This decision has been disapproved to the extent it is inconsistent with the Board's decision in Jesse Brown (2001) SPB Dec. No. 01-02.

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **JALAL EMAMI** From constructive medical termination from the position of Associate Engineer with the Department of Water Resources at Sacramento	SPB Case No. 98-2116 **BOARD DECISION** (Precedential) **NO. 99-07** June 8, 1999

APPEARANCES: Steven B. Bassoff, Labor Relations Counsel, Professional Engineers in California Government, on behalf of appellant, Jalal Emami; Kathryn Harker, Staff Counsel, and Steven Cohen, Assistant Chief Counsel, Department of Water Resources, on behalf of respondent, Department of Water Resources.

BEFORE: Florence Bos, President; Ron Alvarado, Vice President; Richard Carpenter, William Elkins and Lorrie Ward, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) after the Board rejected the Proposed Decision of the Chief Administrative Law Judge (CALJ) to consider whether respondent, the Department of Water Resources (DWR or Department), constructively medically terminated appellant, Jalal Emami, when it applied to the Public Employees' Retirement System (PERS) for disability retirement on appellant's behalf, relieved appellant of all his work duties, and informed appellant that he could use his sick leave or other available leave credits pending PERS's determination on the

disability retirement application. In this Decision, the Board finds that since appellant did not show that he was ready, willing and able to work and had a legal right to work, he failed to prove that DWR constructively medically terminated him.

BACKGROUND

Factual Summary[1]

(Employment History)

Appellant was appointed as a Junior Civil Engineer in August 1984 with the California Department of Transportation (Caltrans). He promoted to Assistant Transportation Engineer with Caltrans in September 1985. He transferred to DWR in October 1986 as an Assistant Engineer. He promoted to Associate Engineer in September 1994.

(Notice of Medical Action)[2]

On April 7, 1998, Dr. Robert Schneider conducted a fitness for duty examination on appellant. Appellant worked from April 7 through May 22, 1998 without incident.

On May 22, 1998, the Department personally served a "Notice of Medical Action" (Notice) upon appellant that stated: (1) based upon Dr. Schneider's evaluation,[3] the Department had determined that appellant was unable to safely and efficiently perform the essential duties of his job or any other job within the Department; (2) DWR was applying to PERS for disability retirement on appellant's behalf; (3) while PERS was

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[1] This factual summary was taken substantially from the Proposed Decision.

[2] No testimony was taken during the hearing before the CALJ. Instead, the parties stipulated to certain facts, submitted a total of three documents (two were submitted by DWR and one by appellant), and made oral arguments.

[3] Dr. Schneider's fitness for duty evaluation was not submitted as an exhibit during the hearing before the CALJ.

processing the disability retirement application, appellant was relieved of his work duties and permitted to use sick leave and other available leave credits[4]; (4) appellant had the right to waive disability retirement, but if he did, DWR would medically terminate him under Government Code § 19253.5; and (5) appellant was to make arrangements with the Department's Health and Safety Coordinator to enter the work site and return any state property that had been issued to him.

By letter dated June 29, 1998, PERS notified appellant that DWR had filed an application for disability retirement on his behalf, and PERS was processing that application.

By letter dated July 21, 1998, PERS informed appellant that PERS had determined that he was "incapacitated" from performing his duties as an Associate Engineer based upon his "psychological (depression) condition." PERS, therefore, approved the application for disability retirement that DWR had filed on appellant's behalf. PERS further advised appellant that his disability retirement would become effective the day after the expiration of his sick leave credits, unless he requested an earlier effective date. PERS also informed appellant that he had the right to respond to the approval of his disability retirement and obtain a hearing before the Office of Administrative Hearings (OAH). [5]

[4] According to the Notice, as of May 1, 1998, appellant had 321 hours of accrued sick leave and 206 hours of accrued vacation leave.

[5] The record did not indicate that appellant ever sought a hearing before OAH to challenge either DWR's decision to apply for disability retirement on his behalf or PERS's approval of that disability retirement application.

Appellant's accrued sick leave credits expired on July 24, 1998.[6] His disability retirement became effective on July 25, 1998.

Procedural Summary

By letter dated June 1, 1998, appellant filed an appeal with the Board contending that the Notice constituted a "constructive medical termination." During the hearing before the CALJ, appellant requested the restoration of his sick leave credits from May 22, 1998, when he was relieved of duty, to July 25, 1998, when his disability retirement became effective. The Proposed Decision found that appellant had not established the elements of a constructive medical termination.

