BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 26738
	)	
D[redacted] J[redacted]	)	**BOARD DECISION**
	)	(Precedential)
From medical termination from the position of Medical Technical Assistant, California Mens Colony Department of Corrections	)	
	)	NO. 93-01
	)	
	)	January 12, 1993

Appearances: Christine Albertine, Legal Counsel, California Correctional Peace Officers Association, representing appellant, D[redacted] J[redacted]; Richard Thompson, Deputy Attorney General, representing the Department of Corrections.

Before Carpenter, President; Stoner, Vice President; Burgener and Ward, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board granted the Petition for Rehearing filed by the appellant D[redacted] J[redacted] (appellant or J[redacted]) after the Board adopted the Proposed Decision of the Administrative Law Judge (ALJ) sustaining her medical termination from the position of Medical Technical Assistant, California Men's Colony, Department of Corrections (Department).

Pursuant to its granting of the Petition for Rehearing, the Board accepted written briefs and listened to oral arguments. After review of the entire record, including the transcripts and briefs submitted by the parties, the Board revokes the medical termination for the reasons set forth below.

FACTUAL AND PROCEDURAL SUMMARY The facts leading up to the medical termination do not appear to be much in dispute. Appellant was appointed a Medical Technical Assistant (MTA) on February 2, 1986. At the time of her appointment, she made her supervisor, the Chief Medical Officer, aware that she had petit mal seizures which were controlled by medication. She performed her duties excellently and without incident until 1988.

Appellant testified that in January 1988 she discontinued taking her medication because she believed the administration might disapprove of a peace officer taking medication. She thereafter experienced some medical problems that precipitated her initial medical termination, effective August 26, 1988.

The testimony of appellant's coworkers and supervisors established that on occasion appellant experienced momentary lapses of awareness of her surroundings and apparently did not remember what occurred during these episodes. one such incident occurred in the locked-down special intensive care unit, on May 11, 1988, when she was on the first floor of Building Number 7 dispensing Appellant became disoriented and fell to the floor.

When she was reassigned to the B-Quad Pharmacy, an area secure from the presence of inmates, she experienced two episodes on July 3, 1988. At these times, her speech became garbled, her

pupils dilated, and her arm became rigid. Her respiration was labored and she was unsteady on her feet.

The medical evidence at the hearing established that appellant had either a seizure condition with partial loss of consciousness or "primary panic disorder" which resulted in a "momentary disconnect from her environment," loss of control of some bodily or motor functions, and disorientation. The occurrence of the disabling episodes was unpredictable.

The initial medical termination action which was based on the above incidents and was to be effective August 26, 1988, was subsequently withdrawn and appellant was permitted to transfer to a Supervising Cook I position as a "reasonable accommodation" of her medical condition.

Appellant suffered two additional incidents related to her medical condition while in the position of Supervising Cook I. The first occurred on October 4, 1988, while appellant was working in the dietary kitchen. At this time, she was observed to be unsteady on her feet and unaware that she was holding a hot pan. Another episode occurred on March 28, 1989, again in the dietary kitchen. Appellant's speech became garbled, her body stiff, her arms jerky and her mouth contorted. Appellant dropped her keys and was later unaware that she had done so.

Appellant experienced difficulties in performing her duties as a Supervising Cook I. Appellant was untrained for this position,

but she had selected it from various vacancies provided to her, due to the position having a salary range comparable to that of an MTA. She was ultimately rejected during probation for various instances of unsatisfactory food preparation, effective April 10, 1989.[1]

The rejection on probation caused appellant to be returned to the last position in which she had permanent status, her MTA position. Eight days after the effective date of the rejection on probation, appellant was again medically terminated from her MTA position, effective April 18, 1989. The Notice of Adverse Action was subsequently amended to add references to the medical reports and incidents of lapses of consciousness being relied on by the Department to support the medical termination.

Appellant claims she was denied a Skelly hearing both after service of the April 18, 1989 Notice of Medical Termination and after the subsequent amendments. The record is unclear as to whether any Skelly hearing occurred on either occasion.[2]

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[1]The hearing on her appeal from the rejection during probation took place on September 22, 1989, and on December 5 and 6, 1989 the Board adopted the Proposed Decision of the ALJ upholding the rejection on probation.

