The appeal has been dismissed.

The County of Merced filed a writ petition in court challenging the Board's decision in this case. On October 31, 2001, the Superior Court of Merced County denied the County's writ petition.

A Notice of Appeal was filed in the above referenced matter on December 27, 2001.

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 00-2360
TINA GABRIAULT	)	**BOARD DECISION** (Precedential)
From dismissal from the position of Social Worker III with the Human Services Agency, County of Merced at Merced.	)	**No. 01-03**
	)	August 7, 2001

APPEARANCES: Barry Bennett, Attorney, on behalf of appellant, Tina Gabriault; William C. Hunter, Deputy County Counsel, on behalf of respondent, Human Services Agency, County of Merced.

BEFORE: Florence Bos, Richard Carpenter, and Sean Harrigan, Members.

DECISION

This appeal is before the State Personnel Board (SPB or Board) after the Board rejected the proposed decision of the administrative law judge (ALJ) to examine whether the dismissal taken by the Human Services Agency (Agency) of Merced County (County) against Tina Gabriault (appellant) should be revoked because the Agency, before it dismissed appellant, failed to consider whether she was entitled to a reasonable accommodation in light of her disability. The Board concludes that, given appellant's known medical condition, before terminating appellant, the Agency had a legal obligation to engage in an interactive process with her to determine whether it

could reasonably accommodate her disability. The Board, therefore, revokes appellant's dismissal.

BACKGROUND

Factual History

(Appellant's Job Duties)

Appellant was appointed to the position of Social Worker (SW) IV on September 15, 1986. She was assigned to the Agency's Emergency Response Unit (ERU). The ERU receives reports of possible child abuse and neglect. Social workers are required to respond to the complaints within statutorily mandated time frames.

The ERU's primary responsibility is to receive and process referrals. ERU personnel conduct intakes and assess whether children are in "emergency" or "at-risk" situations. An emergency situation requires a response within two hours ("immediates"). An at-risk assessment requires a response within ten days ("ten day referral"). Second and third contacts are to be completed within 21 days of the referral. Contacts and attempted contacts must be recorded on the Child Welfare Services Case Management System ("CWS-CMS"), a computer program. The Agency uses CWS-CMS to monitor cases statewide. Social workers are required to input into CWS-CMS information with respect to the contacts they make as soon as possible after making those contacts.

(Appellant's Performance Evaluations,
Corrective Action Plans and Disciplinary Actions)

Until 1998, appellant's performance evaluations rated her as either meeting or exceeding all required standards. Her performance evaluation for the period from September 15, 1995 to September 16, 1996 rated her as exceeding required standards in 40 of the 61 categories on which she was rated. In the employee comments section of that evaluation, appellant wrote, "I can honestly say that even after 10 years I still

enjoy my job… which by the way … is not just my job. It is my life's passion." In 1996, the Merced Chapter of the National Association of Social Workers named appellant Social Worker of the Year.

Beginning in 1998, appellant's performance began to deteriorate. Appellant's performance evaluation for the period from September 11, 1998 to November 11, 1998 rated her "unacceptable" in five areas, including planning, organizing and prioritizing work, and completing tasks with minimum supervision. But that performance evaluation also rated her as "exceeding required standards" in treating co-workers, clients, and the public in a courteous, helpful, nondiscriminatory and professional manner; responding to others in a timely manner; demonstrating ability to assist in determining client or coworker needs through skillful interviewing; and demonstrating knowledge and utilizing available resources in the community and knowing their practical value to the Agency and its clientele.

A performance evaluation for the period from April 28, 1999 to July 30, 1999 rated her as "unacceptable" in 11 areas.

On August 9, 1999, appellant received a Letter of Reprimand for inefficiency and neglect of duty for failing to complete a sufficient number of timely referrals and for failing to timely record referrals on the CWS-CMS computer system. A performance evaluation for the period from August 13, 1999 to September 13, 1999 rated her as "meets required standards" in all areas.