The Board rejected the Proposed Decision to consider whether the Department had refused to allow appellant to work under circumstances where appellant asserted that he was ready, willing and able to work and had a legal right to work.

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

ISSUE

Did DWR constructively medically terminate appellant when it relieved him of his duties and stopped paying him his regular salary after it received Dr. Schneider's fitness for duty evaluation and before PERS approved appellant for disability retirement?

DISCUSSION

Constructive Medical Termination

[6] The CALJ found that appellant did not use any accrued vacation credits while the PERS determination on his disability retirement application was pending, and he was reimbursed for 206 hours of accrued

Government Code §§ 19253.5 and 21153

Government Code § 19253.5 sets forth procedures a state agency must follow when it seeks to demote, transfer or terminate an employee for medical reasons. Government Code § 19253.5(d) allows a state agency to terminate an employee for medical reasons only if: (1) it concludes, based upon a medical examination or other medical evidence, that the employee is not fit to perform the work of his or her position or any other position in the agency; and (2) the employee either is not eligible for, or waives the right to apply for, disability retirement.[7]

Government Code § 21153 prohibits a state agency from separating an employee because of disability, and requires the state agency to apply for disability retirement on behalf of the employee, when the state agency believes the employee is disabled, unless the employee is not eligible for, or waives the right to apply for, disability retirement.[8]

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vacation leave after his disability retirement became effective.

[7] Government Code § 19253.5(d) provides:

> When the appointing power after considering the conclusions of the medical examination provided for by this section or medical reports from the employee's physician, and other pertinent 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.

[8] Government Code § 21153 provides:

> Notwithstanding any other provision of law, an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any member believed to be disabled, unless the member waives the right to retire for disability and elects to withdraw contributions

Since appellant was eligible for disability retirement given his length of state service, before it could take any formal action to medically terminate him based upon Dr. Schneider's evaluation, DWR first had to comply with Government Code §§ 19253.5 and 21153 and apply to PERS for disability retirement on appellant's behalf, unless appellant waived his right to apply for disability retirement.[9]

The Notice did not terminate appellant's appointment as an Associate Engineer; instead, it notified appellant that DWR was going to apply for disability retirement on his behalf, and relieved him of work until PERS made its determination on the disability retirement application. Appellant retained his appointment as an Associate Engineer with the Department until July 25, 1998, when his disability retirement became effective.

Elements of a Constructive Medical Termination

Even though DWR took no formal action under Government Code § 19253.5(d) to terminate his appointment, appellant contends that the Notice constituted a constructive medical termination under the reasoning set forth in C█ █. M█ (M█).[10] In M█ the Board defined a constructive medical termination as follows:

> A "constructive medical termination" arises when an appointing power, for asserted medical reasons, refuses 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.[11]

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or to permit contributions to remain in the fund with rights to service retirement as provided in Section 20731.

[9] 57 Ops. Cal. Atty. Gen. 86, pp. 87-8 (1974).

[10] (1993) SPB Dec. No. 93-08.

[11] Id. at p. 6. (Footnote omitted.)

Expanding upon the analysis recently adopted by the Board in Jesse Brown,[12] the Board finds that in order for appellant to establish that he was constructively medically terminated under the M[redacted] test, he must show that: (1) DWR refused to

[12] (1999) SPB Dec. No. 99-02. The Board's precedential decision in Jesse Brown was not final as of the date of this Decision. See Board Rule 51.6.

allow him to work in his position as an Associate Engineer for asserted medical reasons; (2) he asserted to DWR that he was ready, willing and able to work under circumstances that indicated that he, in all good faith, wished to continue to perform all the duties and responsibilities of his job; and (3) he had a legal right to work pending PERS' disability retirement determination, notwithstanding Dr. Schneider's determination that he was not fit to perform the duties of any position at DWR.

Based upon Dr. Schneider's fitness for duty evaluation, DWR served appellant with the Notice relieving him of all his duties pending PERS's decision on his disability retirement application. The language in the Notice establishes that DWR refused to allow appellant to work in his position as an Associate Engineer for asserted medical reasons. Appellant has, therefore, met the first prong of the M test.

