**BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA**

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| In the Matter of the Appeal by<br><br>**LETICIA GARCIA**<br><br>From Non-Punitive Termination from the position of Clinical Social Worker with Avenal State Prison, Department of Corrections and Rehabilitation at Avenal | SPB Case No. 07-0850A<br><br>**BOARD DECISION**<br><br>(Precedential)<br><br>**No. 08-03**<br><br>July 8, 2008 |

**APPEARANCES**: Robert Battle, Business Agent, American Federation of State, County and Municipal Employees (AFSCME), on behalf of appellant, Leticia Garcia; Michelle Clemmensen, Employee Relations Officer, Department of Corrections and Rehabilitation, on behalf of respondent, Department of Corrections and Rehabilitation (CDCR).

**BEFORE**: Sean Harrigan, President; Richard Costigan, Vice President; Maeley Tom and Patricia Clarey, Members.

## DECISION

This case is before the State Personnel Board (SPB or Board) after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) and determined to hear the case itself. In this Decision, the Board concludes that the Health and Safety Code designates the Department of Health Care Services (DHCS) as the appropriate authority to grant extensions of licensing waivers for social workers employed by the state. Moreover, where, as here, the employing department acts to grant or deny an employee's request for waiver extension, the employing department will be estopped from asserting on appeal that the employee should have sought the waiver extension from DHCS. Accordingly, the Board adopts as its own the attached Decision of the ALJ revoking appellant's non-punitive termination.

Appellant was hired on March 3, 2003, as an unlicensed clinical social worker and appointed to the position of Clinical Social Worker with the understanding that she would complete her training and obtain her license by March 2, 2007. At all times since her hire, appellant's classification required her to possess a license issued by the California Board of Behavioral Science. Pursuant to section 1277 of the Health and Safety Code, however, clinical social workers newly employed by the state may obtain a four-year waiver[1] of the licensing requirement and, under extenuating circumstances, are entitled to a further extension of the waiver for one year. Thus, appellant understood that she was to obtain her license by no later than March 2, 2007, and that she could only extend the licensing deadline under extenuating circumstances.

Between June 2005 and May 2006, appellant experienced a number of personal hardships and stressful circumstances: she suffered from a series of abdominal infections culminating in surgery; she divorced her husband and was engaged in a bitter custody dispute over her minor child; she relocated to a new county; and her sister, who had raised appellant since appellant was ten years old, passed away suddenly.

Unable to prepare for her licensing examinations and after learning from her administrative supervisor that he would support a waiver extension, in early 2007, appellant submitted to the acting Chief Medical Officer at Avenal State Prison a request that her employing department, the Department of Corrections and Rehabilitation (CDCR or the Department), grant her a one-year extension of her licensing waiver pursuant to section 1277 of the Health and Safety Code. Although appellant informed

[1] The waiver period is four years from the commencement of employment in this state.

CDCR that she had completed all of her training hours and required course work and was simply waiting to sit for the written examinations when they were offered, the Department denied the request for an extension.

On March 2, 2007, CDCR non-punitively terminated appellant because she did not possess the required license. At no time did CDCR inform appellant that she should not have submitted her request to CDCR, nor did the Department forward the waiver extension request to DHCS on appellant's behalf.

Appellant filed a timely appeal from CDCR's non-punitive termination action. At the hearing, CDCR contended that DHCS "is the only authority that has the ability to grant an extension of Ms. Garcia's license." However, DHCS has thus far refused to take action on appellant's request, alleging that, as appellant's direct employer, CDCR is the responsible agency.

