

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	SPB Case No. 00-3953
)	
WENDYLIN DONALD)	BOARD DECISION
)	(Precedential)
From rejection during probationary period)	
from the position of Psychiatric Social)	No. 02-10
Worker with Vacaville Psychiatric)	
Program, Department of Mental Health at)	December 17, 2002
Vacaville)	
_____)	

APPEARANCES: Mark A. Ambrose, Attorney, on behalf of appellant, Wendylin Donald; Evon Dixon-Montgomery, Senior Staff Counsel, on behalf of respondent, Department of Mental Health

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

DECISION

This appeal is before the State Personnel Board (SPB or Board) after the Board granted the petition for rehearing filed by the Department of Mental Health (Department) to examine the notice of rejection during probationary period that the Department had served upon Wendylin Donald (appellant). In this decision, the Board finds that the Department did not set forth in the notice of rejection the reasons for appellant's rejection with sufficient specificity for appellant to be able to meet her burden of going forward and proving that there was no substantial evidence to support the Department's reasons for the rejection. The Board, therefore, revokes the rejection and reinstates appellant to the position of Psychiatric Social Worker, as a permanent employee, with lost backpay.

BACKGROUND

Employment History

Appellant was appointed as a Psychiatric Social Worker on November 15, 1999. She was employed at the Intermediate/Day Treatment Program at the California Medical Facility (CMF) in Vacaville. That licensed program provides treatment to inmates at the institution. Appellant was one of the four Psychiatric Social Workers assigned to the program. There are also psychiatrists, psychologists, nurses, and custody staff assigned to the program.

Appellant's supervisor was Stirling Price (Price), LCSW, Assistant Program Director. Appellant was not a licensed Clinical Social Worker. While appellant was on probation, she was also working to achieve licensure. Appellant was assigned to a Program Consultant, Jerald Justice (Justice), who reviewed appellant's clinical work. Justice met with appellant on a regular basis to advise her and help her complete the work needed to obtain her license as a Clinical Social Worker.

Psychiatric Social Workers in the unit were required to lead therapy groups, perform intake evaluations on inmates, produce social histories for new inmates, write discharge summaries, attend Interdisciplinary Treatment Team meetings, and initiate SSI applications for inmates. There are approximately 76 inmates assigned to the unit. The inmates have histories of mental disorders. Some of the inmates are considered violent and may be rejected from the program for behavioral problems.

(First Probationary Report)

Appellant received her first Report of Performance for Probationary Employee on March 14, 2000 (First Probationary Report). In that report, appellant received an overall

rating of “improvement needed,” and, in the categories of skill, knowledge, and relationships with people, she was also rated as “improvement needed.” The narrative portion of that First Probationary Report stated that,

In your first three months as a Psychiatric Social Worker in the Intermediate Treatment Program you have shown enthusiasm for your new position. You have worked hard at learning the institutional setting and the Vacaville Psychiatric Program in general. Your punctuality is good and you show appropriate respect for safety and security of the institution, colleagues and patients. You have demonstrated an eagerness to learn but have had some difficulty being receptive to treatment approaches with which you are not completely familiar or with which you disagree.

I recommend that you study, in depth, the various treatment modalities that you have been involved with: Relapse Prevention, RET and Substance Abuse. Additionally, your clinical supervisor advises that you need to improve in the area of Diagnostic Impression and Differential Diagnosis. You also need to increase the amount of detail you include in your documentation in the patient records. While they are timely, the descriptions of patient progress tend to be too generalized, lacking in specifics.

These are knowledge and skill areas that I’m sure can be improved with effort and continued enthusiasm. In the past two months, you have had disagreements with some fellow clinicians, primarily over the mechanics of group process and inmate/patient treatment planning. On one occasion, your timing and method of dealing with the disagreement was ill advised and poorly timed. This is an area of opportunity to improve. I hope you will seek advise and direction from your clinical supervisor, more experienced clinicians, or myself. This environment can be a difficult and challenging work place. Generally, you are making progress and I am looking forward to assisting with your improvement in the areas indicated above.