[2]The AIJ who presided over the hearing did make a finding at one point in the hearing that there was no Skelly hearing afforded, but it is unclear as to whether this finding applies to the original notice of medical termination, to the amended notice of medical termination or to both. The evidence establishes only that appellant and her representative did meet with the Warden on September 12, 1989, pursuant to a request by the appellant for a Skelly hearing. Despite the fact that the Department may have believed that a Skelly hearing is not required in a medical termination case, and despite the fact that the Department may or may not have considered the meeting that did take place a Skelly hearing, the meeting that did occur may nevertheless have satisfied the Skelly requirements. There is insufficient evidence in the record, however, as to the substance of that meeting to allow us to make that determination. In any event, since we are revoking the medical termination, any remedy that would be afforded for an

The hearing on appellant's appeal from the medical termination took place on December 8, 1989 and January 231, 1990 before ALJ Bicknell J. Showers.

At some point in time that is not clear from the record, the Department applied to the Public Employment Retirement System (PERS) for appellant's disability retirement. on March 19, 1991, PERS denied the Department's application for appellant's disability retirement. In a letter to appellant of that date, PERS stated, in pertinent part:

> All medical evidence submitted was reviewed before a final decision was rendered. our review included the reports prepaid by Drs. Lunianski, Cleff, Hess, Duncan, and Chamberlain. Based on the evidence in those reports it is our determination that your psychiatric and neurological conditions are not disabling. As a result, we have concluded that you are not substantially incapacitated for the performance of your job duties as a Medical Technical Assistant with the Department of Corrections. Therefore, the application for disability retirement is denied.
>
> As the application for disability retirement has been denied, you may wish to consider the following alternatives: (1)

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alleged Skelly violation would be duplicative of the remedy being afforded for the improper medical termination.

Continue/resume working as a Medical Technical Assistant with the Department of Corrections...[3]

After the death of ALJ Showers, the case was reassigned to ALJ Patricia A. Davenport. The March 19, 1991 letter from PERS was forwarded by appellant's representative to ALJ Davenport on April 10, 1991. ALJ Davenport read the transcript and reviewed the file as well as some additional factual stipulations entered into by the parties on December 23, 1991. She issued her Proposed Decision on January 3, 1992. The Proposed Decision contained no reference to the disposition by PERS of the application for disability retirement. The Board adopted the Proposed Decision of ALJ Davenport on January 8, 1992.

ISSUES

This case presents the following issues for determination:

(1) Whether appellant's medical termination was appropriate?

(2) What is the effect of the finding by PERS that appellant is medically able to perform the duties of an MTA?

DISCUSSION

Government Code section 19253.5 sets forth the procedure a state agency is to follow in the event that agency is concerne

[3]The Department contends that appellant was not eligible for disability because she did not have five years of state service; nor was the disability industrial, the Department argues, so as to qualify her based on her peace officer status. Notably, there is nothing in this letter from PERS that disqualifies appellant from disability retirement for lack of eligibility.

that an employee's medical condition is such that the employee is unable to perform the work of his or her position. Section 19253.5(d) provides, in pertinent part:

> When the appointing power after considering the conclusions of the medical examination provided for by this section or medical reports from the employee's physician, and other pertinent information, concludes that the employee is unable to perform the work of his or her present position, or any other position in the agency, and the employee is not eligible [4] or waives the right to retire for disability...the appointing power may terminate the appointment of the employee. (emphasis added).

Government Code section 21023.5, part of the Public Employees Retirement Law, provides in pertinent part:

> Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability...

There are no published appellate court cases interpreting the above-quoted Government Code sections. The Attorney General, however, has interpreted both code sections in 57 Ops.Cal.Atty Gen. 86 (1974). The Attorney General noted that in a bill analysis prepared by the Board in 1970, the statute was summarized as follows:

[4]Eligibility for retirement disability is dependent upon a credit of five years of state service. (Government Code, section 21021). Those who are state peace officers and are incapacitated for the performance of duty as a result of an industrial disability are eligible regardless of the amount of state service. (Government Code, section 21022).

> 'Requires employers whose employees belong to (PERS] to apply for disability retirement of any employee believed disabled. Prohibits separation of employees because of medical disabilities unless the employee waives the right to retire.... I 'When an application for disability retirement is denied by PERS, the employee is then considered capable of performing the full duties of his or her job and is returned to work. 1 (57 Ops.Cal.Atty.Gen. 86, 88, fn.2)

The Attorney General concluded:

> An employer cannot terminate an employee for medical reasons under Government Code Section 19253.5, subdivision (d) after [PERS] has denied disability retirement to the member upon a finding that the employee can perform the duties of the position.