## DISCUSSION

As discussed above, section 1277 of the Health and Safety Code allows for a four-year waiver of the licensing requirements and an additional one-year extension of the waiver, permitting clinical social workers employed by the state to effectively work without a license for a total of five years from the date they commence employment in this state. The relevant portions of section 1277 read as follows:

> (b) Notwithstanding any provision of Part 2 (commencing with Section 5600) of Division 5 of, or Division 7 (commencing with Section 7100) of, the Welfare and Institutions Code or any other law to the contrary, except Sections 2072 and 2073 of the Business and Professions Code, the licensure requirements for professional personnel, including, but not limited to, physicians and surgeons, dentists, podiatrists, psychologists, marriage and family therapists, pharmacists, registered nurses, and clinical social workers in the

state and other governmental health facilities licensed by the state department shall not be less than for those professional personnel in health facilities under private ownership. Persons employed as psychologists and clinical social workers, while continuing in their employment in the same class as of January 1, 1979, in the same state or other governmental health facility licensed by the state department, including those persons on authorized leave, but not including intermittent personnel, shall be exempt from the requirements of this subdivision. *Additionally, the requirements of this subdivision may be waived by the state department solely for persons in the professions of psychology, marriage and family therapy or clinical social work who are gaining qualifying experience for licensure in such profession in this state. A waiver granted pursuant to this subdivision shall not exceed three years from the date the employment commences in this state in the case of psychologists, or four years from commencement of the employment in this state in the case of marriage and family therapists and clinical social workers, at which time licensure shall have been obtained or the employment shall be terminated except that an extension of a waiver of licensure for marriage and family therapists and clinical social workers may be granted for one additional year, based on extenuating circumstances determined by the department pursuant to subdivision (e).* For persons employed as psychologists, clinical social workers, or marriage and family therapists less than full time, an extension of a waiver of licensure may be granted for additional years proportional to the extent of part-time employment, as long as the person is employed without interruption in service, but in no case shall the waiver of licensure exceed six years in the case of clinical social workers and marriage and family therapists or five years in the case of psychologists. However, this durational limitation upon waivers shall not apply to active candidates for a doctoral degree in social work, social welfare, or social science, who are enrolled at an accredited university, college, or professional school, but these limitations shall apply following completion of this training. Additionally, this durational limitation upon waivers shall not apply to active candidates for a doctoral degree in marriage and family therapy who are enrolled at a school, college, or university, specified in subdivision (a) of Section 4980.40 of the Business and Professions Code, but the limitations shall apply following completion of the training. A waiver pursuant to this subdivision shall be granted only to the extent necessary to qualify for licensure, except that personnel recruited for employment from outside this state and whose experience is sufficient to gain admission to a licensing examination shall nevertheless have one year from the date of their employment in California to become licensed, at which time licensure shall have

been obtained or the employment shall be terminated, provided that the employee shall take the licensure examination at the earliest possible date after the date of his or her employment, and if the employee does not pass the examination at that time, he or she shall have a second opportunity to pass the next possible examination, subject to the one-year limit for marriage and family therapists and clinical social workers, and subject to a two-year limit for psychologists . . .

. . . (e) *The department shall grant a request for an extension* of a waiver based on extenuating circumstances, pursuant to subdivisions (b) and (d), *if any of the following circumstances exist*:

(1) The person requesting the extension has experienced a recent catastrophic event which may impair the person's ability to qualify for and pass the license examination. Those events may include, but are not limited to, significant hardship caused by a natural disaster, serious and prolonged illness of the person, serious and prolonged illness or death of a child, spouse, or parent, *or other stressful circumstances.*

(2) The person requesting the extension has difficulty speaking or writing the English language, or other cultural and ethnic factors exist which substantially impair the person's ability to qualify for and pass the license examination.

(3) *The person requesting the extension has experienced other personal hardship* which the department, in its discretion, determines to warrant the extension. (Emphasis added).

Moreover, section 20 of the Health and Safety Code reads:

"State department" or "department" means State Department of Health Services. Commencing July 1, 2007, any reference to the former State Department of Health Services regarding a function vested by Chapter 2 (commencing with Section 131050) of Part 1 of Division 112, in the State Department of Public Health is deemed to, instead, refer to the State Department of Public Health, and any reference to the former State Department of Health Services regarding a function not vested by Chapter 2 (commencing with Section 131050) of Part 1 of Division 112, in the State Department of Public Health, is deemed to, instead, refer to the State Department of Health Care Services.

