

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by ) SPB Case No. 33955  
 )  
D [REDACTED] J [REDACTED] ) **BOARD DECISION**  
 ) (Precedential)  
 )  
From denial of reinstatement ) **NO. 96-03**  
from disability retirement to the )  
position of Correctional Officer )  
at the California Medical Facility )  
Department of Corrections at )  
Vacaville ) April 1-2, 1996

Appearances: Carlos Alcala, Attorney, on behalf of appellant D [REDACTED] J [REDACTED]; John Winn, Staff Counsel, California Department of Corrections, on behalf of respondent, California Medical Facility at Vacaville.

Before: Lorrie Ward, President; Floss Bos, Vice President; Richard Carpenter and Alice Stoner, Members.

**DECISION**

This case is before the State Personnel Board (Board) for determination after the Board rejected the proposed decision of the Administrative Law Judge (ALJ) in the matter of the appeal by D [REDACTED] J [REDACTED] from denial of reinstatement from disability retirement to the position of Correctional Officer at the California Medical Facility, Department of Corrections at Vacaville (Department).

D [REDACTED] J [REDACTED] (appellant) alleges that he is entitled to reinstatement in the position of Correctional Officer following a determination by the Public Employees Retirement System (PERS) that he is no longer disabled from employment in his appointed position.

The Department alleges that appellant waived his right to

(J [REDACTED] continued - Page 2)

reinstatement to any position within the Youth & Adult Corrections Agency. As a threshold matter, the ALJ concluded that the Board lacked jurisdiction to consider whether appellant was entitled to reinstatement following the determination by PERS that appellant was no longer eligible for disability retirement. The ALJ then went on to issue an advisory opinion stating that, assuming the Board did have jurisdiction, the evidence established that appellant executed a valid and enforceable waiver of his right to reinstatement with the Department. PERS filed "informational briefs", in both the original proceedings before the ALJ and this proceeding before the Board, in which PERS took the position that the SPB has jurisdiction over the issue of whether the Department is obligated to reemploy appellant after termination of his disability retirement by PERS. PERS further argued that the waiver signed by appellant should not be enforced on the grounds that it is contrary to public policy and could require PERS to continue paying appellant disability benefits indefinitely.

For the reasons that follow, we adopt the attached ALJ's Proposed Decision with the exception of Section IV, subsections "B" through "E," to the extent that it is consistent with this Decision. We conclude that we have jurisdiction to determine whether appellant is entitled to reinstatement in his former position following a PERS determination that he is no longer medically eligible for disability retirement. We further conclude

(J [REDACTED] continued - Page 3)

that appellant executed a valid waiver of his right to return to employment with the Department, and that the Department is not obligated to reinstate him. Because our constitutional and statutory authority is limited to enforcement of the civil service statutes, we decline to address the issue of what effect this result may have on the obligation of PERS to continue paying disability retirement benefits to appellant.

#### **ISSUES**

1. Whether the State Personnel Board has jurisdiction to resolve a dispute over appellant's right to reinstatement following a determination by the Public Employees' Retirement System (PERS) that he is no longer eligible for disability retirement.

2. Whether appellant waived his right to reinstatement with the Department.

#### **DISCUSSION<sup>1</sup>**

##### Jurisdiction

Our statutory authority is derived from Article VII, Section 3(a) of the California Constitution, which authorizes the Board to "enforce the civil service statutes."<sup>2</sup>

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<sup>1</sup> A full statement of the facts is contained in the ALJ's Proposed Decision, a copy of which is attached hereto.

<sup>2</sup>We note that, under Board Rule 446, 2 Cal. Code Regs. § 446, disability retirement is considered a temporary separation from state service.

(J [REDACTED] continued - Page 4)

We have previously construed our jurisdiction over medical terminations, as set forth in Government Code § 19253.5, to include the authority to order a state appointing power to provide employment to a state employee following a PERS determination that the employee is not medically eligible for disability retirement. See, e.g., D [REDACTED] J [REDACTED] (1993) SPB Dec. No. 93-01; C [REDACTED] M [REDACTED] (1993) SPB Dec. No. 93-08. In those cases, we determined that an appointing power could not terminate an employee for medical reasons under Government Code § 19253.5 or otherwise deny employment based on medical reasons once PERS determined that the employee was not medically unable to work.

