BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by C[redacted] D[redacted] From Constructive Termination from the position of Permanent Intermittent Youth Counselor at Fred C. Nelles School, Department of Youth Authority at Whittier	SPB Case No. 31104 **BOARD DECISION** (Precedential) **NO. 94-15** May 2-3, 1994

Appearances: Rudy Jansen, Staff Legal Counsel, California Correctional Peace Officers Association for appellant, C[redacted] D[redacted]. Patricia Z. Ostini, Staff Counsel, Department of the Youth Authority for respondent.

Before Carpenter, President; Ward, Vice President; Stoner, Bos and Villalobos, Members

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of C[redacted] D[redacted] (Appellant or D[redacted]). D[redacted] appeals his termination from his position as a Permanent Intermittent Youth Counselor at the Fred C. Nelles School, Department of Youth Authority (Department).

The ALJ dismissed the appeal as untimely pursuant to Government Code Section 19630 which provides a one year statute of limitations on causes of action based on state civil service law. The Board rejected the Proposed Decision, deciding to hear the case itself.

FACTS

The uncontested chronology of events relevant to this hearing is as follows.

Appellant was appointed a Youth Counselor full time on July 30, 1973. On August 30, 1976, in addition to his full time Youth Counselor position, appellant became a Permanent Intermittent Teacher. On October 11, 1977, appellant became a full time Teacher at Nelles School and, until the events described herein, occupied an additional position as either a Permanent Intermittent Group Supervisor or Permanent Intermittent Youth Counselor.

On January 16, 1989, appellant was appointed a Parole Agent I in Field Paroles in Orange County. Even after his appointment as a Parole Agent 1, appellant retained his Permanent Intermittent Youth Counselor position at Nelles School. From January 16, 1989 through August 29, 1990, appellant worked 8:00 a.m. to 5:00 p.m., Monday through Friday, as a Parole Agent I. On weekends, he worked as a Youth Counselor, averaging 40 hours a month. He was paid straight time for the hours he worked as a Youth Counselor.

On August 19, 1990, after appellant received his September work schedule as a Youth Counselor, he was informed by the Assistant Superintendent of Nelles School that he would no longer be permitted to work as a Youth Counselor because the Fair Labor

Standards Act (FLSA) required that he be compensated at an overtime rate (1 1/2 times the hourly rate) for each hour he worked over 40 hours a week. Under the Department's interpretation of the FLSA, the hours from both appellant's Parole Agent position and his Youth Counselor position were aggregated in determining how many hours a week had been accumulated for overtime purposes. The last day appellant worked as an Intermittent Youth Counselor was August 29, 1990.

In October of 1990, appellant was scheduled by mistake to work as a Youth Counselor at Nelles School but was subsequently informed that he would not be permitted to work.

On April 22, 1991, appellant filed a grievance through his union, claiming time and one-half for all hours worked since 1985 as an Intermittent Youth Counselor.

On February 2 or 3, 1992, appellant wrote to the Superintendent of Nelles School requesting work as a Permanent Intermittent Youth Counselor. On February 6, the Superintendent, Henry C. Vander Weide, responded to appellant in writing stating that no Intermittent Youth Counselor positions were available at Nelles School.

On February 18, 1992, the Department sent a Notice of Personnel Action to appellant which indicated that appellant had been separated from his Permanent Intermittent Youth Counselor position effective August 29, 1991. The separation was

designated a resignation without fault based on appellant's not having been called to work for over one year. Appellant did not receive this document until after he had filed his appeal.

Appellant filed his appeal with the State Personnel Board alleging constructive termination of the Permanent Intermittent Youth Counselor position on February 26, 1992. Appellant's appeal was received by the Board on February 28, 1992.

ISSUES

a) What is the nature of appellant's termination?

b) Where do his appeal rights lie?

c) Was the termination timely?

d) Was the termination proper and, if not, what is the appropriate remedy?

DISCUSSION

Constructive Termination

In her Proposed Decision, the ALJ found the August 19, 1990 notice that appellant would no longer be called to work to be the equivalent of a separation from service, i.e., a constructive termination. The ALJ reasoned that the one year statute of limitations set forth in Government Code § 19630 started to run when appellant was notified in August 1990 that he would no longer be scheduled to work. The ALJ concluded that appellant's appeal, filed February 28, 1992, was, thus, untimely.

