

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the matter of the Appeal by) SPB Case No. 96-1348/39939
)
G [REDACTED] P [REDACTED]) **BOARD DECISION**
) (Precedential)
From non-punitive termination from the)
Position of Correctional Lieutenant at the) **NO. 97-07**
Northern California Women's Facility with)
The Department of Corrections at Chowchilla) December 2, 1997

APPEARANCES: Annette DeAndreis, Staff Legal Counsel, California Correctional Peace Officers Association, on behalf of appellant, G [REDACTED] P [REDACTED]; Robert K. Gaultney, Senior Staff Counsel, Department of Corrections, on behalf of respondent.

BEFORE: Lorrie Ward, President; Floss Bos, Vice President; Ron Alvarado, Richard Carpenter and Alice Stoner, Members

Government Code § 19585, the non-punitive termination statute, permits a Department to terminate, demote or transfer an employee when the only cause for action against the employee is the employee's failure to meet a requirement for continuing employment. Section 19585 also provides, however, that it "shall not apply to cases subject to the provisions of termination or demotion for medical reasons or retirement for disability."

In this case, appellant, a Correctional Lieutenant, off-work because of total disability, was non-punitively terminated on grounds that he no longer met a requirement for continuing employment because, based on a psychiatric hospitalization, he was no longer

qualified to carry a firearm. At the time of his termination, appellant 's application for Public Employee Retirement System (PERS) disability retirement was pending.¹

In this decision, the State Personnel Board (SPB or Board) finds that the non-punitive termination statute cannot be invoked to deprive an employee of his permanent civil service status during a time when the employee's request for PERS disability retirement is pending.

BACKGROUND

Factual Summary

The parties stipulated to the facts. Paragraph 1 of the written stipulation notes appellant's employment history and that appellant's last day of work was October 10, 1995. The stipulation then continues:

2. Throughout his career with the Department of Corrections, appellant's performance evaluations have been 'Standard' to 'Outstanding.' Appellant has never been formally disciplined.
3. On October 12, 1995, while off-duty, appellant attempted to commit suicide.
4. On October 13, 1995, officers of the Sacramento Police Department pursuant to Welfare and Institutions Code Section 5150 placed appellant on a psychiatric hold.
5. On October 13, 1995, appellant was evaluated pursuant to Welfare and Institutions Code Section 5151 and admitted to CPC Heritage Oaks Hospital on an involuntary psychiatric commitment pursuant to Welfare and Institutions Code Sections 5151 and 5152. Additional 14-day psychiatric commitments, per certification under Welfare and Institutions Code Sections 5250 and 5260 were subsequently put into place. These commitments were converted to involuntary status effective November 1, 1995.
6. The legal ability to carry a firearm is a minimum qualification for a peace officer position with the Department of Corrections. The position of Correctional Lieutenant is a peace officer position. Appellant has never held a non-peace officer position with the Department of Corrections.

¹ According to appellant's Petition for Rehearing, PERS granted appellant's application for disability retirement in December of 1996.

7. As of the date of this stipulation, appellant is temporarily totally disabled and cannot perform the duties of his job classification of Correctional Lieutenant.

8. On October 27, 1995, appellant submitted a claim for Workers' Compensation benefits to the Department. An amended Workers' Compensation claim was submitted on November 30, 1995.

9. On November 30, 1995, appellant submitted a disability retirement application to the Public Employees Retirement System (PERS). As of the date of this stipulation, appellant is awaiting a final determination from PERS on his disability retirement application.

10. Appellant was informed, via a letter dated January 30, 1996, from the State Compensation Insurance Fund (SCIF), the Department's Workers' Compensation Claims Administrator, that his claim for Workers' Compensation benefits, in the form of Industrial Disability Leave (IDL) had been accepted, deeming the emotional/psychological injury of October 12, 1995, stemming from appellant's suicide attempt, to be a work related injury.

11. On February 21, 1996, the Department issued a "Notice of Personnel Action/Report of Miscellaneous Change" which indicated, among other things, that appellant had been 'placed on Industrial Disability Leave due to a job-incurred injury or illness.'