On March 16, 2000, Price gave appellant a memorandum entitled “Chart Review,” which outlined certain deficiencies in the inmate-patient records that appellant had completed. The memorandum noted that chart documentation was a “critical component the inmate-patient’s treatment” and that a “premium” was placed on the

chart's "thoroughness, timeliness and accuracy." The memorandum stated that Price had reviewed the noted deficiencies with appellant and asked appellant to make the necessary corrections as soon as possible.

(Second Probationary Report)

Appellant received her second Report of Performance for Probationary Employee on September 28, 2000 (Second Probationary Report). Overall and in five of the six rating categories, she was rated as "improvement needed." In the category of "relationships with people," she was rated as "unacceptable." The narrative portion of the report noted appellant's deficiencies with respect to: (1) completion of the Social History Evaluation and Discharge Summaries (SHEDS); (2) arrival times; (3) relationships with colleagues, co-workers and inmate-patients; and (4) resistance to accepting supervisory direction with which she might disagree.

With respect to completion of the SHEDS, the report noted that four inmate-patient records were audited for the report and that narratives in the diagnostic rationale sections of those SHEDS "consistently lacked reference to elements of the diagnosis. The rationales were weak and some differential diagnostic considerations were not discussed." In addition, the report noted that 50% of the SHEDS that were audited were completed after their due date. The report did not specifically identify the SHEDS that were audited. The report also stated that appellant needed to improve her provision of group therapy.

With respect to appellant's late arrivals, the report stated that appellant had been observed arriving at her workplace after 7:30 a.m., and that during August she

appeared to arrive at either 7:00 or 7:30 a.m. It also stated that, during discussions, appellant had opted to change her start time to 7:30 a.m.¹

The report stated that the “most critical area of very serious concern [was appellant’s] relationship with colleagues, coworkers and inmate-patients.” The report noted that appellant’s relationships with colleagues were “strained” and, at times, “contentious,” and that her colleagues had expressed “significant reservations” about working with her. The report stated that her colleagues felt appellant was not correctly interpreting their comments, that she communicated to them in a “circuitous, convoluted manner that is confusing and difficult to follow,” and that her attitude was “difficult and at times hostile.” The report noted that appellant “lacked insight into how [her] interactive style with staff and inmate-patients leads to confusion and misunderstanding.” It also noted that appellant was resistant to accepting supervisory direction with which she disagreed and that she had been involved in at least two “contentious arguments” with inmate-patients since she had begun work.

Finally, the report stated that appellant’s failure to “immediately correct and sustain corrected performance will result in [her] being rejected during probation.”

The report did not describe with particularity any of the incidents noted in it.

On October 18, 2000, Price wrote a memorandum to appellant to memorialize a meeting that they had had on October 11, 2000 to review the diagnostic sections of the four SHEDS audited for her Second Probationary Report. On October 19, Price issued a Letter of Instruction to appellant, counseling her for being absent from the Criminal

¹ It was not clear from the report whether appellant’s start time was 7:00 a.m. or 7:30 a.m. prior to the change in her start time.

Thinking group therapy session on October 18, 2000 without notifying anyone of her absence.

(Notice of Rejection)

On October 31, 2000, appellant was served with the Notice of Rejection During Probation (Notice), effective November 7, 2000. The Notice set forth four grounds for appellant's rejection: (1) her lack of the requisite diagnostic skills; (2) her failure to complete the SHEDS in a thorough and timely fashion; (3) her late arrivals at work; and (4) her poor relationships with colleagues, co-workers and inmate-patients. The Notice did not describe with any particularity or specificity any instances in which appellant engaged in the types of inadequate performance or misconduct listed in the Notice. Instead, the Notice generally repeated the conclusions as to appellant's shortcomings that were set forth in the Second Probationary Report.