Appellant, however, presented no evidence to indicate that he has met the second prong of the M test: that he asserted he was ready, willing and able to work under circumstances that indicated that he, in all good faith, wished to continue to perform all the duties and responsibilities of his job. There was no evidence in the record that showed that appellant expressed any disagreement with Dr. Schneider's evaluation that he was not fit for work. Unlike the employee in C . A (A),[13] who, after being put on a three month unpaid leave of absence, asserted to her employer that she was medically able to work and inquired when she could return, appellant submitted no evidence to indicate that, in response to the Notice, he

[13] (1997) SPB Dec. No. 97-01.

ever asserted to DWR that he was fit for duty and wished to remain in his position pending PERS's determination on his disability retirement application.

Appellant contends that the Notice deprived him of the opportunity to assert that he was ready, willing and able to work. The Board disagrees. While the Notice did not explicitly offer appellant the opportunity to challenge DWR's decision relieving him of work, nothing prevented appellant from responding to DWR that he was capable of performing his job and did not wish to be relieved of his duties. The record indicates that appellant did not dispute DWR's determination that, in light of his psychological condition, he was not capable of performing his work duties safely and efficiently and, therefore, should be disability retired. Instead, the record shows that appellant disputed only DWR's failure to maintain him on full paid status pending PERS's decision on his disability retirement application. Appellant has, therefore, failed to show that he asserted to DWR that he was ready, willing and able to work under circumstances that indicated that he, in all good faith, wished to continue to perform all the duties and responsibilities of his job. Appellant has, therefore, failed to meet the second prong of the M test.

Finally, appellant has not shown that he has met the third prong of the M test: that he had a legal right to continue working pending PERS's decision on his disability retirement application, notwithstanding Dr. Schneider's determination that he was not fit to perform the duties of any position at DWR. As the Board recently stated in S A (A),[14] the Board agrees with PERS's position set forth in its

[14] (1999) SPB Dec. No. 99-04, p. 21. The Board's precedential decision in S A was not final as of the date of this Decision. See Board Rule 51.6.

Circular Letter No. 400-316 dated June 12, 1989. In that Circular Letter, PERS stated that while its decision on a disability retirement application is pending, a state agency is not precluded:

> from temporarily removing the member from the job until the initial determination of disability or non-disability is made. PERS recognizes that the employer may have medical reports at this point which indicate the member may injure himself/herself or others if kept on the job. It is hoped that the member would be receiving sick leave or other short-term disability benefit during this period.

The Attorney General has opined that, although a state agency cannot order an employee to use his or her sick leave or take a leave of absence pending PERS's determination on a disability retirement application,[15] an employee is not entitled to continue in his or her regular work assignment when he or she is unable to do so due to illness or injury:

> The medical termination provisions (Gov. Code § 19523.5); the disability retirement provisions (Gov. Code § 20000 et seq.[now found at Government Code § 21150 et seq.]); the industrial disability leave provisions (Gov. Code § 18120 et seq. [now found at Government Code § 19869 et seq.]) all clearly contemplate that there are occasions when employees are too sick or disabled to perform the duties of their class. It would be totally irrational to assume therefore that the Legislature intended an employee physically incapable of performing the duties of his class to nevertheless appear on the job until he either recuperated or was retired on a disability. <u>The agency itself therefore makes the initial determination of fitness to work</u>. As we have earlier stated in cases of slight injury of short duration if the employee does not wish to use his sick leave he simply is not paid for the time….
>
> As to more serious illnesses the employee is protected during his illness by the various programs already described [temporary disability indemnity, industrial disability leave]. The interest of the state is protected by relying upon the fund to make a determination that the individual is in fact disabled and therefore entitled to benefits. Such a determination is

[15] 60 Ops. Cal. Atty. Gen. 61, 65 (1977).

> binding upon the employee and may not be disregarded. It is certainly not to be expected that the fund would arbitrarily find able bodied people physically unfit for duty and therefore entitled to benefits which they do not desire.[16] (Emphasis added.)

Thus, both PERS and the Attorney General have determined that an employer may relieve an employee of his or her work duties pending PERS's determination on a disability retirement application if the employer has medical information that indicates that the employee is not fit for work.

Once an application for disability retirement has been filed with PERS for an employee who has been relieved of duty, the final determination as to whether the employee is fit for work is made by PERS. If PERS determines that the employee does not qualify for disability retirement, that employee has a right to return to his or her position, with all lost backpay and benefits.[17] If the employer does not reinstate the employee to his or her former position when the employee seeks to return, the employee then has a claim for constructive medical termination.[18]

If, however, PERS determines that the employee is incapacitated for duty in his or her position and therefore qualifies for disability retirement, the employee does not have a legal right to return to his or her position, unless PERS subsequently determines that the employee is no longer incapacitated[19] or its decision is overturned on appeal. PERS's decision that the employee qualifies for disability retirement vindicates the employer's earlier determination that the employee was not fit for duty when the

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[16] Id. at p. 67.