Effective March 13, 2000, appellant received a three-day suspension for inefficiency and neglect of duty for failing to complete work in a timely fashion on numerous client referrals and failing to timely input information about her referrals into

CWS-CMS . During its meeting on October 3-4, 2000, the Board modified that adverse action to an official reprimand.[1]

On March 20, 2000, appellant was placed on a 30-day corrective action plan. As part of that plan, Richard Lee Readel (Readel), appellant's supervisor, met with appellant each morning and discussed prioritizing cases. Appellant was instructed to record all field contacts in the computer system on the day they were seen.

On June 19, 2000, appellant was demoted from an SW IV to an SW III position because she lacked a master's degree. Appellant did not appeal that demotion.[2]

On July 14, 2000, appellant was served with notice that she was being dismissed, effective July 19, 2000, for not completing referrals within the required time frames and failing to record her contacts in CWS-CMS. The Agency asserted that it could not assign referrals to appellant at the same rate as other workers due to her inability to respond in a timely fashion. Appellant completed only 28 referral children for the months of May and June 2000, while the average number of referral children completed by other ERU workers during that same time period was 80, or approximately 40 children per month. Of the 25 referrals assigned to appellant, only 2 were then in compliance. Twenty of those cases had been opened for longer than the 30-day emergency response maximum. Because of appellant's failure to timely perform an adequate number of referrals, the Agency had to assign other employees to

[1] SPB Case No. 00-1040.

[2] The ALJ properly dismissed the allegations in the July 14, 2000 notice of adverse action that relate to that earlier demotion pursuant to principles set forth in Carla Bazemore (1996) SPB Dec. No. 96-02. An employee who has already been disciplined for an incident cannot be disciplined a second time for that same incident.

complete work that would have ordinarily been assigned to appellant. The Agency asserted that appellant's failure to make the required number of contacts on a timely basis exposed the children it was charged with protecting to potential harm. The Agency also asserted that appellant had not recorded her contacts on CWS-CMS in a timely fashion.

(Appellant's Disability)

In or around the latter part of 1997, appellant noticed that her hands were tingling and burning after she used the computer and she had numbness in her feet and lower torso. A neurologist diagnosed her condition as neuropathy.[3] Beginning in January 1998, appellant was off work for about 6 months.[4] When she returned to work after her absence, she found that her mind would race and she had difficulty staying on task, focusing and concentrating. She informed Readel of the difficulties she was experiencing.

Sometime after she returned from leave in 1998, appellant was diagnosed by psychiatrist Daisy Ilano (Dr. Ilano)[5] as having a bipolar disorder. On October 30, 1998, at the Agency's request, Dr. Ilano provided the Agency with a report entitled "Physician's Survey for Employment Fitness." In that report, Dr. Ilano informed the Agency of appellant's bipolar disorder. In response to the question asking whether appellant had a condition that substantially limited one or more major life functions, Dr.

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[3] The Merriam-Webster Collegiate Dictionary defines "neuropathy" to be "an abnormal and usually degenerative state of the nervous system or nerves."

[4] While she was out, the Agency trained its employees on how to use the new CWS-CMS system. Appellant was not present for that training, but was provided with remedial training in December 1998.

[5] Dr. Ilano is also the Medical Director of the Merced County Department of Health Services.

Ilano wrote that appellant's bipolar disorder "may limit and affect her focus [and] concentration especially if condition is still being stabilized." Dr. Ilano explained that, because of her medical condition, appellant could "be restless [and] unable to sit still for long periods of time." Dr. Ilano also stated that appellant's condition affected her ability to operate a personal computer since her condition was "still being stabilized." Dr. Ilano anticipated that appellant's condition would stabilize in 3 to 6 months, and that she would then be able to return to work with no restrictions. Dr. Ilano opined that appellant's prognosis was "fair with treatment."

Since her treatment began in 1998, appellant has experienced significant reactions to the medication that was prescribed for her. The level of Lithium originally prescribed for her was so high that it became toxic. Dr. Ilano repeatedly had to adjust the dosages of medications that appellant was receiving in an effort to properly balance them. When appellant's medications were out of balance, she would shake and could not work.

