The California Highway Patrol's Petition for Writ of Mandate was denied on April 10, 1998 by the San Diego County Superior Court.

ARMSTEAD, CONNIE SPB Dec. 97-01

A Petition for Rehearing was filed on March 10, 1997 for Connie Armstead, SPB Dec 97-01.

A board decision designated as precedent does not have precedential effect until it becomes final. A board decision becomes final 30 days from the day it is served on the parties unless a petition for rehearing is filed. If the petition for rehearing is denied, the decision immediately becomes final. If the petition for rehearing is granted, the decision is withdrawn.

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 96-2979
CONNIE J. ARMSTEAD	)	**BOARD DECISION**
(Precedential) From constructive medical termination from the position of Office Assistant (Typing) with the California Highway Patrol at San Diego	)	**NO. 97-01** February 4-5, 1997

Appearances: Michael D. Hersh, Attorney, California State Employee Association, on behalf of appellant, Connie J. Armstead; Martin W. Hagan, Deputy Attorney General, Department of Justice, on behalf of respondent, California Highway Patrol.

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

DECISION AND ORDER

This case is before the State Personnel Board (Board) for consideration after having been heard and decided by a State Personnel Board's Administrative Law Judge.

We have reviewed the attached Proposed Decision of the Administrative Law Judge. The Board has decided to adopt the Proposed Decision as a Precedential Decision of the Board, pursuant to Government Code § 19582.5.

The attached Proposed Decision in the above-entitled matter is hereby adopted by the State Personnel Board as its Precedential Decision.

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 February 4-5, 1997.

_____
C. Lance Barnett, Ph. D.
Executive Officer

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by CONNIE J. ARMSTEAD From constructive medical termination from the position of Office Assistant (Typing) at the Department of the California Highway Patrol at San Diego	)	Case No. 96-2979

PROPOSED DECISION

This matter came on regularly for hearing before Melvin R. Segal, Administrative Law Judge, State Personnel Board, on November 26, 1996, at San Diego, California. The final brief was received on December 23, 1996.

The appellant, Connie J. Armstead, was present and was represented by Michael D. Hersh, Attorney, California State Employees Association.

The respondent, Department of California Highway Patrol, was represented by Daniel E. Lungren, Attorney General, by Martin W. Hagan, Deputy Attorney General.

I

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

The above constructive medical termination effective July 8, 1996, does not comply with the procedural requirements of the State Civil Service Act.

The Board has jurisdiction over an appeal from a constructive medical termination. (C[redacted]. M[redacted] (1993) SPB Dec. No. 93-08, pgs. 5-7.)

II

Appellant was appointed to the position of Office Assistant (Typing) on April 19, 1993. She has no prior State service.

III

Respondent scheduled appellant for a fitness for duty examination due to its concern over appellant's absences and behavior.

The fitness for duty examination was conducted by Dominic Addario, M.D., on June 6, 1996. In a medical report dated June 28, 1996, Dr. Addario concluded that appellant was not fit for duty because her mental state caused a distortion rendering her incapable of carrying out her usual and customary duties. He concluded that with treatment appellant "may be able to return to work." He recommended a three month separation and that appellant be reevaluated at the end of that period.

On July 8, 1996, appellant was placed on unpaid leave. Appellant was informed that she was placed on a three month leave of absence but prior to returning to work she would be reevaluated by Dr. Addario. (Respondent also advised appellant of the procedures by which to request nonindustrial disability (NDI).)

On July 15, 1996, appellant's union representative filed an appeal with the State Personnel Board demanding that appellant be restored to her position. On July 19, 1996, appellant's union representative filed a grievance on appellant's behalf. That grievance is outside the scope of this appeal.

On October 22, 1996, appellant advised respondent that she was medically able to return to work, and inquired when she could return. On November 20, 1996, appellant was notified that she was medically terminated, effective December 27, 1996. That termination is the subject of a separate appeal.

* * * * *

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

Government Code section 19253.5 provides a procedure for dealing with employees who may not be able to perform their work due to medical reasons. Subdivision (a) allows the appointing power to "require an employee to submit to a medical examination by a physician or physicians designated by the appointing power to evaluate the capacity of the employee to perform the work of his or her position." The state pays for the examination. (Subdivision (b).)

Subdivision (c) provides:

> "When the appointing power, after considering the conclusions of the medical examination and other pertinent information, concludes that the employee is unable to perform the work of his or her present position, but is able to perform the work of another position including one of less than full time, the appointing power may demote or transfer the employee to such a position."

Subdivision (d) provides that when the appointing power, based on the same 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 or waives the right to retire for disability and elects to withdraw his or her retirement contributions or to permit his or

her contributions to remain in the retirement fund with rights to service retirement, the appointing power may terminate the appointment of the employee."

