

**BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA**

In the Matter of the Appeal by )

**JESSE BROWN** )

For determination of backpay, benefits )  
and interest after court decision granting )  
appellant's petition for writ of mandate )

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SPB Case No. 98-0384

**BOARD DECISION  
ON BACKPAY**  
(Precedential)

**No. 01-02**

July 10-11, 2001

**APPEARANCES:** Claire Iandoli, Attorney, California State Employees Association, on behalf of appellant, Jesse Brown; David Beales, Staff Counsel, on behalf of respondent, Department of General Services.

**BEFORE:** William Elkins, Vice President; Florence Bos, Richard Carpenter and Sean Harrigan, Members.

**DECISION**

This matter is before the State Personnel Board (SPB or Board) to determine whether respondent, Department of General Services (DGS), owes any lost backpay, benefits and interest to Jesse Brown (appellant) in light of the First District Court of Appeal's unpublished decision in Brown v. State Personnel Board (Case No. A090512). In that case, the court found that DGS had violated appellant's due process rights by failing to provide him notice and an opportunity to be heard before cutting off his administrative time off (ATO) payments. The Board finds that appellant is entitled to backpay, plus interest thereon, from February 1, 1998, when DGS stopped paying appellant ATO, to April 17, 1998, when appellant's disability retirement became effective, in order to compensate him for the violation of his due process rights.

## **BACKGROUND**

### Factual Summary

DGS appointed appellant as a Janitor on May 10, 1983. In November and December 1997 and January 1998, appellant was on paid ATO status. On December 5, 1997, DGS sent appellant to Dr. Robert T. Levine for a fitness for duty examination. Dr. Levine issued a fitness for duty report dated December 19, 1997, which concluded that appellant was "not fit for duty in his employment as a janitor or in any position" with DGS for one year. (Emphasis in original.)

On February 2, 1998, DGS served a letter dated January 27, 1998 (Options Letter) upon appellant. The Options Letter informed appellant that "Dr. Levine has advised us that you are not currently fit for duty" and stated that:

Effective February 1, 1998, you will no longer be on Administrative Time Off (ATO) and you will need to elect an employment status option. You will be placed on approved leave (dock) until we receive your choice of your employment status option. Below are the options available to you. Remember that the option you choose may affect your health, dental, and/or vision benefits.

Sometime after it ceased paying appellant ATO, DGS applied to the Public Employees' Retirement System (PERS) for disability retirement on appellant's behalf. From February 1, 1998 through April 16, 1998, appellant exhausted his accrued sick leave, vacation leave and personal holiday leave credits and, thereby, received his full pay and benefits, except for one hour, his last hour on April 16, 1998. Effective April 17, 1998, PERS approved appellant for disability retirement. Since April 17, 1998, appellant has been receiving disability retirement benefits from PERS.

## Procedural History

On February 6, 1998, appellant filed an appeal with SPB, alleging that DGS constructively medically terminated him when it served the Options Letter upon him and ceased paying him ATO. At its meeting on March 9, 1999, the Board issued a Precedential Decision in the Matter of the Appeal by Jesse Brown, SPB Dec. No. 99-02 (SPB Case No. 98-0384) (Precedential Decision), which found that appellant had not been constructively medically terminated.<sup>1</sup>

On or about September 10, 1999, appellant filed a Verified Petition for Writ of Administrative Mandate (Writ Petition) in the San Francisco County Superior Court (Case No. 306274) to compel the Board to set aside its Precedential Decision. The superior court granted appellant's Writ Petition and, on January 25, 2000, issued an Amended Peremptory Writ of Mandamus (Writ) commanding the Board to set aside its Precedential Decision and to take such other action as was consistent with the Writ and the law.

At its Board meeting on February 9-10, 2000, in compliance with the Writ, the Board set aside and vacated its Precedential Decision, and asked the parties to submit written argument as to what further actions, if any, the Board should take to comply with the Writ, including, but not limited to, whether and to what extent the Board should award appellant any back salary and/or benefits.

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<sup>1</sup> After the Board issued the Precedential Decision, Government Code § 19253.5(i) was enacted, which provides that an appointing power must give an employee at least 15-days' written notice and an opportunity to respond before applying to PERS for disability retirement on the employee's behalf and placing the employee on involuntary leave.

