



E. G.¹

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS
AND REHABILITATION

Appeal from Non-Punitive Termination

Case No. 11-1257

**BOARD DECISION
(Precedential)**

NO. 12-01

BEFORE: President Mayley Tom, Vice-President Patricia Clarey, and Members Anne Sheehan, Richard Costigan, and Kimiko Burton

DECISION AND ORDER

This case is before the State Personnel Board (SPB or Board) for consideration after having been heard and decided by an SPB Administrative Law Judge (ALJ).

We have reviewed the ALJ's Proposed Decision sustaining the non-punitive termination. The Board has decided to adopt the attached Proposed Decision as a Precedential Decision of the Board, pursuant to Government Code section 19582.5.

The findings of fact and Proposed Decision of the Administrative Law Judge in said matter are hereby adopted by the State Personnel Board as its Precedential Decision.

THE STATE PERSONNEL BOARD

Maeley Tom, President
Patricia Clarey, Vice-President
Anne Sheehan, Member
Richard Costigan, Member
Kimiko Burton, Member

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order, and I further certify that the attached is a true copy of the

¹ Appellant is a peace officer, therefore, his name is redacted.

Administrative Law Judge's Proposed Decision adopted as a Precedential Decision by
the State Personnel Board at its meeting on June 5, 2012.

SUZANNE M. AMBROSE
Executive Officer

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Proposed Decision

STATEMENT OF THE CASE

This matter came on regularly for hearing before Teri L. Block, Administrative Law Judge (ALJ), State Personnel Board (SPB), on March 1, 2012, at Fresno, California. The case was submitted on March 1, 2012, following oral closing arguments.

Appellant, E.G., was present and represented himself.

Respondent, California Department of Corrections and Rehabilitation (Respondent, CDCR or Department), was represented by Hazel Bergtholdt, Senior Staff Counsel, CDCR.

Following Appellant's nolo contendere plea to violation of Penal Code section 273.5 (domestic violence), Respondent non-punitively terminated Appellant because the terms of his probation preclude him from carrying a firearm – a requirement for continuing his employment as a Correctional Officer (CO). Appellant argued he should be reinstated because he qualifies for relief under Penal Code section 29855.

ISSUES

The issues to be resolved are:

1. Did Respondent properly non-punitively terminate Appellant under Government Code section 19585?

2. If Respondent properly non-punitively terminated Appellant, should Appellant be reinstated pursuant to relief granted under Penal Code section 29855?

PROCEDURAL HISTORY

At the commencement of the evidentiary hearing, Respondent filed a written Motion to Dismiss (Motion) on the ground that Appellant is not entitled to relief under Penal Code section 29855 as a matter of law. The Motion was taken under consideration, and Respondent proceeded with its case-in-chief. The merits of Respondent's Motion are discussed below, under Principles of Law and Analysis.

Respondent's request for Judicial Notice was also granted as to the following:

- California Penal Code sections 273.5, 12021, subdivision (c)(2) (recodified as section 29855), 29815, and 29825;
- Title 18, United States Code sections 921, 922, and 927;
- *United States v. Hayes* (2009) 555 U.S. 415;
- California Attorney General Information Bulletin No. 2004-FD-05, Sept. 28, 2004;
- Tulare County Superior Court Pleadings and Court Documents –
 - Temporary Restraining Order (Domestic Violence), Case No. 237924, 07/08/10
 - Arraignment/Complaint (Penal Code § 243(e)(1)), Case No. PCM239209, 08/03/10
 - Criminal Protective Order (Domestic Violence), Case No. PCM239209, 08/03/10
 - Findings and Order after Hearing (Child Custody/Visitation/Support), Case No. 10-237942, 08/10/10
 - Pre-Trial Conference Minute Order (Penal Code § 243(E)(1)), Case No. PCM239209, 08/24/10
 - Plea Hearing/Entry of Plea (Amended to Penal Code § 273.5), Case No. PCM239209, 02/03/11
 - Order Granting Probation, Case No. PCM239209, 02/03/11
 - Modified Criminal Protective Order (Domestic Violence)/Probation Condition Order, Case No. PCM239209, 02/03/11.