Shelby Farrow, Jr., an Office Technician with the Department, testified that, when he served the Notice upon appellant, he also served a Skelly package that included copies of: a memorandum from Price to Billie Polk, Personnel Officer, dated October 24, 2000; the first page of the First Probationary Report; the Second Probationary Report; a memorandum dated September 27, 2000 from Price to appellant; a memorandum dated October 18, 2000 from Price to appellant; a memorandum dated October 19, 2000 from Price to appellant; another memorandum dated September 27, 2000 from Price to appellant; and a memorandum dated March 16, 2000 from Price to appellant. The Skelly package did not include copies of any SHEDS prepared by appellant.

Procedural History

Respondent rejected appellant during her probationary period pursuant to Government Code § 19173 for reasons related to appellant's qualifications, the good of the service, and failure to demonstrate merit, efficiency, fitness and moral responsibility.²

During the hearing before the Administrative Law Judge (ALJ), appellant presented her case first and called nine witnesses, including herself. After conducting the evidentiary hearing, the ALJ issued a proposed decision, which recommended revoking the rejection. The Board initially adopted the proposed decision, but thereafter granted the Department's petition for rehearing.

The Board has reviewed the record in this matter, including the transcripts, exhibits and written arguments, and has heard the oral arguments, and now issues the following decision.

ISSUES

The following issue is before the Board for review:

Did the Notice adequately set forth the reasons for appellant's rejection?

DISCUSSION

Government Code § 19173 provides that:

Any probationer may be rejected by the appointing power during the probationary period for reasons relating to the probationer's qualifications, the good of the service, or failure to demonstrate merit, efficiency, fitness, and moral responsibility, but he or she shall not be rejected for any cause

² The Department also included in the Notice that the action was being taken against appellant under Government Code § 19572, subdivisions (b) incompetency, (c) inefficiency, (c) inexcusable neglect of duty; and (m) discourteous treatment of the public or other employees. During the course of the hearing, the ALJ correctly stated that he would not address those provisions because they were relevant only to adverse actions and not to rejections on probation.

constituting prohibited discrimination as set forth in Sections 19700 to 19703, inclusive.

Pursuant to Government Code § 19175(d), if a rejected probationer timely appeals his or her rejection to the Board, the Board may restore the probationer to his or her position only if the Board:

determines, after a hearing, that there is no substantial evidence to support the reason or reasons for rejection, or that the rejection was made in fraud or bad faith. At the hearing, the rejected probationer shall have the burden of proof. Subject to rebuttal by the rejected probationer, it shall be presumed that the rejection was free from fraud and bad faith and that the statement of reasons therefor in the notice of rejection is true.

In Wiles v. State Personnel Board,³ the California Supreme Court explained that:

The object and purpose of a probationary period is to supplement the work of the civil service examiners in passing on the qualifications and eligibility of the probationer. During such period the appointive power is given the opportunity to observe the conduct and capacity of the probationer, and if, in the opinion of that power, the probationer is not fitted to discharge the duties of the position, then he may be discharged by the summary method provided for in the Civil Service Act before he acquires permanent civil service status.

Because probationary employees do not have permanent civil status, they are not entitled to all the due process rights that permanent state employees enjoy.⁴ As the court in Anderson v. State Personnel Board stated, “Probationary employees have only statutory rights, and have no vested interest in employment.”⁵

Even though probationers’ rights are limited, Government Code § 19173(b)(1) requires state agencies to inform rejected probationers of the “reasons for the

³ (1942) 19 Cal.2d 344, 347. See also, D. R. (1994) SPB Dec. No. 94-29.

⁴ Compare, Skelly v. State Personnel Board (1975) 15 Cal.3d 194.