12. On or about April 30, 1996, appellant received a letter dated April 29, 1996, from the NCWF Return to Work Coordinator, Theo Veteran, stating that NCWF "has received notification that your injury/illness may have resulted from your employment."

13. Appellant received IDL benefits beginning in April 1996 and retroactive to October 12, 1995. Appellant continued to receive such benefits until June 19, 1996, [at which time the benefits] ended as a result of this Non-Punitive Termination. After IDL benefits ceased, appellant received Temporary Disability (TD) payments which are approximately one-third the amount of IDL previously received. As of the date of this stipulation, appellant continues to receive TD payments.

14. On June 17, 1996, appellant received a Notice of Non-Punitive Termination, dated June 11, 1996, and signed by NCWF Ward, Mamie Lockette. The effective date of this termination was given as June 19, 1996.

15. On June 18, 1996, appellant, via a letter from his representative at the California Correctional Peace Officers Association (CCPOA) to Warden

Lockette, demanded that the Notice of Non-Punitive Termination be rescinded immediately. The grounds stated for such demand were that the termination was based on an improper application of Government Code Section 19585(a).

16. On June 18, 1996, appellant's representative was informed, via telephone call from Lieutenant Darren Bobella, NCWF Employee Relations Officer, that Warden Lockette would not rescind the Notice of Non-Punitive Termination given to appellant.

17. On June 19, 1996, the Non-Punitive Termination of appellant became effective.

DISCUSSION

Welfare and Institutions Code § 8103

Welfare and Institutions Code § 8103 provides in relevant part that:

(f)(1) No person who has been (A) taken into custody as provided in Section 5150 because that person is a danger to himself, herself, or to others, (B) assessed within the meaning of section 5151, and (C) admitted to a designated facility within the meaning of Section 5151 and 5152 because that person is a danger to himself, herself, or others, shall own, possess, control, receive, or purchase and firearm for a period of five years after the person is released from the facility...."

The parties stipulated that the ability to carry a firearm is a requirement for appellant's position as Correctional Lieutenant. The parties also stipulated that, on October 13, 1996, appellant was placed on psychiatric hold by officers pursuant to Welfare and Institutions Code § 5150 and was thereafter subjected to a psychiatric evaluation pursuant to Welfare and Institutions Code §§ 5151 and 5152. Appellant was subsequently committed to 14 days of psychiatric care pursuant to Welfare and Institutions Code §§ 5250 and 5260. Thus, there is no

dispute that, pursuant to Welfare and Institutions Code § 8103, appellant is disqualified from carrying a firearm.

Government Code § 19585

Government Code § 19585 provides in relevant part that:

(a) This section shall apply to permanent and probationary employees and may be used in lieu of adverse action and rejection during probation when the only cause for action against an employee is his or her failure to meet a requirement for continuing employment, as provided in this section. This section shall not apply to cases subject to the provisions of termination or demotion for medical reasons or retirement for disability. (emphasis added).

(b) An appointing power may terminate an employee who fails to meet the requirement for continuing employment that is prescribed by the board . . . in the specification for the classification to which the employee is appointed

(d) For the purpose of this section, requirements for continuing employment shall be limited to the acquisition or retention of specified licenses, certificates, registrations, or other professional qualifications, education, or eligibility for continuing employment

The parties stipulated that appellant had applied for disability retirement. The application was pending at the time of appellant's termination. Appellant notes that the statute specifically provides that section 19585 "shall not apply to cases subject to the provisions of termination or demotion for medical reasons or retirement for disability." For its part, the Department argues that appellant was terminated not because he was "medically" disabled, but because he was "legally" disabled; thus, the Department argues, appellant's case is not a case "subject to the provisions of termination or demotion for medical reasons or retirement for disability."

The Department's argument has already been examined and rejected by the court of appeal in Patton v. Governing Board.² In Patton, the court interpreted Government Code § 21023.5 which prohibited an employer from separating an employee eligible for disability retirement "because of disability" unless the employee waives his or her right to disability retire. In that case, the school district terminated the employment of a bus driver who, because of physical disabilities, had lost his certificate to drive a bus. As here, the bus driver had applied for disability retirement. The school district argued that it did not terminate the bus driver because of his disability but because he lost his certificate. The court of appeal found that separating the bus driver from service for loss of his certificate was the same as separating him from service "because of" his disability. The court reminded the school district that courts look at substance rather than form.³

In 1995, Government Code § 21023.5, the statute construed in Patton, was repealed and reenacted as section 21153.⁴ The reenactment of this statute demonstrates a clear intent by the legislature to continue to protect the rights of employees eligible for disability retirement as acknowledged by the court in Patton.⁵

² Patton v. Governing Board (1978) 77 Cal. App.3d 495

³ Id. at 501-502.