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FINDINGS OF FACT

There are no material facts in dispute. The facts are as follows:

1. At all relevant times, Appellant was employed as a CO at California Substance Abuse Treatment Facility and State Prison, at Corcoran, California. Appellant must carry a firearm at work as a condition of his employment.
2. On August 3, 2010, following a marital dispute, Appellant was charged in Tulare County Superior Court with violation of Penal Code section 243, subdivision (e)(1) (spousal battery).
3. On February 3, 2011, Appellant pleaded nolo contendere to an amended charge of violation of Penal Code section 273.5 (willful infliction of corporal injury upon a spouse) – a felony, unless the court grants probation without imposing sentence and declares the offense to be a misdemeanor pursuant to Penal Code section 17, subdivision (b)(3), which is precisely what the Tulare County Superior Court did in Appellant's case. The court also issued a three-year criminal protective order against Appellant under Penal Code section 136.2, which required, among other things, that Appellant surrender all firearms to law enforcement or a licensed gun dealer within 24 hours.
4. The court suspended Appellant's sentence and granted him three years of probation subject to various conditions, including a 10-year ban on owning or possessing any firearm, and a lifetime ban on possessing any firearm on federal land.

5. Immediately thereafter, Appellant filed an unopposed petition for relief under Penal Code section 12021 (recodified as Penal Code section 29855) (hereafter Section 29855), which provides in relevant part:

Any person employed as a peace officer described in Section 830.1, 830.2, 830.31, 830.32, 830.33, or 830.5 whose employment or livelihood is dependent on the ability to legally possess a firearm, who is subject to the prohibition imposed by Section 29805 because of a conviction under Section 273.5, 273.6, or 646.9, may petition the court only once for relief from this prohibition.

6. The court granted Appellant's petition for relief and modified the terms of his probation and criminal protective order to allow him to carry a firearm during and within the scope of his employment. The following paragraph was crossed out on the Judicial Council form that the court used to modify the terms:

Good cause appearing, the court orders that the above-named Defendant ... must surrender to local law enforcement or sell to a licensed gun dealer any firearm owned or subject to his or her immediate possession or control within 24 hours after service of this order and must file a receipt with the court showing compliance with this order within 48 hours of receiving this order.

7. On May 9, 2011, Respondent issued a Notice of Non-Punitive Termination (Notice) terminating Appellant, citing ineligibility to carry a firearm at work. The Notice asserted that a conviction under Penal Code section 273.5 is a violation of Title 18, United States Code section 922, which carries a permanent ban on use or possession of firearms that cannot be abridged by state law.

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PRINCIPLES OF LAW AND ANALYSIS

An appointing power may terminate, demote, or transfer an employee who fails to meet the requirement for continuing employment. (Gov. Code, § 19585, subd. (b).) As a result of Appellant's conviction under Penal Code section 273.5, the court placed Appellant on probation and issued a criminal protective order under Penal Code section 136.2 that precluded him from carrying a firearm at work or otherwise. Appellant sought relief from the Penal Code section 136.2 firearm ban, pursuant to Penal Code section 29855, in order to carry a firearm at work – a requirement for continuing his employment as a CO. In its Motion to Dismiss, Respondent argued Appellant is not entitled to relief under Section 29855 because (1) Section 29855 is preempted by the federal Gun Control Act, which precludes such relief; and (2) he falls into two classes expressly excluded from relief under the statute.

Federal Law Preempts Section 29855

Respondent argued that Appellant is not entitled to relief under Section 29855 because the federal Gun Control Act of 1968 (18 U.S.C. § 921 *et seq.*, hereinafter, "the Act") expressly precludes state law to the contrary and therefore, preempts Section 29855.

In *English v. General Electric* (1990) 946 U.S. 72, the Supreme Court explained that federal preemption occurs in three circumstances: (1) Congress can define explicitly the extent to which its enactments preempt state laws (field preemption); (2) in the absence of explicit statutory language, the state law is preempted where it regulates conduct in a field that Congress intended the federal government to occupy exclusively (usually inferred from a scheme of federal regulation that leaves no room for the states

to regulate) (implied field preemption); and, (3) state law is preempted to the extent that it actually conflicts with federal law (conflict preemption). (*Id.* at p. 78-79.)