⁵ (1980) 103 Cal.App.3d 242, 249.

rejection.”⁶ In Brown v. State Personnel Board, the court found that a rejection notice that merely stated in conclusory terms that an employee’s performance was “unsatisfactory” and did not include a “statement of fact ... with respect to the employee’s lack of any one of the qualities prescribed by the statute” did not set forth a sufficient statement of reasons.⁷ The court in Bryant v. State Personnel Board concluded that a rejection notice that summarily informed a probationary state employee that he was being rejected for the good of the service and failure to demonstrate merit and fitness, and that he had been guilty of action unbecoming an employee did not comprise an adequate statement of reasons for the rejection.⁸ The court explained that a notice of rejection must contain “the factual reasons which support or justify” the appointing power’s conclusion that the rejection of the employee would be for the good of the service.⁹

⁶ Government Code § 19173(b)(1) provides:

A rejection during probationary period is effected by the service upon the probationer of a written notice of rejection which shall include: (a) an effective date for the rejection that shall not be later than the last day of the probationary period; and (b) a statement of the reasons for the rejection. Service of the notice shall be made prior to the effective date of the rejection, as defined by board rule for service of notices of adverse actions. Notice of rejection shall be served prior to the conclusion of the prescribed probationary period. The probationary period may be extended when necessary to provide the full notice period required by board rule. Within 15 days after the effective date of the rejection, a copy thereof shall be filed with the board. (Underlining added.)

See also, Board Rule 52.3, which provides, among other things, that an appointing power must give a probationer prior written notice of a rejection during probationary period that includes “the reasons for such action.” Title 2, California Code of Regulations, § 52.3.

⁷ (1941) 43 Cal.App.2d 70, 76.

⁸ (1950) 96 Cal.App.2d 423, 426.

⁹ Id.

The court in Dona v. State Personnel Board summed up what a notice of rejection must include in order to comply with the requirements of Government Code § 19173 as follows:

The notice of rejection must, under this section, be accompanied 'by a statement of the specific reasons therefor'. It is not sufficient for the appointing power simply to give its conclusions, unsupported by facts. Thus in Bryant v. State Personnel Board... it was held that a notice of rejection which gave as the 'reasons' for the rejection 'the good of the service and failure to demonstrate merit and fitness', and which charged the probationary employee with 'actions unbecoming an employee' was insufficient as a matter of law. In Brown v. State Personnel Board... the reason given in the notice of rejection was 'services unsatisfactory,' and this was held to be insufficient. ... The notice of rejection here involved carefully complies with the requirements of the section. It charges that appellant shirks his fair share of duties, sleeps while on duty, fails to keep appointments, fails to obey orders and instructions, fails to cooperate with the forest service, creates dissension among the other employees, and shows no interest in his job. If the notice contained no more than this it might be insufficient under the rule of the Bryant and Brown cases, supra. But unlike those cases each charge is supported with detailed allegations setting forth places, names and dates. A reading of the notice demonstrates that it complies in all respects with the requirements of section 19173 of the Government Code. (Underlining added.)¹⁰

The Notice that the Department served upon appellant in this case delineates the Department's conclusions that appellant lacked the requisite diagnostic skills, that she did not relate well with her co-workers and inmate-patients, and that, during the month of August, she did not arrive at work in a timely and consistent fashion. The Notice does not, however, include any detailed allegations setting forth places, names and dates to support these conclusions. The Notice also does not specifically describe any

¹⁰ (1951) 103 Cal.App.2d 49, 50-51. The court in Dona recognized that the language of Government Code § 19173 before 1949 required appointing powers to include in a notice of rejection the "specific reasons" for the rejection and that, when the law was amended in 1949, the word "specific" was not included in the amended language. The court stated that, "the change effected by the amendment is in form and not in substance. The result would not be affected by the amendment." 103 Cal.App.2d 49 at p. 50, n. 1.

instances in which appellant exhibited inadequate diagnostic skills, failed to act in an appropriate manner toward colleagues and inmate-patients, or arrived late.