[17] See M___ and D___ J___ (1993) SPB Dec. No. 93-01, p. 10.

[18] Id.

[19] See Government Code §§ 21192 and 21193.

employer relieved him or her from duty. Thus, a PERS determination that an employee qualifies for disability retirement precludes an employee from being able to state a claim that he or she had a legal right to work, as that term is used in M█████. An employee who cannot show that he or she has a legal right to work cannot state a claim under the third prong of the M█████ test that his or her employer constructively medically terminated him or her when it relieved him or her from duty pending PERS's disability retirement decision.

PERS's final approval of appellant's disability retirement confirmed Dr. Schneider's and DWR's initial conclusion that appellant was not fit for duty pending that approval. Since appellant was not fit for duty pending PERS's disability retirement determination, he did not have a legal right to work as that term is used in the third prong of the M█████ test. Appellant has, therefore, failed to state a claim for constructive medical termination.[20]

Compliance with Government Code § 19253.5

Appellant contends that, in light of the Board's reasoning set forth in A█████, DWR was prohibited from issuing the Notice without first complying with all the procedural requirements for a medical termination set forth in Government Code § 19253.5. The Board disagrees.

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[20] The only assertion that appellant has made in this case is that the Notice effected a constructive medical termination as defined in M█████. He has not asserted that DWR's actions violated any other laws. The Board's decision in this matter is, therefore, confined solely to the issue of whether appellant has stated a claim for constructive medical termination under M█████. Although the Board finds that appellant has not shown that he had a legal right to work as that term is used in M█████ and, therefore, has failed to state a claim for constructive medical termination, the Board makes no findings as to whether appellant may be able to assert under any other laws that he had a legal right to work.

In A█████, an employer, after receiving a fitness for duty evaluation that opined that the employee was not fit for duty for three months, ordered the employee on a three month unpaid leave of absence, and barred her from working until she was reevaluated by a doctor and released to return to work. The employee in response to having been put on an unpaid leave of absence, asserted to her employer that she was medically able to work and inquired when she could return. The employer contended that the employee needed to provide evidence establishing that she had a right to work before the employer was obligated to take her back. Adopting the proposed decision of an administrative law judge as its own precedential decision, the Board rejected the employer's contention and found that, by barring the employee from work, the employer had, in effect, issued a medical termination without complying with the procedures set forth in Government Code § 19253.5(d). The Board concluded that those facts fit the definition of a constructive medical termination set forth in M████

Unlike appellant, the employee in A█████ was not eligible for disability retirement. Since the employee in A█████ was not eligible for disability retirement, there were no legal barriers that prevented her employer from immediately initiating a formal medical termination action against her in accordance with Government Code § 19253.5(d) upon receipt of the fitness for duty evaluation. The Board in A█████, therefore, found that the employer could not bar the employee from her job for medical reasons without first following the procedures set forth in Government Code § 19253.5.

Appellant in this case, unlike the employee in A█████, was eligible for disability retirement. As such, Government Code §§ 19253.5 and 21153 prohibited DWR from taking any action to initiate a medical termination against appellant unless appellant first

waived his right to apply for disability retirement. In the Notice, the Department informed appellant that he had the right to waive disability retirement. There was no evidence presented during the hearing before the CALJ that indicated that appellant ever informed DWR that he wished to waive disability retirement, or that he objected to the Department's applying for disability retirement on his behalf. Thus, since appellant was eligible for disability retirement and did not waive it, the Department was precluded from initiating a formal medical termination action under Government Code §§ 19253.5 and 21153. In light of these facts, the Board's determination in A[redacted] that an employer cannot, for medical reasons, bar an employee who is not eligible for disability retirement from work without first initiating a formal medical termination under Government Code § 19253.5 is not applicable to this case.