Constructive termination is generally defined as "a situation in which the employee resigns rather than continue to tolerate unreasonable conditions imposed on his or her employment by the employer." (McCarthy, Recovery of Damages for Wrongful Discharge (2d ed. 1990) § 6.29, p. 457). Appellant did not resign as a result of intolerable conditions. In fact, he conscientiously sought to be returned to his position as Youth Counselor. Thus, the usual definition of the term "constructive termination" does not apply to the circumstances here.

The Board does, however, recognize in some circumstances that actions of a department may have the effect of changing the status of an employee without affording that employee all the rights of more formal action. For example, in C[redacted] M[redacted] (1993) Dec. No. 93-08, the Board found a "constructive medical termination" when the appointing power, for asserted medical reasons, refused to allow the appellant to work, but did not serve the appellant with a formal notice of medical termination. In M[redacted], the Board treated the appointing power's refusal to allow M[redacted] to work as a "constructive medical termination" under Government Code § 19253.5 and afforded M[redacted] all the rights of an employee terminated under § 19253.5.

Thus, the "constructive termination" question before the Board is whether appellant's status as a permanent intermittent employee was changed by the Department's notice that appellant

would no longer be scheduled to work. Keeping in mind that appellant must be afforded all the rights an employee separated from service would expect to enjoy, we must examine the various means of separating a permanent intermittent employee from state service.

A permanent employee is one who has completed his probationary period and achieved permanent status. [Government Code § 18528]. An intermittent employee works periodically or for a fluctuating portion of the full time work schedule. [Government Code § 18552]. Thus, although a permanent intermittent employee may be called to work only periodically, the employee retains permanent status unless separated from service.

Government Code § 19100.5 provides that the methods of separation of an intermittent employee are subject to SPB rule.[1] SPB Rule 446 and Rule 448 are the only Board rules that apply to the separation of permanent employees.

Board Rule 446 defines the means of permanently separating an employee as follows:

> Permanent separations from state service shall include dismissal; resignation; automatic resignation (AWOL); rejection during probationary period; termination for failure to meet conditions of employment; termination of

[1]The Board rules are contained in Title 2 of the California Code of Regulations.

limited-term, temporary authorization, emergency, Career Executive Assignment, or exempt appointment; and service retirement.

None of the above permissible means of separating a permanent employee applied to appellant. He was not dismissed. He did not resign. As discussed below, he did not resign pursuant to the automatic resignation statute. He was not terminated for failure to meet the conditions of his employment or for any of the other reasons specified in Rule 446.

Appellant was only notified he would not be scheduled to work for FLSA related reasons. Since the Department has no obligation to work a permanent intermittent employee any specified number of hours, the Department's mere failure to work appellant does not constitute a constructive termination. Since we find appellant was not constructively terminated in August of 1990, his appeal is not untimely as no cause of action arose on that date. Not until one and one-half years later was appellant formally notified of his termination from state service by reason of "automatic resignation."

Automatic Resignation

On February 18, 1992, the Department sent appellant a Notice of Personnel Action informing him that he had been separated from state service pursuant to Board Rule 448. The Department argues before the Board that even before appellant received the February 18, 1992 notice, appellant had been terminated through

automatic resignation because he had not worked for almost 18 months. The Department also argues that the Board has no jurisdiction over the reinstatement of an employee terminated pursuant to Board Rule 448 because Government Code § 19996.1, which provides a procedure for reinstatement of employees separated through resignation, is administered exclusively by the Department of Personnel (DPA).

We need not reach the question of whether DPA has exclusive jurisdiction over reinstatement of permanent intermittent employees. Government Code § 19100.5 provides that the "the status, tenure, and methods of separation [of intermittent employees] . . . shall be subject to [State Personnel Board] rule." The Board rule at issue is Rule 448. It is well within the Board's jurisdiction to interpret its own rules. Thus, the question becomes whether a permanent intermittent employee can be separated from service pursuant to Board Rule 448 based on the Department's unilateral decision not to schedule him to work.

During August of 1990, when appellant was notified that he would no longer be scheduled to work, Board Rule 448 provided:

> An intermittent employee whose continuity of employment in a position is interrupted by a nonwork period that is not covered by a paid leave or by a formal leave of absence without pay that extends longer than one year

> may be considered to have automatically resigned from the position without fault as of one year from the last day the employee was on pay status.[2]

As the Department notes, the rule provided on its face for the automatic resignation without fault of an intermittent employee when employment has been interrupted by a nonwork period of more than one year. On September 4, 1992, after the events at issue here, the automatic resignation rule was amended to specifically require a showing of "circumstances which create a presumption that the employee has abandoned his or her position." Notwithstanding later changes in the rule, however, at all times, the rule impliedly required some form of unauthorized absence before the Department could invoke the rule governing automatic resignation.