In its second Informational Brief, PERS takes the position that the Board, not PERS, has the authority to order a state department to reemploy an employee whose status has changed, for PERS's purposes, from retirement to nonretirement status. We agree. As noted correctly by PERS, the Public Employees' Retirement Law vests authority in PERS to determine whether an individual in PERS-covered employment is disabled for retirement purposes. Government Code §§ 21040-21034. This includes the authority to determine whether or not an individual who has previously been disability retired is no longer disabled and therefore eligible for "reinstatement" to nonretirement status. Government Code §§ 21028-21029. However, PERS has no authority to order a state department to provide continued employment or

(J [REDACTED] continued - Page 5)

reemployment to an employee, or to provide any remedies to enforce such an order.

Here, the Department does not assert that its refusal to reinstate appellant is based on concerns regarding his medical condition. Instead, it bases its refusal solely on the fact that, in settling his workers compensation claim, appellant expressly waived his right to return to work for any department within the Youth and Adult Corrections Agency.

There is no specific statutory provision vesting jurisdiction with any entity over a refusal to reinstate for nonmedical reasons following a disability retirement. Nonetheless, in the absence of any statutory authority to the contrary, we view the question of whether the Department lawfully refused to return appellant to work following the conclusion of a disability retirement as within our general jurisdiction to enforce the civil service statutes relating to tenure in civil service employment. Had the issue of waiver not been raised in this case, our authority under Government Code section 19253.5 would have permitted us to order the Department to reemploy appellant following the PERS determination. Accordingly, we construe our jurisdiction as including the authority to determine whether, following a PERS determination that an employee is not medically eligible for disability retirement, the employee is entitled to return to his former position.

Waiver

We adopt the determination of the ALJ that appellant knowingly executed a valid waiver of his right to reemployment with the Department. We further adopt the determination of the ALJ that appellant's waiver is not contrary to public policy, nor is it inconsistent with the provisions of Government Code § 21029.<sup>3</sup> In so doing, we note that the waiver only applies to the Youth and Adult Corrections Agency, and does not preclude appellant from seeking employment with any other state agency.

Moreover, we conclude that Cansdale v. Board of Administration (1976) 59 Cal.App.3d 656 does not compel a contrary result in this case. There, the court suggested in dicta that an employee who exercises his option to reinstatement following the cancellation of his disability retirement cannot be terminated without the due process protections outlined in Skelly v. State Personnel Board

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<sup>3</sup>Government Code § 21029 provides, in relevant part:

If the determination pursuant to Section 21028 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employer offers to reinstate that employee, his or her disability retirement allowance shall be canceled forthwith, and he or she shall become a member of the retirement system.

If the recipient was an employee of the state...and is so determined to be not incapacitated for duty in the position held when retired for disability...he or she shall be reinstated at his or her option to such a position....(emphasis added).

(J [REDACTED] continued - Page 7)

(1976) 15 Cal.3d 194. Here, however, appellant waived his right to exercise his option to reinstatement under Government Code § 20129. Therefore, the Department took no action to deprive him of any property interest, and no Skelly issue arises.

We expressly decline to determine whether PERS has any obligation to continue paying disability benefits to appellant following its determination that appellant is no longer medically disabled from employment in his former position.<sup>4</sup>

#### 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 attached ALJ's Proposed Decision is adopted to the extent it is consistent with this Decision;
2. The appeal of D [REDACTED] J [REDACTED] from denial of reinstatement from disability retirement to the position of Correctional Officer is DENIED;
3. This decision is certified for publication as a Precedential Decision. (Government Code section 19582.5).

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<sup>4</sup>In light of our conclusion that appellant waived his right to reinstatement with the Department, we also decline to consider whether appellant's alleged dishonesty during his retirement provides a separate ground for denying reinstatement.