DWR's Failure to Engage in an Interactive Process

In accordance with Government Code §§ 19253.5 and 21153, since appellant was eligible for, and did not waive, disability retirement, instead of initiating a formal medical termination, DWR filed for disability retirement on appellant's behalf. Unfortunately, neither of these two statutes provides any guidance as to an employer's obligations pending PERS's disability retirement decision with respect to an employee who is unfit for duty according to a medical evaluation. Appellant contends that since there is no statute that explicitly permitted DWR to serve the Notice, DWR was without legal authority to summarily put appellant off work without pay pending PERS's determination without first consulting with appellant. Appellant has not cited, however, any statute or regulation that prohibits an employer from immediately relieving an employee of his duties pending PERS's decision on a disability retirement application

when that employer has received a doctor's medical evaluation that states that the employee is not fit for work.

As set forth above, the Board agrees with PERS and the Attorney General that an employer may relieve an employee from duty pending PERS's disability retirement decision if the employer has received a doctor's medical evaluation stating that the employee is not fit for duty. The question for the Board's determination is whether the process DWR used, which summarily relieved appellant from duty without first offering him any alternatives or options,[21] was consistent with the law regarding constructive medical termination.

As the Board stated in Doris Jones,[22] when applying the requirements for reasonable accommodation and the prohibitions against discrimination based upon disability set forth in Government Code §§ 19230 and 19702, the Board looks for guidance to the Americans with Disabilities Act (ADA),[23] and the Equal Employment Opportunity Commission (EEOC) regulations and interpretative guidance, and court decisions thereunder. The Board finds that this guidance is also useful when reviewing issues that arise in constructive medical termination cases.

In its regulations and interpretive guidance addressing the process an employer should follow when determining whether to provide a reasonable accommodation to an

[21] The record contains no information as to the interactions, if any, between appellant and DWR before appellant was sent for a fitness for duty examination, or before DWR served the Notice. The Board assumes from this lack of evidence that DWR and appellant did not engage in an interactive process before DWR served the Notice.

[22] (1999) SPB Dec. No. 99-06, p. 15. The Board's precedential decision in Doris Jones was not final as of the date of this Decision. See Board Rule 51.6.

[23] 42 U.S.C. § 12101 et seq. The Board also looks for guidance to California Fair Employment and Housing Act, Government Code § 12940 et seq. (FEHA).

employee, EEOC has advised that the employer should engage in a flexible, informal "interactive process" with the employee during which the parties identify the employee's limitations and the possible reasonable accommodations that could be implemented to overcome those limitations. [24] The Ninth Circuit Court of Appeals in Barnett v. U.S. Air, Inc.[25] has interpreted this EEOC guidance as "permissive language" that "serves as a warning to employers that a failure to engage in an interactive process might expose them to liability for failing to make a reasonable accommodation."[26] But the Ninth Circuit concluded that

> The ADA and its regulations do not, however, create independent liability for the employer for failing to engage in ritualized discussions with the employee to find a reasonable accommodation.[27]

Just as EEOC strongly encourages employers to engage in an interactive process before making a final determination on reasonable accommodation, the Board strongly encourages appointing powers to engage in a similar process before summarily relieving an employee of his or her duties pending a PERS disability retirement decision. While in some instances an appointing power may have to immediately send an employee home without prior discussion when a fitness for duty evaluation indicates that the employee poses an unreasonable risk of injury to him or herself or others, in most cases, the employee's physical or mental state will not be so threatening as to preclude sufficient time for interaction and mutual consideration of options and

[24] 29 CFR § 1630.2(o)(3) and 29 C.F.R. § 1630.9, Appendix III.

[25] (9th Cir. 1998) 157 F. 3d 744, 752-3.

[26] Id. at p. 752.

[27] Id.

alternatives.[28] By engaging in an informal, flexible interactive process before relieving an employee from duty and applying for disability retirement on the employee's behalf, an employer may significantly lessen the possibility that the employee will later challenge the employer's decision, or that the Board or a court will find that its decision was not correct. But, while the Board strongly encourages an appointing power to engage in an interactive process before involuntarily relieving an employee from duty, the failure to engage in such a process will not, in itself, constitute grounds for finding that a constructive medical termination has occurred.

Although the Board would have preferred that DWR had engaged in an interactive process with appellant before sending him home, DWR's failure to engage in such a process before it served the Notice upon appellant summarily relieving him of his duties pending PERS's disability retirement determination did not, in itself, constitute a constructive medical termination.

Pay Status Pending PERS's Decision

Appellant asserts that DWR should have maintained him on full paid status pending PERS's determination on his disability retirement application. The Board disagrees.