Appellant is not eligible to retire for disability because she does not have sufficient years of state service, nor does she have safety member benefits. (Government Code sections 21021 and 21022.)

Subdivision (f) requires that the employee so transferred, demoted or terminated receive written notice at least 15 days prior to the effective date of the action. The employee may appeal the action to the State Personnel Board, which is then required to hold a hearing.

Subdivision (h) provides that the employee shall be reinstated to a vacant position when he or she is no longer incapacitated.

Respondent did not follow this procedure. Respondent ordered appellant on a three month nonpaid leave and barred her from returning to work until she passed its reevaluation certifying her ability to perform her job. Respondent did not serve appellant with a notice of medical termination. No procedure recognized in section 19253.5, or any other authorized procedure, was used by respondent in barring appellant from her job.

By refusing to allow appellant to work, respondent in effect issued a medical termination. The medical termination was not valid because appellant was not given proper notice and an opportunity for a timely appeal and hearing.

The State Personnel Board has found constructive medical termination and ordered reinstatement where the employees were eligible to apply for disability

retirement from the Public Employees Retirement System (PERS), and thereafter found to be ineligible for disability retirement because they were not disabled within the meaning of PERS law, but the employer nonetheless refused to allow the employees to return to work. (C[redacted] M[redacted] (1993) SPB Dec. No. 93-08; D[redacted] J[redacted] (1993) SPB Dec. No. 93-01.)

Although the discussion of PERS' role in those cases is not applicable to the instant case because appellant was not eligible to apply for disability retirement with PERS, the State Personnel Board's discussion of constructive medical termination is instructive:

> "A 'constructive medical termination' arises when an appointing power, for asserted medical reasons, refuses [4] to allow an employee to work, but has not served the employee with a formal notice of medical termination, and the employee challenges the appointing power's refusal to allow the employee to work under circumstances where the employee asserts that he or she is ready, willing, and able to work and has a legal right to work."
>
> "[4] The appointing power's 'refusal' to allow the employee to work may be outright or may consist of an offer of reinstatement conditioned upon the employee undergoing various medical examinations or tests." (M[redacted], supra, 6.)
>
> That scenario fits this case to the letter.

Respondent claims that appellant's situation does not amount to a constructive medical termination because "her leave status was for a short duration" and because in the other cases the employees often "did not know if they would ever be able to return to work." Even assuming the factual assumptions in this argument were accepted, and would thus preclude the finding of a constructive medical termination, it cannot reasonably be said that a three month separation is of "short duration." Moreover,

respondent's mandate that appellant pass a medical reevaluation prior to returning to work certainly creates a situation similar to situations where the employees did not know if they would ever be able to return to work.

In asserting that there was no constructive medical termination, respondent states that appellant never provided evidence establishing a right to work. This argument is rejected; it misperceives that status of appellant's vested right to her civil service position and would reverse the burden of proof. (See, Skelly v State Personnel Board (1975) 15 Cal 3d 124, 206-207.)

In a further attempt to avoid the consequences of its constructive medical termination, respondent seeks support from the nonprecedential case of Carmelita Reyes (1995) SPB Case No. 35400.[1] Reyes voluntarily left her job and applied for nonindustrial leave. The employer applied for PERS disability retirement on her behalf in accordance with the mandate of the Government Code. When PERS denied that application, Reyes failed to timely request reinstatement. In the instant case, appellant did not voluntarily leave her job, did not apply for NDI, and was ineligible for PERS disability retirement. In Reyes, the Board found that there was no constructive medical termination. The facts, as noted, are distinguishable.

Finally, respondent argues that its internal procedures and Department of Personnel Administration (DPA) rules authorize its action. These arguments are not persuasive. An internal administrative procedure which is inconsistent with a statute

[1] Writ denied November 4, 1996.

must fail. The DPA regulations referred to are for voluntary leaves. Clearly, these regulations are inapplicable to a forced leave.

Appellant is entitled to back pay for the period from July 8, 1996, to her medical termination, assuming she was ready, willing and able to work as an Office Assistant (Typing) during all or part of that period.

* * * * *

WHEREFORE IT IS DETERMINED that the constructive medical termination taken by respondent against Connie J. Armstead effective July 8, 1996, is hereby revoked. Said matter is hereby referred to the Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary, if any, due appellant under the provisions of Government Code section 19584.

* * * * *

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: January 14, 1997

MELVIN R. SEGAL
Melvin R. Segal,
Administrative Law Judge,
State Personnel Board.

[ARMSTEAD.F]

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