DGS filed an appeal with the First District Court of Appeal from the superior court's order granting the Writ, which stayed further proceedings in this matter by the Board until the First District Court of Appeal ruled upon DGS's appeal. On January 30, 2001, the First District Court of Appeal issued its unpublished decision in Brown v. State Personnel Board (Case No. A090512) (Brown), which affirmed the superior court's order. After the First District Court of Appeal issued its unpublished decision, appellant asked the Board to rule upon the backpay issues, and DGS concurred in that request.

The Board has reviewed the record in this matter, including the written arguments of the parties, and now issues the following decision.

### **ISSUES**

This case presents the following issues for determination:

1. Is appellant entitled to any backpay, benefits and interest to compensate him for the violation of his due process rights?
2. If so, to how much compensation is appellant entitled?

### **DISCUSSION**

In its unpublished decision in Brown, the First District Court of Appeal found that DGS violated appellant's due process rights. Citing to Skelly v. State Personnel Board (Skelly)<sup>2</sup> and Bostean v. Los Angeles Unified School District (Bostean)<sup>3</sup>, the court reasoned as follows:

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<sup>2</sup> (1975) 15 Cal.3d 194.

<sup>3</sup> (1998) 63 Cal.App.4th 95.

As a permanent civil service employee, Brown had a protected property interest in his continued employment as a janitor with DGS. Placing him on non-work status interfered with his receipt of a regular paycheck. DGS's action in sending him the options letter had an adverse effect on at least some of his benefits and his receipt of salary and can be viewed as tantamount to punitive or disciplinary. (*Bostean, supra*, 63 Cal.App.4th at p. 110.) The options letter indicated Brown was unfit for duty and did not include the option of continuing employment. Moreover, Brown was not given a copy of Dr. Levine's report, on which the action was based, until the day of the hearing before the ALJ. Brown was entitled to the minimal pre-removal safeguards set forth in *Skelly v. State Personnel Bd., supra*, 15 Cal.3d at page 215, which include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based and the right to respond.

Relying upon *Barber v. State Personnel Board (Barber)*<sup>4</sup>, appellant asserts that, to recompense him for the violation of his due process rights, he is entitled to lost backpay, benefits and interest from February 1, 1998, when DGS stopped paying him ATO, to the date the Board renders its decision in this case.

DGS asserts that, at most, appellant is entitled to be compensated for: (1) one hour's salary (the last hour for which he was not paid on April 16, 1998) plus 7% interest thereon; (2) arguably, the 192 hours of vacation leave that he used between February 1 and April 16, 1998; and (3) arguably, the 24 hours of personal holiday leave that he used between February 1 and April 16, 1998. DGS asserts that appellant is not entitled to any interest on the vacation and personal holiday leave he used because Government Code § 19584 does not provide for such interest. DGS also asserts that appellant is not entitled to be compensated for any sick leave he used because, under Government Code § 21163, he was required to exhaust all his sick leave before his

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<sup>4</sup> (1976) 18 Cal.3d 395.

disability retirement could become effective. Finally, DGS asserts that its liability ceased when appellant's disability retirement became effective on April 17, 1998.

In this case, neither party disputes that, at all relevant times, appellant was not able to work due to his illness. The Board must, therefore, determine whether appellant is entitled to any compensation for the established due process violations in light of the "ready, able and willing" limitation set forth in Government Code § 19584.

Government Code § 19584 and the Ready, Able and Willing Requirement

When the Board revokes or lowers a penalty in an adverse action appeal, it awards backpay, benefits and interest pursuant to Government Code § 19584, which, in relevant part, provides:

Whenever the board revokes or modifies an adverse action and orders that the employee be returned to his or her position, it shall direct the payment of salary and all interest accrued thereto, and the reinstatement of all benefits that otherwise would have normally accrued.

...

**Salary shall not be authorized or paid for any portion of a period of adverse action that the employee was not ready, able, and willing to perform the duties of his or her position**, whether the adverse action is valid or not or the causes on which it is based state facts sufficient to constitute cause for discipline. (Emphasis added.)