(J [REDACTED] continued - Page 8)

THE STATE PERSONNEL BOARD\*

Lorrie Ward, President

Floss Bos, Vice President  
Richard Carpenter, Member  
Alice Stoner, Member

\*Member Ron Alvarado was not present when this decision was adopted.

\* \* \* \* \*

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on April 1-2, 1996.

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C. Lance Barnett, Ph.D.  
Executive Officer  
State Personnel Board



(J [REDACTED] continued - Page 1)

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	
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D [REDACTED] J [REDACTED]	)	Case No. 33955
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From denial of reinstatement from	)	
disability retirement to the	)	
position of Correctional Officer	)	
at the California Medical Facility,	)	
Department of Corrections at	)	
Vacaville	)	

PROPOSED DECISION

This matter came on regularly for hearing before Mary C. Bowman, Administrative Law Judge (ALJ), State Personnel Board (SPB), on March 29, 1995, at Vacaville, California, and on April 6 and June 12, 1995, at Sacramento, California.

The appellant, D [REDACTED] J [REDACTED], was present. On March 29 and April 6, he was represented by Carlos Alcala. On June 12, 1995, he appeared without representation.

The respondent was represented by John Winn, Staff Counsel, California Department of Corrections (CDC).

Evidence having been received and duly considered, the Administrative Law Judge makes the following findings of fact and Proposed Decision:

I

On June 17, 1993, the appellant requested reinstatement from disability retirement to Correctional Officer with CDC. On June 30, 1993, CDC denied the request; and on July 12, 1993, appellant appealed that decision to the SPB.

(J [REDACTED] continued - Page 2)

The jurisdiction of the SPB to hear the matter is at issue. The parties agreed to a hearing on the merits before the SPB and a ruling on jurisdiction was reserved.

The matter was originally set for a hearing before ALJ Phillip E. Callis on March 3, 1994. It was continued at the request of the respondent with the concurrence of the appellant. It was reset for August 24, 1994, but was again continued at the request of the respondent with the concurrence of the appellant.

On February 6, 1995, the matter was set a third time before ALJ Mary C. Bowman. Appellant's counsel appeared telephonically and requested a continuance because of a calendar conflict in Sacramento Municipal/Superior Court. The continuance was granted for good cause shown.

The hearing commenced on March 29 and continued on April 6, 1995. At the end of the second day of hearing, the record was left open to take a declaration from John R. Holstedt, respondent's witness. Because of the inability of counsels to agree on the declaration, another day of hearing was set for June 12, 1995.

Respondent's counsel and the appellant appeared. Appellant's counsel did not appear. Two hours before the hearing, his secretary faxed an unsigned letter to the ALJ and respondent's counsel advising that he would not be present because he was in a trial in San Joaquin County. He suggested in the letter that if Holstedt did not testify "the matter should simply be put on the record," and if the

(J [REDACTED] continued - Page 3)

respondent's counsel did not plan to have him testify, the record could be "closed."

Respondent's counsel chose not to have Holstedt testify. Accordingly, a record of his decision was made and the record of hearing closed.

## II

### WORK HISTORY

On February 10, 1986, the appellant began working for the State as a Correctional Officer at the California Medical Facility (CMF) at Vacaville. On May 11, 1987, he was injured in the line of duty and was off work for approximately three months. He returned to light duty for approximately nine months; and thereafter, he was disability retired at the request of respondent through application to the Public Employees Retirement System (PERS).

The appellant filed Workers' Compensation claims with the State Compensation Insurance Fund (SCIF) against the department relating to the May 11, 1987, injury. All claims were settled by a waiver of reemployment and a compromise and release executed April 23, 1991.

On June 16, 1993, upon prior application by the appellant, PERS issued a letter determination that the appellant was again capable of performing the duties of a Correctional Officer and approved appellant's application for reinstatement from disability retirement. The letter determination advised the appellant that his disability retirement allowance would continue until he was offered

(J [REDACTED] continued - Page 4)

reemployment with CDC and directed him to contact CDC to arrange reemployment.