Because of her bipolar condition and her adverse reactions to her medications, on many days, appellant was too ill to come to work. On those days, she would call in sick. Appellant was on medical leave for approximately 2 1/2 months near the end of 1999. Between August 1999 and March 2000, she worked only seven 40-hour workweeks. Appellant discussed the reasons for her absences with Readel, who approved all her sick leave.

Appellant admitted that she never formally requested a reasonable accommodation from the Agency. Appellant testified, however, that she asked that some of her workload be reduced while she was struggling to balance her medications.

In addition to her regular social worker duties, appellant was the chairperson for “Helping Others Ease Sorrow (HOPES), an educational and support program for victims of child abuse. In December 1998, appellant was relieved of her responsibilities for HOPES. In March 2000, she was relieved of her on-call duties.

When appellant realized that her disorder and difficulties with her medication were making it impossible for her to handle all of her cases in a responsible and timely fashion, she asked that she be relieved of some of her caseload. Appellant was not permitted to give back any of the cases that had been assigned to her.

Appellant testified that she would often find new referral cases on her desk when she returned from sick leave. According to appellant, some of those referrals were already over the time deadlines when she received them.

Readel testified that, if he knew an employee was going to be out of the office for an extended period of time, he would not assign any new referrals to that employee. If, however, the employee was expected to return within a day or two, he would continue to assign cases to the employee during his or her absence. Readel stated that he assigned referral cases to employees based upon the number of referrals they were processing, and, because appellant was processing many fewer referrals than her co-workers, he had assigned to her many fewer referrals.

Appellant testified that she considered her field work, and not her computer work, to be her first priority. She stated that she had made more contacts than the Agency indicated in the notice of adverse action, but she had not recorded all those contacts in the CWS-CMS computer system as of the date of her termination.

Procedural History

In her proposed decision, the ALJ recommended that appellant's dismissal be sustained. The Board rejected that proposed decision at its meeting on April 17, 2001.

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

ISSUES

The following issues are before the Board for consideration:

1. Before dismissing appellant, was the Agency legally required to engage appellant in an interactive process to determine whether it could reasonably accommodate her disability?

2. If so, what is the appropriate remedy?

DISCUSSION

The Agency dismissed appellant pursuant to Local Agency Personnel Standards (LAPS) Section 17544, subdivisions (a) incompetency, (b) inefficiency, (c) neglect of duty, (i) willful disobedience and (k) other conduct either during or outside of duty hours which causes discredit to the agency or the employment.[6] The Agency asserts that it properly dismissed appellant under these subdivisions because she was not adequately performing her job duties.

Appellant does not dispute that, due to her bipolar disorder, she neither timely made the required minimum number of referrals nor recorded some of the referrals she

[6] Title 2, California Code of Regulations § 17544.

did make in the CWS-CMS computer system. She contends, however, that under the California Fair Employment and Housing Act (FEHA),[7] the federal Americans with Disabilities Act (ADA)[8] and Board precedent, the Agency should not have dismissed her without first reviewing whether it could have reasonably accommodated her disability.

Appellant, as employee of a County agency subject to LAPS, is entitled to the protections of the FEHA.[9] When interpreting the scope of the FEHA, the Board looks for guidance to the ADA, the decisions courts have reached when applying the ADA and the guidelines issued by the Equal Employment Opportunity Commission (EEOC) when interpreting the ADA.

The Agency does not dispute that appellant's bipolar disorder constitutes a disability under the FEHA.[10] The Agency asserts, however, that, even though appellant may have disability covered under the FEHA, the Agency was entitled to dismiss her because, after numerous efforts were made to correct her performance, she was still not able to perform the essential functions of her job. According to the Agency, Section 17140 of LAPS[11] permits the Agency to dismiss an employee who cannot adequately perform her job duties:

> Employees shall be retained on the basis of the adequacy of their performance and provision shall be made for correcting inadequate performance and separating employees whose inadequate performance cannot be corrected.

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[7] Government Code § 12940 et seq.

[8] 42 U.S.C. § 12101 et seq.

[9] See, LAPS § 17151; Title 2, California Code of Regulations § 17151.