The Department's assertion that appellant was fully aware of her shortcomings because Price and Justice, on a regular basis, discussed those shortcomings with her, is not well-taken. Government Code § 19173 requires an appointing power to include in the notice of rejection the reasons for the rejection. Just because the Department may have orally notified appellant of her shortcomings did not relieve the Department of its obligation to describe in the written Notice the reasons for the rejection.

The Department also asserts that appellant was aware of the reasons for her rejection because those reasons were set forth in the materials that were served upon her with the Notice. A review those materials reveals that they do not contain any more specific details as to places, names and dates than does the Notice. While the First and Second Probationary Reports describe appellant's deficiencies with some specificity, they do not set forth any particular instances when those deficiencies were exhibited. The other documents that were included with the Notice do not provide any more details as to the specific reasons underlying the rejection.

In any event, the Department could not satisfy its obligation to set forth in the Notice the reasons for appellant's rejection by mailing with the Notice additional documents that may have included further support for the rejection. Appellant could not be expected to wade through additional documents to discern the reasons for her rejection if those reasons were not specifically set forth in the Notice. Instead, the Department had to include the reasons for appellant's rejection in the Notice itself.

Next, the Department asserts that it could not describe the incidents that comprised the reasons for the rejection because it was prevented by privacy and confidentiality laws from disclosing inmate-patient information. Clearly, the Department could have disclosed sufficient information about those incidents to comply with the requirements of Government Code § 19173 without revealing confidential information by referring to inmate-patients by only their first names or initials.

Finally, the Department argues that appellant was fully aware of the reasons for her rejection as evidenced by her ability to draft a detailed notice of appeal to SPB and to present her case during the evidentiary hearing before the ALJ. By failing to include in the Notice the specific reasons for the rejection, the Department forced appellant to take a scattershot approach to the case and raise all the reasons that might arguably have been relevant to the Department's rejection decision in order to ensure that she carried her burden of proof. If the Department had set forth the specific reasons for appellant's rejection in the Notice, appellant would have been able to present a more streamlined and focussed case to the ALJ, and the ALJ would have been better able to assess whether there was substantial evidence to support the reasons for the rejection.

Moreover, the mere fact that appellant may have guessed right as to the reasons for her rejection did not relieve the Department from complying with the requirement set forth in Government Code § 19173 to include in the Notice a statement of reasons.

CONCLUSION

Government Code § 19173 requires an appointing power to set forth in a notice of rejection during probationary period the reasons for the rejection. For the Board to revoke a rejection, Government Code § 19175 requires a probationary employee to

prove that there is no substantial evidence to support the reasons for rejection, or that the rejection was made in fraud or bad faith. An appointing power must set forth in a rejection notice the reasons for the rejection with sufficient factual specificity so that a probationer can mount a focussed challenge to those reasons and the Board can assess whether there is substantial evidence to support those reasons.

In this case, the Department stated in the Notice only its conclusions as to why appellant should be rejected. It did not, however, specify any factual reasons to support those conclusions. By failing to include in the Notice the specific reasons for the rejection, the Department failed to comply with Government Code § 19173. Appellant's rejection must, therefore, be revoked.

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 rejection during probationary period taken against Wendylin Donald in the position of Psychiatric Social Worker is revoked;
2. The Department of Mental Health shall reinstate Wendylin Donald as a permanent employee in the position of Psychiatric Social Worker and shall pay to her such salary, if any, that may be due and owing under Government Code § 19180;
3. This matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing on the written request of either party in the event the parties are unable to agree as to the salary due appellant under Government Code § 19180;
4. This decision is certified for publication as a Precedential Decision. (Government Code § 19582.5).

STATE PERSONNEL BOARD¹¹

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

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing
Decision and Order at its meeting on December 17, 2002.

Walter Vaughn
Executive Officer
State Personnel Board

[Donald-dec]

¹¹ President Ron Alvarado did not participate in this decision.