As stated at section I above, on June 17, 1993, the appellant applied to CDC for reinstatement to the position of Correctional Officer. On June 30, 1993, CMF advised him that he would not be reinstated because he had executed an agreement on April 23, 1991, whereby he waived reemployment rights with the Youth and Correctional Agency (including CDC).

The appellant currently receives a monthly disability retirement allowance through PERS. He has not been reinstated to any civil service position with the State.

### III

#### ISSUES

The jurisdiction of the SPB to hear and decide the matter is at issue.

Also at issue is whether the appellant executed a valid waiver of his mandatory right to reinstatement to the position of Correctional Officer, prohibiting him from further employment with CDC.

### IV

#### JURISDICTION

A. The SPB is not prohibited from hearing the matter pursuant to Government Code section 19996.1.

Prior to the hearing and at the hearing, the respondent challenged the jurisdiction of the SPB to reinstate the appellant to employment with CDC. The respondent contended that the appellant executed a valid waiver on April 23,

(J [REDACTED] continued - Page 5)

1991, which was in effect a resignation from State service and that the only appeal rights which exist are those set forth in Government Code section 19996.1.

Section 19996.1 provides for resignation from State civil service subject to Department of Personnel Administration (DPA) rules. It also provides for an appeal to DPA, not SPB, by petition to set aside a resignation, when the petition is filed with DPA within 30 days after the last date upon which service to the state is rendered or the date the resignation is tendered to the appointing authority, whichever is later.

The language of the waiver, at issue, is as follows:

I understand that the Department of Corrections will not settle my workers' compensation cases by compromise and release so long as the possibility remains that I might become reemployed by that department or the Youth and Adult Corrections Agency. I understand that I have alternatives to a compromise and release settlement but I prefer that settlement. After consultation with my attorneys in both the workers compensation case and the civil case which I also have with the Department of Corrections, I hereby waive any rights to reinstatement or rehire and I agree not to apply for employment within the Youth and Adult Corrections Agency. ~~or the Department of Corrections in particular."~~

It is signed "D [REDACTED] J [REDACTED]" and dated "4/23/91."

The language does not support the respondent's contention that it is a "resignation." It is a waiver of reemployment. Therefore, the SPB is not prohibited from hearing the matter based solely on section 19996.1.

(J [REDACTED] continued - Page 6)

B. The Public Employees' Retirement Law is controlling.

A second jurisdictional issue raised by the ALJ is whether the appeal is properly before the SPB. In order to make a jurisdictional determination, the controlling law must be addressed within the context of SPB's authority.

The SPB is an agency of Constitution authority. It derives its authority from Section 2 Article VII of the California Constitution. Its enforcement authority is set forth at section 3(a) of the Constitution, as follows:

The board shall enforce the civil service statutes and, by majority vote of all its members, shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions.

The implementing legislation for the exercise of this authority is the Civil Service Act set forth at Government Code sections 18500 through 19799. (See also the SPB regulations set forth at 2 CCR sections 1 through 549.)

The SPB has statutory authority to ensure that prior civil service employees are properly mandatorily reinstated from medical termination, pursuant to Government Code section 19253.5. The SPB also has jurisdiction over certain permissive reinstatements, as limited by Government Code sections 19140 through 19180. Those sections do not provide authority for the SPB to enforce mandatory reinstatement of a disability retired civil service employee. (Some reinstatement rights fall statutorily within the jurisdiction of DPA.)

(J [REDACTED] continued - Page 7)

The Public Employee Retirement System and its Board of Administration are by contrast, statutory, not constitutional, in origin. The governing law is the Public Employees' Retirement Law set forth at Government Code sections 20000 through 21763. The system and its board were created by Chapter 700 of the Statutes of 1931, as amended and continues in existence as a unit of the State and Consumer Services Agency. (See also the PERS regulations set forth at 2 CCR sections 550 through 599.515.)