[10] See, Pensinger v. Bowsmith, Inc. (1998) 60 Cal.App.4th 709, 719. See also, Den Hartog v. Wasatch Academy (10th Cir. 1997) 129 F.3d 1076, 1081.

[11] Title 2, California Code of Regulations Section 17140.

The Agency contends that, in dismissing appellant for her inadequate job performance, it acted in accordance with the Board's precedential decision in Lolita Gonzales.[12] In Gonzales, the Board found that an appointing power was justified in medically terminating an employee, notwithstanding her disability, in light of the serious threats of violence she had made against her supervisor and her excessive absenteeism. The Board, in that case, stated:

> A mentally disabled employee with unsatisfactory performance or conduct is not entitled to special protection under the ADA or similar legislation. If similar performance or conduct by a non-disabled employee would result in discharge, the disabled employee is not "otherwise qualified" for the position, even if the employee claims that the misconduct was "caused" by the disability. Discrimination laws such as the ADA protect only those who can do their job satisfactorily in spite of their disability, not those who could do it but for their disability.

The Agency asks us to apply this reasoning to sustain appellant's dismissal for inadequate performance. The Board declines to do so. Disability discrimination law has evolved since 1994 when Gonzales was issued.[13] As the Ninth Circuit recently stated in Humphrey v. Memorial Hospitals Association,[14]

> For purposes of the ADA, with a few exceptions, ….conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination.… The link between the disability and termination is particularly strong where it is the employer's failure to reasonably accommodate a known disability that leads to discharge for performance inadequacies resulting from that disability.

The Board now holds that, before an employer may dismiss an employee with a disability for inadequate performance, the employer must first explore with that

[12] (1994) SPB Dec. No. 94-13

[13] To the extent Gonzales is inconsistent with the holdings herein, it is disapprove.

employee, through a flexible interactive process, whether the employee could perform the essential functions of the existing job, or a reassigned job, with a reasonable accommodation.

The Agency also contends that it had no responsibility to reasonably accommodate appellant because she never requested a reasonable accommodation. Although appellant admitted that she never formally asked for a reasonable accommodation, she notified the Agency of her disability and informed them that she was having difficulty performing all of her job duties because of that disability and her adverse reactions to her medication.

As the Board made clear in Dianna Henning,[15] when an employer learns that an employee has a disability that may be impeding her from performing all of the essential functions of her job, the employer has an affirmative obligation to communicate with the employee about whether she may need a reasonable accommodation. Adopting the reasoning set forth in Barnett v. U.S. Air, Inc.,[16] the Board, in Henning, held that the obligation to engage in the interactive process

> is triggered not only when the employee requests a reasonable accommodation, but when the employer knows of the employee's disability and the need for an accommodation. According to Barnett, an employee does not have to refer to the ADA or even the term "reasonable accommodation" in order to trigger the interactive process – it is sufficient if the employee uses "plain English" to inform his or her employer of the need for an adjustment due to a medical condition.

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[14] (9th Cir. 2001) 239 F.3d 1128, 1139-1140; petition for cert. filed June 13, 2001 (No. 00-1860).

[15] (2001) SPB Dec. No. 01-01.

[16] (9th Cir. 2000) 228 F.3d 1105, 1112. The U.S. Supreme Court has granted certiorari in Barnett to review the decision's analysis of the ADA's impact on a bona fide seniority system. (2001) 121 S.Ct. 1600. That grant of certiorari does not affect the decision's reasoning with respect to the interactive process.

The Agency requested and received a report on appellant's fitness for duty from Dr. Ilano. That report clearly notified the Agency of appellant's bipolar disorder, the effects that disorder had on her ability to concentrate, and her need for an accommodation with respect to using the computer. When it received that information, the Agency should have: (1) analyzed appellant's job and determined its purpose and essential functions; (2) consulted with appellant to ascertain her job-related limitations and how those limitations could be overcome with a reasonable accommodation; (3) in consultation with appellant, identified potential accommodations and assessed the effectiveness that those accommodations would have in enabling appellant to perform the essential functions of her position; and (4) taking into consideration appellant's preference, selected and implemented an accommodation that was most appropriate for both the Agency and appellant.[17] The Agency, by failing to initiate an interactive process with appellant to ascertain whether and to what extent she might need a reasonable accommodation to assist her in performing her job duties, denied appellant the rights to which she was entitled under the FEHA.