In D J (J ,[29] the Board suggested in dicta that a state agency should place an employee "on paid status in some position within the agency" pending a

[28] For example, the appointing power may consider placing the employee in a temporary light duty assignment pursuant to Board Rule 443 pending PERS's disability retirement decision.

[29] (1993) SPB Dec. No. 93-01, p. 10.

PERS disability retirement determination. But, as explained in A[redacted],[30] the Board in J[redacted] did not mandate that an employee who cannot work for medical reasons must remain on full paid status. Appellant, through the use of his accrued sick leave, received his full income during the pendency of his disability retirement application. This use of his sick leave is consistent with the "hope" expressed in PERS's Circular Letter No. 400-316 that an employee who cannot work for medical reasons not go entirely without any income pending its determination on his or her disability retirement application. Appellant has not presented to the Board any law that would have required DWR to keep appellant on full paid status, when he was not psychologically capable of working safely and efficiently, until PERS approved him for disability retirement. DWR's failure to pay appellant his regular salary while he was out of work pending PERS's disability retirement decision did not constitute a constructive medical termination.

Due Process Issues

Relying upon Bostean v. Los Angeles Unified School District (Bostean),[31] appellant contends that DWR denied him his due process rights when it relieved him of his duties without first giving him notice and offering him an opportunity to be heard. In Bostean, a school district placed an employee on an involuntary, indefinite, unpaid leave of absence. The Second Circuit Court of Appeal concluded that since the plaintiff was a civil service employee with permanent status, he had a constitutionally protected

[30] SPB Dec. No. 99-04, at p. 22.

[31] (1998) 63 Cal. App. 4th 95.

property interest in continued employment and was, therefore, entitled to due process before the school district could suspend him without pay. The court ruled that the employee should have received notice and an opportunity to be heard before being placed on an unpaid leave of absence.

Extrapolating from Bostean, appellant argues that, given the due process rights of state civil service employees recognized in Skelly v. State Personnel Board (Skelly),[32] DWR should have granted appellant notice and an opportunity to respond before it relieved him of his duties.[33] Appellant contends that DWR's failure to give him notice and an opportunity to respond before he was relieved of his duties imposed upon appellant the entire risk that DWR may have made an incorrect decision when it concluded that he was not fit for work. The Board disagrees.

The facts set forth in Bostean are distinguishable from the facts of this case. As the Board explained in A[redacted],[34] in Bostean, the court found that there were no procedures available under the school district's rules pursuant to which the employee could have challenged the school district's decision post-deprivation or been made whole if that decision were found to have been erroneous:

[32] (1975) 15 Cal. 3d 194.

[33] Pursuant to Skelly, the Board adopted Rule 52.3, which requires an appointing power to give an employee notice and an opportunity to respond before the appointing power can, among other things, demote, transfer or terminate an employee for medical reasons under Government Code § 19523.5. Board Rule 52.3 does not include a requirement that an appointing power give an employee notice and an opportunity to respond before the employer may remove the employee from work and apply for disability retirement on that employee's behalf. Appellant's arguments, in effect, seek to expand the scope of Board Rule 52.3 to include a requirement that an appointing power give an employee prior notice and an opportunity to respond before the employer may relieve the employee of his or her duties while an application for disability retirement is pending.

[34] SPB Dec. No. 99-04 at p. 27.

> In the instant case, there was no such collateral or related proceeding in which Bostean was involved which could have assured his supervisors that the decision to place him on involuntary illness leave was medically warranted.
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> Further weighing in Bostean's favor in the balancing of factors is District's denial of back pay and benefits for the substantial period of time--seven months--while he was on involuntary illness leave of absence. District's rules apparently do not afford the successful employee in Bostean's position the right to be made whole as a result of a favorable ruling in a post-deprivation hearing. Thus, there is no indication in this record that there were any additional or substitute procedural safeguards to remedy the erroneous deprivation of a property interest. The procedures in Rule 836B also do not contain any provisions to guarantee that the appellant is afforded a timely post-deprivation hearing or any method for Bostean to attempt to resolve the appeal more quickly.[35]

Unlike the school district's rules in Bostean, the rules and regulations applicable to appellant in this case afforded appellant procedures pursuant to which he could have challenged DWR's decision post-deprivation and, most importantly, been made whole in the event that that decision was determined to be wrong. As PERS's July 21, 1998 letter indicated, under PERS's regulations,[36] appellant could have challenged both DWR's decision to apply for disability retirement on his behalf and PERS's determination approving his disability, and obtained a hearing before OAH.[37] In addition, if PERS had denied the disability retirement application, DWR would have been required to reinstate appellant and pay him all his lost backpay and benefits from

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[35] Bostean, 63 Cal. App. 4th at p. 117.