The Act provides:

It shall be unlawful for any person ...who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(18 U.S.C. § 922(g)(9).)

The Act defines the term “misdemeanor crime of domestic violence,” in relevant part, as follows:

A misdemeanor under Federal, State, or Tribal law [that] has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse ...

(18 U.S.C. § 921(a)(33)(A).)

Thus, Congress expressly prohibited persons convicted of misdemeanor crimes of domestic violence under state, federal or tribal laws from possessing firearms under any circumstances, leaving no room for the states to regulate. In doing so, Congress explicitly preempted state laws, including Section 29855, that offer relief from the federal firearms ban under Title 18 United States Code section 922(g)(9). (*English, supra*, 946 U.S at p. 78-79.)

Notably, after reviewing the Act’s legislative history, the Supreme Court observed:

Existing felon-in-possession laws, Congress recognized, were not keeping firearms out of the hands of domestic abusers, because “many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.” 142 Cong. Rec. 22985 (1996) (statement of Sen. Lautenberg). By extending the federal firearm prohibition to persons

convicted of “misdemeanor crime[s] of domestic violence,” proponents of § 922(g)(9) sought to “close this dangerous loophole.” *Id.*, at 22986.

(*United States v. Hayes* (2009) 555 U.S. 415, 426.)

Respondent argued that permitting a peace officer exception to the federal firearm ban under California law would frustrate Congress’s intent to close this “dangerous loophole.” This argument is persuasive, particularly since the California Attorney General has taken a similar position. Information Bulletin No. 2004-FD-05, which the Attorney General addressed to all California criminal justice agencies, states:

On June 4, 2004, the California Department of Justice (DOJ) was advised by the United States (U.S.) Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) regarding the effect of “set asides/dismissals” pursuant to California Penal Code (PC) Section 1203.4, for conviction of a misdemeanor crime of domestic violence, as defined under Title 18 U.S.C. Section 921(a)(33).

Accordingly, this Information Bulletin is to notify all California agencies of the impact this determination will have on certain agency employees/clients. Specifically, employees/clients who have PC Section 273.5 and /or 243(e)(1) convictions that include the use or attempted use of physical force, or the threatened use of a deadly weapon are affected. While these individuals may have had their conviction set aside/dismissed pursuant to PC Section 1203.4, concordant with ATF advice, they remain prohibited from acquiring/possessing firearms under federal law. As you may know, the misdemeanor crime of domestic violence firearm disability under federal law applies to federal, state, and local government employees in both their official and private capacities. Since, the firearms prohibition relief afforded to many peace officers pursuant to PC Section 12021(c)(2) [recodified as Penal Code section 29855] and/or 1203.4 has been nullified according to the ATF determination, affected officers will no longer be able to acquire/possess firearms.

In the past, many agency employees/clients received a firearms clearance from the California Department of Justice, Firearms Division, because their past domestic violence misdemeanor convictions were set aside/dismissed pursuant to PC Section 1203.4. Now, the Department will no longer be able to clear these individuals to acquire/possess firearms. Additionally, employers of affected subjects who occupy jobs that require an annual/bi-annual DOJ employment clearance, will immediately begin

receiving prohibited notifications from the Department regarding these individuals eligibility to acquire/possess firearms.

Accordingly, Appellant is not entitled to relief from the firearm ban resulting from his conviction for violation of Penal Code section 273.5 as a matter of law because the federal Gun Control Act preempts Section 29855. Therefore, Appellant cannot meet the requirement for continuing employment that he carry a firearm at work. Based on the foregoing analysis, it is not necessary to address Respondent's alternate theory that Appellant fails to meet the requirements of Section 25885, subdivision (d)(2).

CONCLUSIONS OF LAW

1. Respondent's non-punitive dismissal of Appellant was proper.
2. Based upon the federal Gun Control Act, Appellant is not eligible for relief under Penal Code section 29855, and therefore, is not entitled to reinstatement.

ORDER

Respondent's Motion to Dismiss is **GRANTED**. Respondent's non-punitive dismissal of Appellant is **SUSTAINED**.

DATED: May 7, 2012



Teri L. Block
Administrative Law Judge
State Personnel Board