In both the earlier and later versions of Rule 448, the one year nonwork period specifically excludes periods of nonwork "covered by a paid leave or by a formal leave

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[2]Even assuming, arguendo, that appellant was considered terminated on an automatic resignation theory, the effective date would not be the last day of pay status as the Department argues, but one year from the last day of pay status.

Unlike Government Code § 19996.2, the statute governing automatic resignation of (nonintermittent) permanent and probationary employees which provides for automatic resignation if the employee is absent without leave for 5 consecutive working days and sets tight limits on the time in which an employee may seek reinstatement, the SPB rule sets no timeframes. Thus, if appellant was, in fact, forced to "constructively resign" by the Department's decision not to call him to work for over a year, according to Board rule, the cause of action arose on August 19, 1992. Consequently, the appeal filed on February 28, 1992 would be timely even under the Department's automatic resignation theory.

of absence." In other words, authorized absences have never counted toward the one year nonwork period.

In addition, Rule 446, quoted above in its entirety, provides in pertinent part:

> Permanent separations from state service shall include dismissal; resignation; automatic resignation (AWOL) . . . (emphasis added)

The inclusion in Rule 446 of the descriptive parenthetical "(AWOL)" makes it clear that the Board considered automatic resignation to be an approved response by a Department to an employee's unauthorized absence, and not simply a function of the Department's decision not to schedule an employee to work.

This finding is consistent with the later amendment to Rule 448 and with the California Supreme Court's decision in Coleman v. Department of Personnel Administration (1991) 52 Cal. 3d 1102. Although the issue in Coleman was what process is due when an employee is terminated under an automatic resignation statute, the underlying assumption was that Mr. Coleman was, in fact, absent without leave. The theory underlying separation under an automatic resignation statute is that the employee has effectively resigned by failing to appear for work. [Id. at 1115].

In the present case, there is no indication that appellant was absent without leave. Thus, the attempt of the Department to

separate appellant from service by invoking the automatic resignation statute was misguided.

Having found that there are no means of separation as described in Board Rule 446 which apply to appellant's situation, the Board orders that appellant's name be returned to the list of permanent intermittent employees.

Effect of Reinstating Appellant

In 1991, the Board decided a similar case involving the attempted termination of a permanent intermittent employee. In the case of S[redacted] M[redacted] (1991) SPB Dec. No. 91-05, the Department of Corrections sought to void M[redacted] appointment as a Permanent Intermittent Correctional Officer. The Department argued that the appointment was voidable because the Department was unaware that allowing M[redacted] to work for Corrections would require the payment of overtime since M[redacted] was also a full-time fire fighter. The Board found no basis for voiding M[redacted] appointment and ordered her reinstated. After the Board's decision was final, M[redacted] sought back pay for the period during which she had been erroneously terminated. In S[redacted] M[redacted] (1993) Board Dec. 27771 (M[redacted] II), the Board adopted the ALJ's Proposed Decision denying M[redacted] back pay because M[redacted] had not been scheduled to work by the Department and had not worked as a permanent intermittent employee. As explained in the decision, "[M[redacted]] had no vested entitlement

to a particular work schedule or established number of work hours." The Board adopted this decision at its September 21, 1993 meeting.

Although the decision in M[redacted] II was not a precedential Board decision, the reasoning is persuasive. The Board may order appellant reinstated to his position as a permanent intermittent employee but the Board does not have control over whether the Department schedules appellant to work.

CONCLUSION

The August 19, 1990 notice to appellant that he would no longer be scheduled to work did not constitute a separation from state service sufficient to give notice under any applicable statute or rule that appellant should consider himself permanently terminated from his permanent intermittent position. Nor did appellant at any time automatically resign his Youth Counselor position.

The Department of Youth Authority's February 18, 1993 attempted termination of appellant by giving notice to appellant of its intent to terminate him based on a theory of automatic resignation is set aside for the reasons discussed above. Although the Board orders the Department of Youth Authority to reinstate appellant to its list of permanent intermittent employees, there is no related order that appellant be scheduled to work in the future or be eligible for back pay.

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 above-referenced action of the Department in separating C[redacted] D[redacted] from state service is revoked;

2. Appellant, C[redacted] D[redacted], shall be returned to the list, if any, of permanent intermittent employees;

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

THE STATE PERSONNEL BOARD

Richard Carpenter, President
Lorrie Ward, Vice-President
Alice Stoner, Member
Floss Bos, Member
Alfred R. Villalobos, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on May 2-3, 1994.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board