The Agency contends that it did make efforts to accommodate appellant's bipolar disorder: it approved all the sick and medical leave she requested and it eliminated her responsibilities for HOPES and on-call duties. But, even with these accommodations, appellant was not able to perform the essential functions of her job.

While the Agency may have made some accommodations for appellant's disability, it should have been apparent to the Agency that those accommodations were

[17] These guidelines are taken from the EEOC's guidelines at 29 C.F.R. Pt. 1630, App. § 1630.9.

not sufficient and that further accommodation was needed. Citing to Humphrey,[18] the Board in Henning ruled that,

> An employer's obligation to engage in the interactive process … extends beyond the first attempt at reasonable accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed.[19]

Appellant's performance evaluations from 1986 – 1996 indicate that appellant was an excellent social worker whose work ethic, interviewing skills and compassion were great assets to the Agency. When it became obvious that, because of her recently diagnosed bipolar disorder, appellant was no longer able to conduct the required minimum number of referrals or to input all the referrals she did conduct into the computer system in a timely fashion, before resorting to dismissal, the Agency was obligated to communicate with appellant to ascertain whether and to what extent it might be able to accommodate her in her existing job or reassign[20] her to another, vacant position so that she could continue to be as productive an employee as she had been during the first 10 years of her tenure.[21]

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[18] 239 F.3d at p. 1138.

[19] SPB Dec. No. 01-01 at pp. 20-21.

[20] See, Barnett, 228 F.3d at p.1111 (A "'qualified individual with a disability' includes individuals who could perform the essential functions of a reassignment position, with or without reasonable accommodation, even if they cannot perform the essential functions of the current position…")

[21] While the Agency is not required to eliminate any essential functions of appellant's job or create a new job for her, it is required, first, to determine whether it can accommodate appellant in her existing job by, among other things, restructuring that job to eliminate non-essential functions, providing her with assistive devices, or allowing her to work part-time. If the Agency finds that it can not accommodate her in her existing job, it is then required to explore whether it can reassign her to a vacant position for which she is qualified and medically capable of performing. See, Sylvia Solis (2000) SPB Dec. No. 00-07,

Because the Agency failed to adequately explore through a flexible, interactive process with appellant whether it could reasonably accommodate her disability before it dismissed her, that dismissal must be revoked.

CONCLUSION

For some time before it dismissed appellant, the Agency was aware that she had a bipolar disorder that made it difficult for her to perform some of her job responsibilities. Even though appellant did not expressly request a reasonable accommodation, the Agency was required to initiate an interactive process to review whether it could reasonably accommodate her known disability before it dismissed her. Because the Agency failed in its obligation to explore with appellant whether she could continue to perform the essential functions of either her existing position with a reasonable accommodation or a reassigned position before it dismissed her, that dismissal must 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 dismissal of Tina Gabriault from the position of Social Worker III with the Human Services Agency, County of Merced is revoked;
2. The Human Services Agency, County of Merced shall reinstate Tina Gabriault in her position as a Social Worker III;
3. The Human Services Agency, County of Merced shall enter into an interactive process with Tina Gabriault to determine whether it can reasonably accommodate her disability in her position as a Social Worker III, and, if not, whether she can be

reassigned to a vacant position within the Human Services Agency for which she is qualified and can perform the essential functions;

4. The Human Services Agency, County of Merced shall pay to Tina Gabriault all back salary, benefits and interest, if any, that would have accrued to her had she not been improperly dismissed;
5. This matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the back salary, benefits and interest due appellant.
6. This decision is certified for publication as a Precedential Decision. (Government Code § 19582.5).

STATE PERSONNEL BOARD[22]

Florence Bos, Member
Richard Carpenter, Member
Sean Harrigan, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on August 7, 2001.

____
Walter Vaughn
Executive Officer
State Personnel Board

[Gabriault-dec]

[22] President Ron Alvarado and Vice President William Elkins did not take part in this decision.