The Public Employees' Retirement Law vests authority in PERS to review and decide whether a public employee shall be disability retired. See sections 21020 through 21034. It also vests authority in PERS to determine whether a retired member shall be reinstated from retirement. See sections 2110 through 21103.

The appellant is not currently a civil service employee under the jurisdiction of the Civil Service Act; he is a member of the PERS drawing a retirement allowance under the Public Employees' Retirement Law. He was disability retired effective October 26, 1988, pursuant to the Public Employees' Retirement Law; and he is seeking reinstatement from retirement under the Public Employees' Retirement Law.

By direction of PERS, he was examined by a physician and determined to be no longer physically incapacitated to perform his former duties as a Correctional Officer. The particular statutes controlling are sections 21028 and 21029, which provide at relevant part:

21028. ... Upon the basis of [a medical] ... examination , the [Public Employees' Retirement Board] ... shall determine whether [a retiree]... is still incapacitated, physically or mentally, for duty in the state agency... where he or she was employed and in the position held by him or her when retired for disability, or in a position in the same classification, and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

21029. If the determination pursuant to Section 21028 is that the recipient is not so incapacitated for duty in the position held when retired for disability or in a position in the same classification or in the position with regard to which he or she has applied for reinstatement and his or her employee offers to reinstate that employee, his or her disability retirement allowance shall be canceled forthwith, and he or she shall become a member of the retirement system.

If the recipient was an employee of the state...and is so determined to be not incapacitated for duty in the position held when retired for disability...he or she shall be reinstated at his or her option to such a position...

These are the provisions of law applicable to this case.

Therefore, it is concluded that are no provisions of law set forth in the Civil Service Act (which is the statute setting forth SPB's enforcement authority) under which the appellant is seeking relief.

C. The parties have appeal rights before PERS and the courts, not SPB.

The Public Employees Retirement Law provides for appeals of PERS decisions, including the decision of PERS finding the appellant no longer incapacitated but still entitled to an allowance. Those appeal rights are set forth at 2 CCR section 555.1, which provides as follows:



Any applicant dissatisfied with the action of the Executive Officer on his application, other than his referral of the matter for hearing, may appeal such action to the Board by filing a written notice of such appeal at the offices of the Board within thirty days of the date of the mailing to him by the Executive Officer, at his most recent address of record, of notice of the action and right of appeal...

The parties were advised of section 555.1 in the original letter of determination issued June 16, 1993.

CDC did not appeal the determination of PERS regarding appellant's reinstatement from disability. It did not reinstate him.

The California Code of Civil Procedure also provides for judicial review, either by ordinary mandamus (section 1085) or administrative mandamus (section 1094.5) action. CDC did not challenge PERS determination by judicial process. Neither PERS nor the appellant, although both were represented by counsel, sought to enforce PERS directive to CDC to reinstate the appellant by judicial process.

Appellant's response was instead to seek an alternate forum, the SPB, to resolve the issues of the validity of the waiver executed with the Workers' Compensation settlement approved by the Workers' Compensation Appeals Board (WCAB).

D. The parties consented to an evidentiary hearing before the SPB.

On November 19, 1993, CDC impliedly consented to the SPB deciding the issue of enforceability of the waiver. In a letter from Steve Cambra, Regional Administrator for the Institutions Division of CDC to the appellant, Cambra stated,

(J [REDACTED] continued - Page 10)

... your request to exercise your reinstatement rights from your disability retirement is denied. You may appeal this decision in writing directly to Mr. David Tristan, Deputy Director, Institutions Division, at the above address. You may also appeal this decision by contacting the State Personnel Board.

On August 11, 1993, similarly PERS issued a letter to appellant advising him that PERS would continue to pay him disability retirement benefits "pending the outcome of any SPB proceedings." PERS later sought permission to file an informational pre-hearing brief in this matter. (That request was granted by the Chief ALJ prior to hearing.) In its informational brief, PERS referenced a prior advisory opinion of the Policy Division of the State Personnel Board issued by Duane Morford, Chief of the Policy Division, SPB to Steven Phillips, Chief of the Post Retirement Services Division of PERS on February 20, 1992. The memorandum confirmed discussion between the two chiefs regarding reinstatement following disability retirement, and was apparently relied on in resolving similar disability reinstatement issues in the past.