When the Board revokes or modifies a medical termination, demotion or transfer and orders that an employee be returned to work, it awards backpay and benefits pursuant to Government Code § 19253.5(g), which provides:

Whenever the board revokes or modifies a demotion, transfer, or termination, the board shall direct the payment of salary to the employee calculated on the same basis and using the same standards as provided in Section 19584.<sup>5</sup>

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<sup>5</sup> In D. [REDACTED], D. [REDACTED], (2000) SPB Dec. No. 00-04. pp. 9-11, the Board explained that, when determining how backpay should be calculated when a medical termination is revoked, the Board will reconcile the "ready, able and willing" requirements of Government Code § 19584 with the provisions of Government

Appellant argues that the “ready, able and willing” limitation set forth in Government Code § 19584 should not apply because he has not asked the Board to revoke an adverse action or a medical termination and return him to work; instead, he is requesting only that the Board compensate him for the violation of his due process rights. We agree.

The Board finds that the clear implication of Barber is that the Board has the inherent authority to order the payment of backpay for any period of time that the Board finds that an appointing power has deprived an employee of the due process protections guaranteed in Skelly.<sup>6</sup> Notwithstanding appellant’s inability to perform the duties of his position, DGS was not legally authorized to cease paying appellant ATO until after it had complied with the due process notice and opportunity to respond requirements set forth in Skelly. It would be illogical for the Board to find that an appointing power violated an employee’s rights by failing to provide all the due process to which he or she was entitled under Skelly, but then to deny that employee any remedy for that violation due to the employee’s inability to perform in his or her position because of illness or injury. Thus, the Board finds that employees who are not able to work due to illness or injury will, nonetheless, be entitled to backpay for that period of time during which they

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Code § 19253.5 that prohibit a department from medically terminating an employee unless the department has determined that the employee cannot perform the work of any vacant position in the department to which the employee could be transferred or demoted to ensure that an employee who may not be able to work in his or her prior position will obtain backpay if he or she could work in another position within the department.

<sup>6</sup> See also, Wilkerson v. City of Placentia (1981) 118 Cal.App.3d 435, 443.

were deprived their due process rights, notwithstanding the “ready, able and willing” limitation set forth in Government Code § 19584.

Appropriate Time Period During Which Appellant Should Receive Backpay

The next question that the Board must answer is how to calculate the period of time during which appellant was denied his due process rights.

In Barber<sup>7</sup>, the California Supreme Court ruled that an employee who was not granted his due process rights was entitled to the payment of backpay from the date of his termination until the Board issued its decision on the merits, reasoning as follows:

The constitutional infirmity of the disciplinary procedures used in the present case was the imposition of discipline prior to affording the employee notice of the reasons for the punitive action and an opportunity to respond. (*Skelly v. State Personnel Bd.*, *supra*, 15 Cal.3d at p. 215, 124 Cal.Rptr. 14, 539 P.2d 774.) This infirmity is not corrected until the employee has been given an opportunity to present his arguments to the authority initially imposing discipline. (*Id.*) Under the procedures applied to plaintiff, the constitutional vice existed until the time the board rendered its decision. Prior to that time, the discipline imposed was invalid. The board's argument that we should measure damages terminating at the time the employee could reasonably have responded cannot be accepted. The due process right to respond exists only if response is permitted to be made, and therefore must be available for consideration prior to rendering the disciplinary decision. As noted, at the time plaintiff was permitted to file an answer, the discipline imposed on him was invalid. The prior period for measuring the amount of back pay due therefore begins at the time discipline is actually imposed and ends on the date the board files its decision.

Appellant asserts that, under this reasoning, he is entitled to backpay until the Board renders its decision on backpay in this case. The Board disagrees.

In Barber, the court made clear that the appropriate ending date of the period of

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<sup>7</sup> 18 Cal.3d 395 at p. 403



due process violation was the date that the decision on the merits in the underlying action was issued.<sup>8</sup> The underlying action in Barber involved disciplinary proceedings. Because the Board is the entity empowered to render decisions on the merits in disciplinary proceedings, the appropriate end to the period of due process violation in that case was the date the Board issued its decision on the merits in the disciplinary action.