⁴ Government Code §21153 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 provide for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability . . .

⁵ In reenacting this statute, it was the legislature's stated intent not to make any substantive changes in the law relating to the rights and benefits of employees.

The case before the Board is, if anything, stronger than the case in Patton. In Patton, the court had to infer that, in enacting Government Code § 21023.5, the legislature intended to prohibit an employer from terminating an employee who had lost a needed certificate because of his disability. In Government Code § 19585, the prohibition is explicit. The statute clearly states that it “shall not apply to cases subject to the provisions of termination or demotion for medical reasons or retirement for disability.” Given that appellant’s case is subject to resolution by disability retirement, the Department is barred from relying on Government Code § 19585.

This analysis is consistent with that applied in the Board’s recent decision in J.
F.⁶ In F, a licensed psychiatric technician was off-work on an approved, industrial disability leave. The employer told F that she would not be called to work until she was ready to perform her full duties. While she was still off-work, her psychiatric technician license lapsed and her Department terminated her pursuant to section 19585.

The Board found that it was not appellant’s lack of a license that prevented her from working, it was her work-related injury and the Department’s determination that she could not work in her position because of that injury. The Board refused to apply the non-punitive termination statute to F case, explaining that it did not believe that the legislature intended that an employee who was not at work and not scheduled to work would lose her right to employment because of a lapsed license.

⁶ (1997) SPB Dec. 97-03. Appellant has filed a Petition for Writ of Mandamus in superior court challenging only the Board’s refusal to grant back pay in this case.

Appellant's situation in the instant case is similar to F [REDACTED]. Appellant was off-work on workers compensation, had applied for disability retirement, and was not expected to immediately return to work when the Department non-punitively terminated him.

The Board's analysis in this case is also consistent with the policy evidenced in Government Code § 19253.5 which provides that, once an employee is eligible for disability retirement, a Department may not medically terminate that employee unless the employee waives his or her disability retirement rights.⁷ Similarly, Government Code § 19585 provides that the "section shall not apply to cases subject to termination or demotion for medical reasons or retirement for disability." Thus, the legislature has clearly prohibited a Department from invoking the non-punitive termination statute when *either* disability retirement or medical termination is available. Thus, a Department may not invoke the non-punitive termination statute thereby depriving an employee of his or her mandatory reinstatement rights when a medical termination/demotion or disability retirement is appropriate.⁸

CONCLUSION

For the reasons set forth above, the Board concludes that the Department erred in its non-punitive termination of appellant and revokes that termination. Appellant's status is now that of an employee who has been disability retired. Should appellant's disability retirement end, and should PERS deem him eligible for reinstatement, the Department will

⁷ See also D [REDACTED] J [REDACTED] (1993) SPB Dec. 93-01; C [REDACTED] M [REDACTED] (1993) SPB Dec. 93-08.

⁸ Government Code § 19253.5 (h) [mandatory reinstatement from medical termination]; Government Code 21193 [mandatory reinstatement from disability retirement]; Government Code §19585 (g) [permissive reinstatement from non-punitive termination].

be bound to reinstate him and then take any appropriate action based on his qualifications at that time.

ORDER

1. The non-punitive termination of G [REDACTED] P [REDACTED] from his position as Correctional Lieutenant with the Department of Correction, Northern California Women's Facility is revoked;
2. This decision is certified for publication as a Precedential Decision pursuant to Government Code § 19582.5.

STATE PERSONNEL BOARD

Lorrie Ward, President
Floss Bos, Vice President
Ron Alvarado, Member
Richard Carpenter, Member
Alice Stoner, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on December 2, 1997.

Walter Vaughn
Acting Executive Officer
State Personnel Board

[papad.dec]