The appellant continues to seek an opinion from SPB to resolve the enforceability of the waiver and his request for reinstatement.

SPB, itself, has at times exercised broad authority in the area of public employment/retirement. According to two precedential decisions (D [REDACTED] J [REDACTED] (1993) SPB Dec. No. 93-01 and C [REDACTED] [REDACTED]. M [REDACTED] (1993) SPB Dec. No. 93-08), the SPB has jurisdiction to consider appeals of employees who have

(J [REDACTED] continued - Page 11)

not been medically separated either by termination or disability retirement as "constructive medical terminations; and that jurisdiction arises from Article VII, section 3 of the California Constitution which gives the SPB "direct authority to 'enforce civil service statutes.'" (See M [REDACTED] at page 6.) Section 3 provides in its entirety,

The [SPB] board shall enforce the civil service statutes and, by majority vote of all its members, shall prescribe probationary periods and classifications, adopted other rules authorized by statute and review disciplinary actions.

Section 3 is preceded by section 1, however, which provides that "civil service" includes every "officer and employee of the state except as otherwise provided in this Constitution." "Employee" is defined in the Civil Service Act as "a person legally holding a position in state civil service." The appellant is not currently a civil service employee.

E. The SPB is without authority to enforce the Public Employees' Retirement Law; however, it can issue an advisory opinion, as requested by parties. It is concluded from the above, that at the time of the appeal, the parties had recourse to seek review of PERS and/or respondent's determinations either to PERS or to the courts. No such timely action was taken.

It is also concluded that at the time of the appeal and up to this date, the appellant is not a civil service employee; he is a retired public employee. Therefore, jurisdiction to review the actions of PERS and/or CDC with respect to the Public Employees' Retirement Law, as set

(J [REDACTED] continued - Page 12)

forth at Title 2 of the Government Code commencing with section 20000, does not rest with SPB.

Because the parties have agreed to a hearing on the merits before the SPB, the following advisory opinion is rendered.

V

WAIVER

At issue is whether the appellant executed a valid waiver of his mandatory right to reinstatement to the position of Correctional Officer, thereby prohibiting him from further employment with CDC.

A. Validity of Waiver - It was not forged.

The original waiver was placed in evidence. The waiver was drafted by either appellant or respondent's workers' compensation attorney on April 23, 1991. It was signed "D [REDACTED] J [REDACTED], 4/23/91." The appellant's workers' compensation attorney mailed the appellant a copy of the waiver and the executed compromise and release shortly after it was approved by the WCAB in 1991.

Approximately two years later, the appellant sued his workers' compensation attorney for damages alleging that the signature ascribed to him and date on the waiver were forged. A motion for summary judgment was filed by the attorney. That motion was granted on or about November 14, 1992.

On July 9, 1993, the appellant, through his current counsel advised the respondent in writing that the

(J [REDACTED] continued - Page 13)

appellant's position was that the waiver was a falsified document.

On July 14, 1993, the appellant's counsel filed the appeal in this matter again stating,

Mr. J [REDACTED] contends that the settlement agreement relied [on] [REDACTED] by California [sic] Department of Corrections to deny reinstatement [sic] is fraudulent.

Prior to the hearing, the respondent engaged the services of a document reviewer for the Department of Justice to review the waiver. A affidavit in the record from the reviewer indicates that the waiver bears the signature of and was dated by the appellant.

At the hearing, the appellant through counsel stipulated that the appellant no longer disputed that he signed the waiver. He gave no reasonable explanation for his former accusations.

It is found that the waiver was executed by the appellant on or about April 23, 1991.

B. Validity of Waiver - It was knowingly executed.

At the hearing, the appellant claimed that he did not "knowingly" execute the waiver, and that because it was not knowingly executed it should not be enforced.