The Attorney General's interpretation of the law pertaining to the disability retirement of state employees is consistent with the several appellate court decisions holding that county employees cannot be denied income on the grounds of disability while at the same time be denied retirement on the grounds of no disability. (Phillips v. County of Fresno (1990) 225 Cal.App.3d 1240, 1258; Leili v. County of Los Angeles (1983) 148 Cal.App.3d 985, 987-988; McGriff v. County of Los Angeles (1973) 33 Cal.App.3d 394, 399). In each case, the employee was denied employment income and benefits for medical reasons, but was later found by the retirement board not to be disabled. In each case, the court relied on Government Code section 31725, which governs the retirement of county employees. Section 31725 provides that when a county employee is dismissed because he or she is physically or mentally unfit to perform his or her duties, and the retirement board denies

the employee a disability retirement, and no appeal of the retirement board's decision is filed or an appeal is unsuccessfully prosecuted, the employer must reinstate the employee retroactively to the date the employee was first released from employment.

The rationale in each of the above cited cases was taken from the legislative history of section 31725. The Report of the Assembly Committee on Public Employment and Retirement, 1 Appendix to Journal of the Assembly (1970 Reg Sess.) pages 11-13, explained the purpose of the section:

> ...the purpose of enacting this section was to eliminate severe financial consequences to an employee resulting from inconsistent decisions between an employer and the retirement board concerning the employee's ability to perform his duties. Prior to the enactment of the statute, a local government employer could release an employee on the grounds of physical incapacity, and the retirement board could then deny the employee a pension on the ground he was not disabled....

The Assembly Committee found:

> As a result of such disputes, approximately one percent of the applicants for a disability retirement pension have found themselves in the position of having neither a job or a retirement income...Thus, to remedy this problem, which... is virtually a matter of life and death for the very few individuals involved each year, the Public Employees' Retirement System should be given authority... to mandate reinstatement of an individual-upon a finding of a lack of disability--but that the employing agency have the right of appeal to the courts.

The rationale expressed in the cited cases as well as in the opinion of the Attorney General is equally applicable to the case at bar. In the instant case, the Department determined, on the

basis of medical reports and incidents that occurred during appellant's tenure as an MTA and Supervising Cook I, that appellant was unable to perform the work of an MTA. Appellant was, however, based on her status as a peace officer, eligible for disability retirement. There is no evidence that appellant waived her right to retire for disability. In fact, the Department did apply for the disability retirement. Pending the PERS determination, the appellant should have been placed on paid status in some position within the agency pursuant to section 19253.5.[5] The medical termination was therefore improper at the outset.

Once PERS denied the application for disability retirement, finding that appellant was not incapacitated to perform her duties as an MTA, the Department was clearly bound to reinstate appellant to paid status as an MTA and to pay her all back pay and benefits that would have accrued to her had she not been unlawfully medically terminated, from the date of the medical termination to the date of her reinstatement. The fact that the Department may disagree with the determination of PERS does not relieve it of its financial obligation to the appellant.[6] As was noted by the

[5]Had PERS granted the application for disability retirement, and had appellant medically retired or waived her right to that retirement, the Department's obligation to keep appellant on paid status would have ceased.

[6]There is nothing in the record to indicate that the Department in any way challenged the decision of PERS.

appellate court in the case of Phillips v. County of Fresno, supra, the financial burden of litigating a disagreement between the employer and the retirement board concerning the employee's disability or lack thereof lies with the employer. The court further noted that if the employer chooses not to challenge the retirement board's decision, the employer must reinstate the employee retroactive to the date of termination. In either event, and so long as inconsistent decisions regarding disability exist, the employer may not leave the employee without income. (225 Cal.App.3d at pp. 1255-1258).

CONCLUSION

For all of the reasons set forth above, we revoke the medical termination and order appellant reinstated to her position of Medical Technical Assistant with all of the back pay and benefits to which she may be entitled as a matter of law.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code section 19253.5, it is hereby ORDERED that:

1. The above-referenced medical termination taken against D[redacted] J[redacted] is revoked;

2. The Department of Corrections and its representatives shall reinstate appellant D[redacted] J[redacted] to her position of Medical

Technical Assistant and pay her all back pay and benefits that would have accrued to her had she not been wrongfully terminated; 3. This to agree as to the salary and benefits due appellant.

4. This opinion is certified for publication as a Precedential Decision (Government Code section 19582.5).

STATE PERSONNEL BOARD*

Richard Carpenter, President
Alice Stoner, Vice-President
Clair Burgener, Member
Lorrie Ward, Member

*There is currently a vacancy on the Board

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on January 12, 1993.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board