Based upon the plain language of the relevant statutes, and in the absence of any regulation or other authority setting forth DHCS' intent to delegate its statutory mandate as set forth in section 1277, the Board finds that DHCS is the department

authorized to grant licensing waivers and requests for one-year extensions of licensing waivers. As such, employees and representatives of state employees falling within the subject classification should direct their requests for waivers and extensions of waivers to DHCS.

In this case, however, CDCR acted on (i.e., denied) appellant's request for a waiver extension and, in doing so, either led appellant to believe, or confirmed her belief, that CDCR was somehow authorized to act on her request. Under the circumstances, appellant's conclusion was entirely reasonable and the facts make clear that even CDCR believed it was authorized to grant or deny appellant's waiver extension request. Irrespective of the statutory authority that plainly indicates DHCS as the department authorized to act on licensing waiver and waiver extension requests, both appellant and CDCR acted under mistake of law, and it is therefore somewhat disingenuous for the Department, after acting on appellant's request, to now contend that appellant should have sought her waiver extension from DHCS.

Moreover, the Board is satisfied that, had appellant either submitted her request to DHCS[2] or had CDCR properly applied the law in considering her request, appellant would have been entitled to the additional one-year extension of the licensing waiver. The plain language of subdivision (e) of section 1277 requires the department, defined in section 20 as the DHCS, to grant an extension request based on extenuating circumstances when the person requesting the extension has either (1) suffered a

[2] The record indicates that, after her non-punitive termination, appellant did in fact submit a waiver extension request to DHCS and, for reasons unknown to the Board and the parties, DHCS declined to act on appellant's request, and instructed appellant to submit her request to CDCR. While the Board is uncertain as to the rationale for DHCS'

catastrophic event that may impair his or her ability to prepare for or pass the license examination; (2) difficulty speaking or writing English or other cultural or ethnic factors exist that substantially impair the person's ability to succeed in the examination; or (3) experienced other personal hardship that, in the department's discretion, warrants the extension. For purposes of subdivision (e) or section 1277, "catastrophic events" include, but are not limited to serious and prolonged illness of the person, serious and prolonged illness of a child, spouse, or parent, "or other stressful circumstances."

The Board is satisfied that extenuating circumstances precluded appellant from fulfilling the requirements for licensure and, therefore, warranted the one-year extension of the licensing waiver. At a bare minimum, appellant has shown that she suffered from "other stressful circumstances" and "personal hardship." Pursuant to the express language in section 1277 of the Health and Safety Code, DHCS was required to grant appellant's request for extension due to extenuating circumstances. Although the Board makes no determination as to the propriety of DHCS' apparent delegation to CDCR of its authority to act on appellant's request for a waiver extension, the Board finds that CDCR improperly declined appellant's request for an extension of the waiver based upon her proven stressful circumstances and personal hardship. Accordingly, the Board revokes appellant's non-punitive termination.

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delegation of its statutory duty to CDCR, what is certain is that appellant is clearly caught between the proverbial "rock and hard place."

## CONCLUSION

Based on the foregoing, the Decision of the ALJ is adopted and, to the extent that it is consistent with Board's findings and conclusions herein, is designated precedential.

## ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The Non-Punitive Termination of Leticia Garcia from the position of Clinical Social Worker with the Department of Corrections and Rehabilitation is revoked;
2. The Department of Corrections and Rehabilitation shall reinstate Leticia Garcia to her former position and pay to Leticia Garcia all back pay and benefits, if any, that would have accrued to her had she not been improperly non-punitively terminated, plus interest at the rate of seven (7) percent per annum;
3. Leticia Garcia is granted one (1) year from the date of her reinstatement to obtain her license, as required under Health and Safety Code section 1277;
4. This decision is certified for publication as a Precedential Decision. (Government Code § 19582.5.)

**STATE PERSONNEL BOARD**[3]

Sean Harrigan, President
Richard Costigan, Vice President
Maeley Tom, Member
Patricia Clarey, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on July 8, 2008.

Suzanne Ambrose
Executive Officer
State Personnel Board

[3] Member Anne Sheehan did not participate in this Decision.