Applying the basic law of contracts, the contract or agreement should be interpreted to give effect to the mutual intention of the parties existing at the time of its execution and the language of the agreement should govern the interpretation if clear and concise. Also, a contract may be explained by reference to circumstances under which it was made and the matter to which it relates. (See

(J [REDACTED] continued - Page 14)

generally California Civil Code sections 1635 et seq.)

The language of the waiver agreement (set forth at section V.A. above) is clear and concise. It states that the appellant agrees not to apply for employment and waives any right of reinstatement. It also clearly states that the appellant understands he is waiving the right so that he can settle his workers' compensation claim.

The following evidence taken from the appellant at the hearing establishes the circumstances under which he executed the waiver. On April 23, 1991, on the day set for the workers' compensation hearing, the appellant appeared at the WCAB with his workers' compensation attorney. He recalled that he "just wanted to get the [workers' compensation] hearing over with; he had "a shot of brandy at home that morning"--"or two". He also testified that after a couple of hours of "badgering" by his attorney regarding the waiver, he went to the 7-11 on the corner of Howe and Arden and bought a beer which he consumed. (He admitted he may have had more than one, but they were small cans).

While at the 7-11 store, the appellant called and talked with Attorney Alcalá's secretary and was advised against waiving reemployment rights.

Thereafter, he returned to the hearing site and signed the compromise and release. He did not specifically recall signing the waiver. He was not sure if he had taken medication at the time of the hearing. However, he denied that he felt he was under the influence when he signed the

(J [REDACTED] continued - Page 15)

compromise and release.

The appellant further testified that in discussing the terms of the compromise and release, his attorney advised him that in exchange for \$45,000 in a lump sum the respondent was asking that he waive his right to reinstatement and future medicals. He stated he said to the attorney something to the effect of, "why should I waive the right to reinstatement?--I just paid \$4000 to a [another] lawyer [Alcala] to get my job back;" and his attorney responded something to the effect of, "just sign and date this, I'm the attorney; if PERS decides to reinstate you, they have the right to do it."

Subsequent to the execution of the compromise and release and the waiver, the appellant's workers' compensation attorney provided him with copies of the executed documents, as set forth above, and the appellant accepted payment of the lump sum award. He did not thereafter challenge the validity of the settlement before the WCAB.

The appellant introduced testimony from some of his coworkers that he has spent years attempting to reinstate to the position of Correctional Officer. That testimony consisted of conversation between those coworkers and the appellant. He also introduced testimony from some coworkers that he was treated differently from some other employees at CMF who sustained work related injuries but were not disability retired by respondent.

(J [REDACTED] continued - Page 16)

The evidence on appellant's efforts to reinstate was not considered to prove or disprove whether he executed a valid waiver.

It only demonstrated that the appellant wanted both the workers' compensation settlement and reinstatement.

The evidence relating to the circumstances surrounding the appellant's retirement was not considered relevant to the issues at hand. The decision of PERS to approve or not approve the request for disability retirement in 1988 was not before the ALJ for review.

It is concluded that the appellant failed to prove that he did not knowingly execute the waiver, In fact, the evidence proved that the appellant knew and relied on the execution of that waiver to obtain a substantial award of money from respondent in the workers' compensation forum.

C. The appellant waived his right to any offer of reemployment with CDC.

The final issue which must be addressed is the enforceability of the waiver to deny the appellant reinstatement to the position of Correctional Officer.

PERS, by its informational brief, and the appellant, by adoption of PERS argument, contest the enforceability of the executed waiver.

According to PERS's brief:

Under the Public Employees' Retirement Law, PERS has the sole jurisdiction to determine under what conditions state employees may receive retirement-related benefits. Accordingly, PERS determines, under pertinent statutes, when employees are eligible for disability retirement and when they may be reinstated on the basis that



(J [REDACTED] continued - Page 17)

they are no longer disabled. Under the Public Employees' Retirement Law, a state employee who is no longer disabled has an absolute right of return to his or her previous position.