In contrast, in this case, the underlying issue was whether appellant was fit to work at DGS or should have been disability retired. Appellant's first opportunity to contest the disability retirement application DGS filed on his behalf was before PERS. As the Board made clear in C. M.<sup>9</sup> and D. J.<sup>10</sup>, once an application for disability retirement has been filed, the determination as to whether an employee is fit for duty rests solely with PERS. If either party is not satisfied with PERS's decision, that party may appeal to PERS. Unless and until PERS overturns its decision on appeal, or its decision is successfully challenged in court, both the parties and the Board are bound by PERS's determination. Thus, in this case, the relevant decision on the merits for the purpose of determining the period of due process violation is PERS's decision on the disability retirement application filed on appellant's behalf.

Effective April 17, 1998, PERS approved appellant for disability retirement.

There is no indication in the record that appellant ever challenged the disability

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<sup>8</sup> An appointing power can earlier remedy a due process violation by offering an employee a Skelly meeting that fully complies with the requirements of Board Rule 52.3, modifying the effective date of the action to a date that is no earlier than five working days after offering the employee the Skelly meeting, and paying the employee backpay up to the new effective date. E. W. (1999) SPB Dec. No. 99-09.

<sup>9</sup>(1993) SPB Dec. No. 93-08.

retirement application that DGS filed on his behalf or sought to appeal PERS's determination that he qualified for disability retirement.<sup>11</sup> Appellant's failure to appeal from PERS's disability retirement determination and his acceptance of disability retirement benefits were clear indications that he did not intend to return to work at DGS, but instead, intended to remain on disability retirement.<sup>12</sup> In accordance with the reasoning set forth in Barber, appellant's right to a backpay remedy to compensate him for the violation of his due process rights terminated on the date PERS's approval of the disability retirement application filed on his behalf became effective and he began receiving disability retirement benefits.

#### Other Benefits

Appellant also asks that the Board order DGS to recompense him for the vacation leave, sick leave and personal holiday leave he used between February 1 through April 16, 1998. Because appellant has already received payment for that leave, he is not entitled to recover a second time for those same leave credits.<sup>13</sup>

#### **CONCLUSION**

To compensate appellant for the failure to provide him with his due process rights before cutting off his ATO payments, DGS shall pay to appellant backpay, calculated at

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<sup>10</sup> (1993) SPB Dec. No. 93-01.

<sup>11</sup> See, Mitchell v. State Personnel Board (1979) 90 Cal.App.3d 808, 813-814. (The court held that an employee's failure to avail himself of an offered hearing, which would have cured the unconstitutional aspect of his dismissal, constituted a waiver of any right to back pay for that period of time extending beyond the last date the right to the offered hearing could have been exercised.)

<sup>12</sup> See, Coleman v. Department of Personnel Administration (1991) 52 Cal.3d 1102, 1124. (The court held that an employee who had not been reporting to work, and gave no indication that he intended to return to work, was not entitled to an award of backpay.)

<sup>13</sup> See, Currieri v. City of Roseville (1975) 50 Cal.App.3d 499, 507-508.

the rate he was being paid when he was placed on ATO, for the period from February 1, 1998 through April 16, 1998, plus interest thereon at 7% per annum.<sup>14</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 Department of General Services shall pay to Jesse Brown an amount equal to the pay he would have received for the period from February 1, 1998 through April 16, 1998, calculated at the rate he was receiving at the time he was placed on administrative time off, plus interest thereon calculated at 7% per annum.

2. This matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing upon the written request of either party in the event that the parties are unable to agree as to the back pay and interest due Jesse Brown.

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

### **STATE PERSONNEL BOARD<sup>15</sup>**

William Elkins, Vice President  
Florence Bos, Member  
Richard Carpenter, Member  
Sean Harrigan, Member

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<sup>14</sup> The Board's decision in J. E. [REDACTED] (1999) SPB Dec. No. 99-07 is disapproved to the extent it is inconsistent with the Board's decision in this case.

<sup>15</sup> President Ron Alvarado did not participate in this decision.

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on July 10-11, 2001.

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Walter Vaughn  
Executive Officer  
State Personnel Board

[Brown-bkpy dec]