If a member's impending ruling on his disability retirement application was delayed through no fault of the member until after the dismissal, the member's right to a disability retirement may survive the dismissal

Example 2: Medical Evidence of Permanent Incapacity Prior to the Event Which Gave Cause to the Dismissal

The court stated that if there was **unequivocal medical evidence** establishing that the member was permanently incapacitated prior to the event which gave cause to the dismissal, the member's right to a disability retirement would survive the dismissal. The court stated for Smith, **there was not "undisputed"** evidence "that a favorable decision on his claim would have been a forgone conclusion (as perhaps with a loss of limb)."

New Standard for Incapacity?

Did *Smith* establish a new disability standard for terminated members?

Probably not. There is no discussion in the decision comparing an ***unequivocal/undisputed*** standard with the preponderance of evidence standard applied in disability-retirement cases. Most likely dicta.

Deputy in Hypothetical 2

Deputy was terminated because of the bad act he committed on June 1, 2012. Under *Smith*, the member would have to prove that he was permanently incapacitate on May 31, 2012, the day before the bad act.

On May 31, 2012, he was performing his full duties and did not have any work restriction. Deputy is not eligible to apply for a disability retirement.

Martinez v. Public Employees' Retirement System (2019) 33 Cal.App.5th 1156

A member's resignation in lieu of termination is tantamount to a dismissal for purposes of applying the *Haywood/Smith* criteria.

QUESTIONS?