PERS, by brief, thereafter directed the SPB to find that any waiver executed whereby an employee who has disability retired gives up his right to reinstatement in settlement of a worker's compensation claim be found invalid based on Civil Code section 3513 and voided as contrary to public policy.

Section 3513 is one of many Maxims of Jurisprudence. It states,

"Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."<sup>5</sup>

PERS concern for violations of public policy stems from its view that the statute (section 21029) is intended to relieve the state from payment of a retirement allowance to those who are no longer disabled. That is to say, the statute is intended to enable able-bodied individuals to return to full employment instead of continuing to pay them disability benefits.

PERS argument is based on its understanding of Government Code section 21029 (referenced above) that it cannot cancel the PERS benefit payments until CDC actually offers to reinstate the retiree (appellant); and therefore

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<sup>5</sup>This maxim, like the others in the Civil Code are intended to aid in the application of civil laws, not stand independently as law. (See Civil Code section 3509.)

(J [REDACTED] continued - Page 18)

it is required to continue to pay disability benefits to an individual who is no longer disabled if no offer is made.

This argument is rejected because it misperceives the effect of the original waiver of reemployment.

The term "mandatory" does not mean "absolute." The appellant has mandatory reinstatement rights; he does not have absolute reinstatement rights. There is nothing in section 21029 which absolutely mandates the appellant's return to his prior job or that he be paid benefits indefinitely. The appellant has an exercisable "option" to not return. As stated therein, "...he or she shall be reinstated at his or her option to such a position."

The waiver is broader in intent than PERS or the appellant suggest. It is an agreement that any current or future tender of employment is rejected. The actual offer or tender of employment need not be made anymore than the actual refusal need to be rendered because both have been, in effect, waived. (The law does not require idle acts.)

Accordingly, it is concluded that the appellant has waived any offer of future employment along with his waiver of reemployment with CDC. This waiver does not prohibit the appellant from seeking reemployment with other State agencies or departments. It also by its nature permits PERS to treat it as a waiver of offer and a exercise of appellant's option to not accept reemployment with CDC under Government Code section 21029, thereby permitting

(J [REDACTED] continued - Page 19)

cancellation of his disability retirement allowance.

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PURSUANT TO THE FOREGOING FINDINGS OF FACT THE ADMINISTRATIVE LAW JUDGE MAKES THE FOLLOWING DETERMINATION OF ISSUES:

Based on the above, it is concluded that the authority of the SPB to issue a decision in this matter is advisory and consistent with past practices between management staff of the SPB and PERS. The appellant, respondent and PERS have agreed that the SPB should hear the matter on its merits and issue a decision. Consequently, the findings of facts and determination of issues set forth in this decision are intended to assist PERS and the parties in complying with their statutory obligations under the Public Employees' Retirement Law.

From the evidence on the record it is determined that the appellant executed a valid and enforceable waiver of his right to reemployment with CDC; and that CDC reasonably relied on that waiver in denying the request for reemployment after the appellant was determined to be no longer incapacitated for the performance of the position of Correctional Officer.

It is determined that the statutory provisions of Government Code section 21029 relating to reinstatement from disability retirement are not inconsistent with said waiver.

(J [REDACTED] continued - Page 20)

Further, it is determined that the appellant is not without any relief. Should PERS chose to cancel his retirement allowance, he has a right to seek employment with all state agencies and/or departments except for the Youth and Adult Corrections Agency. He also has a right to appeal any PERS decisions, pursuant to section 555.1, as referred to above.

For the above reasons it is determined that the appeal should be denied.

\* \* \* \* \*

WHEREFORE IT IS DETERMINED that the action of the appointing power in refusing to reinstate the appellant to the position of Correctional Officer effective June 30, 1993, is affirmed and the appeal is denied.

\* \* \* \* \*

I hereby certify that the foregoing constitutes my Proposed Decision in the above-entitled matter and I recommend its adoption by the State Personnel Board as its decision in the case.

DATED: July 5, 1995.

Mary C. Bowman

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Administrative Law Judge  
State Personnel Board