[36] See 2 C.F.R. § 555.3, which provides:

> Accusation. Any member whose retirement for disability has been requested by his employer shall be entitled to a hearing. The Executive Officer, upon determination that a member shall be retired for disability on such application, shall file an accusation and serve a copy thereof on the member and his employer.

[37] As set forth above, there was no indication in the record that appellant ever sought a hearing before OAH.

the time he asserted that he was ready, willing and able to return to his job.[38] Thus, contrary to appellant's assertion, DWR, and not appellant, bore the ultimate risk of an incorrect decision.

Since, unlike the school district employee in Bostean, appellant had available to him the opportunity to challenge DWR's decision post-deprivation and be made whole if that decision were found to have been wrong, the question for the Board's determination is whether these post-deprivation safeguards were sufficient to protect appellant's property rights in his permanent civil service position in the absence of pre-deprivation notice and an opportunity to be heard.

In Skelly, the California Supreme Court ruled that the determination of whether pre-deprivation process is due an employee who is deprived of some or all of his or her property rights in his or her permanent civil service job must be made after balancing all the competing interests involved, including the following factors:

> whether predeprivation safeguards minimize the risk of error in the initial taking decision, whether the surrounding circumstances necessitate quick action, whether the postdeprivation hearing is sufficiently prompt, whether the interim loss incurred by the person affected is substantial, and whether such person will be entitled to adequate compensation in the event the deprivation of his property interest proves to have been wrongful.[39]

Applying these factors in Civil Service Association v. City and County of San Francisco (Civil Service Association),[40] the California Supreme Court ruled that a city

[38] M[redacted], supra. In addition, if appellant had waived his right to apply for disability retirement and DWR had decided to medically terminate him, DWR would have been required to grant appellant all the procedural protections set forth in Government Code § 19253.5 and Board Rule 52.3. See William A. Poggione (1995) SPB Dec. No. 95-12, pp. 16-17.

[39] Skelly, 15 Cal. 3d at p. 209.

[40] (1978) 22 Cal. 3d 552, 562

and county were not required to give civil service employees pre-deprivation notice and an opportunity to be heard before imposing disciplinary suspensions of five days or less:

> The shortness of the suspension tends to demonstrate that the interim loss should not be deemed "substantial" within the meaning of Skelly in the absence of special circumstances being indicated in any particular case. None are shown here. [Footnote omitted.] A short suspension is not a destruction of the employee's employment but rather is an interruption. Usually in the event of a wrongful deprivation being shown the employee can be made whole by back wages for the period of wrongful suspension. We note in passing that historically the state has treated suspensions of 10 days or less as being somewhat minor with less procedural safeguards offered. [Citations omitted.]
>
> We also note that, during the period pending hearing, the employee in the minor suspension case does not face the bleak prospect of being without a job and the need to seek other employment hindered by the charges against him.

Following the reasoning set forth in Civil Service Association, the Sixth District Court of Appeal in Sienkiewicz v. County of Santa Cruz (Sienkiewicz)[41] concluded that a county employer did not have to give a civil service employee pre-deprivation notice and an opportunity to be heard before it placed the employee on an indefinite medical leave of absence, in light of the availability of a prompt post-deprivation hearing. In Sienkiewicz, a detention officer, who had sustained serious facial injuries in an off-duty motorcycle accident, asked his employer, the County Sheriff, to place him in a position that did not involve inmate contact until he had fully recovered from the psychological trauma of his accident. In response, his employer relieved him of his duties and informed him that he could “use paid leave to [his] credit and then request a leave of absence without pay until such time as [he could] provide this office with evidence that

[41] (1987)195 Cal. App. 3d 134, 139.

[his] presence at [his] normal work assignment would not endanger [his] safety or the safety of [his] fellow employees." The employee sued, claiming, among other things, that he had been denied due process because he had not been given notice and a hearing before he was placed on an indefinite medical leave of absence. The Sixth District Court of Appeal analogized the indefinite leave of absence imposed by the Sheriff to the short-term suspensions reviewed in Civil Service Association, and ruled that the employee was not entitled to a pre-deprivation hearing, since he had the right to a prompt post-deprivation hearing. The court regarded the employee's "alleged suspension as short-term, though no term was specified, because it was within his power to end it quickly by showing he had overcome his fear."[42]

As explained below, balancing the factors delineated in Skelly in light of the reasoning set forth in Civil Service Association and Sienkiewicz, the Board finds that due process did not require that DWR give appellant pre-deprivation notice and an opportunity to be heard before it relieved him of his duties:

The first factor identified in Skelly is whether pre-deprivation safeguards would have minimized the risk of error in the initial taking decision. The Notice provides that DWR based its decision to relieve appellant of his duties upon Dr. Schneider's fitness for duty evaluation. Since that evaluation was not submitted into evidence, the Board cannot judge whether it was sufficiently thorough and impartial to provide adequate safeguards against error. If DWR had provided appellant with the opportunity to respond to Dr. Schneider's fitness for duty evaluation or obtain a second opinion from

[42] Id. at p. 141.

another doctor before it relieved him from duty, DWR clearly would have provided additional safeguards to minimize the risk that it may have made an error in determining that appellant was not fit for duty.

The second factor identified in Skelly is whether the surrounding circumstances necessitated quick action. The stipulated facts provided that appellant worked without incident between April 7, 1998, when the fitness for duty examination was conducted, and May 22, 1998, when he was relieved of duty. DWR submitted no evidence to show that, in light of his psychological condition, appellant posed an unreasonable risk of harm or injury to himself or others to compel DWR to take immediate action on May 22, 1998, after it had received Dr. Schneider's fitness for duty evaluation. While, as set forth above, it is certainly conceivable that an employer would have to act expeditiously to remove immediately from duty a worker who posed such an unreasonable risk, in the absence of any supporting evidence, the Board cannot find that the surrounding circumstances in this case necessitated quick action on the part of DWR.

The third factor is whether the post-deprivation hearing was sufficiently prompt. Appellant was relieved of his duties on May 22, 1998. He filed his appeal from constructive medical termination with the Board on June 1, 1998. PERS approved him for disability retirement on July 21, 1998, effective July 25,1998. The hearing before the CALJ was conducted on August 11, 1998. Since less than three months passed between when appellant was relieved of his duties and when his post-deprivation hearing before the Board was held, appellant's post-deprivation hearing was sufficiently prompt.

The fourth factor is whether the interim loss incurred by appellant was substantial. Because appellant had more than sufficient sick leave available to provide him with the equivalent of his full salary during the short period between when he was relieved of his duties and when PERS approved him for disability retirement, appellant suffered no loss during this interim period.

The final factor is whether appellant would have been entitled to adequate compensation in the event that DWR's deprivation of his property interest proved to have been wrongful. As set forth above, if PERS had denied the disability retirement application DWR had submitted on appellant's behalf, DWR would been required to pay appellant all his lost backpay and benefits from the time he asserted that he was ready, willing and able to return to work.[43] Thus, appellant would have been entitled to adequate compensation in the event that DWR's determination that appellant was not fit for duty was incorrect.

Although some of the Skelly factors weigh in favor of requiring DWR to have provided appellant notice and an opportunity to respond before it relieved appellant of his duties, the Board finds that these factors are outweighed by the factors that indicate that pre-deprivation process was not necessary in this case to adequately protect appellant's property interests in his permanent civil service position in light of the short duration of the deprivation, the post-deprivation processes and remedies available to appellant, and the lack of any interim injury. Although, as set forth above, the Board strongly encourages an employer, in non-emergency situations, to engage in an

[43] See M[redacted], SPB Dec. No. 93-08, p. 9.

informal, flexible interactive process before relieving an employee of his or her duties and applying for disability retirement on his or her behalf, the Board finds that, in this case, DWR was not required by due process considerations to give appellant notice and opportunity to be heard before it served the Notice upon him and relieved him of his duties.

CONCLUSION

Appellant has failed to show that DWR constructively medically terminated him when it served the Notice of Medical Action upon him. The Board, therefore, dismisses his appeal.

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 Appeal of Jalal Emami from constructive medical termination from the position of Associate Engineer with the Department of Water Resources at Sacramento is hereby dismissed.

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

STATE PERSONNEL BOARD

Florence Bos, President
Ron Alvarado, Vice President
Richard Carpenter, Member
William Elkins, Member
Lorrie Ward, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on June 8, 1999.

____
Walter Vaughn
Executive Officer
State Personnel Board

[Emamidec]