BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **JONATHAN SILVERMAN** From dismissal from the position of Workers' Compensation Payroll Auditor, Range B, with the State Compensation Insurance Fund at San Francisco	)	SPB Case No. 05-0078 **BOARD DECISION** (Precedential) No. 07-01 January 9, 2007

APPEARANCES: Kaye Antel-Berenson, Senior Labor Relations Representative, SEIU Local 1000, on behalf of appellant, Jonathan Silverman; James E. Toomey, Jr., attorney, on behalf of respondent, State Compensation Insurance Fund.

BEFORE: Sean Harrigan, President; Anne Sheehan, Vice President; William Elkins, Maeley Tom, and Patricia Clarey, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) after the Board rejected the Proposed Decision of the Administrative Law Judge and determined to hear the case itself. In this Decision, the Board concludes that the appointing power, the State Compensation Insurance Fund (SCIF), failed to continue to engage in the interactive process prior to dismissing appellant for performance deficiencies related to his disability. The Board, therefore, revokes appellant's dismissal.

ISSUES

Appellant asserts that his inability to meet SCIF's performance standards was related directly to his diagnosed disability of Attention Deficit/Hyperactivity Disorder (ADHD), and that SCIF failed to reasonably accommodate that disability by considering reassignment as a reasonable accommodation prior to terminating appellant's

employment. SCIF contends that it repeatedly attempted to reasonably accommodate appellant's disability, but that appellant was still unable to perform the essential functions of his position even with reasonable accommodation. The issues to be resolved are:

1. Did SCIF engage fully in the interactive process in order to reasonably accommodate appellant?
2. Was SCIF obligated to consider reassignment as a reasonable accommodation prior to terminating appellant's employment?

BACKGROUND

Employment History

Appellant has been employed by the State since August, 1999. Effective March 21, 2003, he received a demotion from the position of Workers Compensation Insurance Representative, Range C, to the position of Workers Compensation Payroll Auditor, Range B. Appellant's employment history is discussed in further detail below under Findings of Fact.

FINDINGS OF FACT

(Appellant's Employment History)

Appellant was appointed as a Worker's Compensation Payroll Auditor (WCPA), Range A, on August 2, 1999. Within the classification of WCPA, appellant worked as an audit analyst in the Audit Services unit. In that capacity, he was required to analyze or review payroll audits prepared by payroll auditors to ensure that they complied with

SCIF guidelines and Workers' Compensation Insurance Rating Bureau (WCIRB) rules and regulations. During his probationary period, appellant received probationary reports that indicated that he was meeting or exceeding expectations, but advised him that he needed to increase his production to meet departmental goals. Appellant's production rate did increase during his probationary period, and he passed probation and advanced to Range B on August 2, 2000, but was again advised to increase his monthly production. For the period April through July 2000, appellant averaged 88 audits per month, while the departmental average was 196 audits per month.

In March 2001, appellant received an evaluation for the period August 2000 through January 2001. That evaluation indicated that appellant had increased his monthly production to 113 audits per month, but the departmental average was 181 audits per month. The reviewer admonished appellant to increase his production to 207 per month.

On May 31, 2001, appellant transferred to the position of Workers' Compensation Insurance Representative (WCIR), in the Broker Services unit. In September 2001, appellant was reassigned to the Underwriting Unit as a District Underwriter. On August 2, 2001, he received a salary increase to WCIR, Range C.

On or about July 3, 2002, appellant received a combined second and third probationary report in the classification of WCIR, Range C, covering the period August 31, 2001 through May 31, 2002. That report recommended that appellant be granted permanent status "with reservations," and identified deficiencies his performance with respect to his error rate and failure to meet departmental production standards.

The performance appraisal suggested that appellant contact the Employee Assistance Program (EAP) if he felt personal problems were interfering with his work.

On February 19, 2003, appellant met with SCIF Employee Assistance Program (EAP) Coordinator Lisa Eng-Beeman to discuss utilizing EAP benefits. Eng-Beeman referred appellant to Dr. Murray Levine, Ph.D, a licensed psychologist. Appellant had actually started seeing Dr. Levine prior to that date because of problems he was experiencing in focusing on his work.

On or about March 6, 2003, SCIF served appellant with a Notice of Adverse Action demoting him to the classification of WCPA, Range B, effective March 21, 2003. The Notice of Adverse Action charged appellant with making numerous errors in his work, failing to keep his desk organized, failing to process new business, and failing to comply with instructions to seek assistance from individuals designated by his supervisors. After appellant appealed that adverse action, the parties entered into a stipulation under which SCIF agreed to withdraw the Notice of Adverse Action and appellant agreed to voluntarily demote to WCPA, Range B (SPB Case No. 03-0690). The Board issued a decision approving the stipulation for settlement on May 19, 2003.

(Basis for Current Action)

Following the demotion action, appellant began working for SCIF Audit Manager JoAn Quintanilla in the SCIF San Francisco District Office on or about March 24, 2003. Instead of his prior position as audit reviewer, however, appellant was assigned to perform the duties of a field payroll auditor. Quintanilla supervised a group of approximately eight payroll auditors. The duties of a field payroll auditor were to visit policyholder offices, collect payroll information from accountants and bookkeepers, and

make sure that employees were classified correctly by category for purposes of determining the correct premium to collect from the policyholders. The field payroll auditors were required to determine three things: the policyholder's payroll, the type of ownership, and the type of exposure to injury for the employees working for the policyholder.

Payroll information collected by a field payroll auditor is also submitted to the WCIRB, which gathers statistical information in order to make recommendations for payroll premium rates. WCIRB randomly audits the field payroll auditors' findings.

Field payroll auditors have 90 days from the date that a policy expires to complete an audit. The WCIRB assesses fines on SCIF for late reporting. The accuracy of an audit is also important because an inaccurate audit report can result in SCIF collecting either too much or too little premium from a policyholder.

When appellant began working as a field payroll auditor under Quintanilla's supervision, he was given the same training as he had received previously as an audit reviewer in 1999. As part of the training, appellant received sample audits to complete with the guidance of a trainer. After the sample audits, appellant "shadowed" other, more experienced, payroll auditors to observe them conduct actual audits in the field. After appellant shadowed other auditors, another auditor was assigned to shadow appellant.

Quintanilla became concerned about appellant's ability to succeed as a field payroll auditor when it took him longer that other new field auditors to complete a computerized training course. Quintanilla extended the time period for another auditor to shadow appellant from two weeks to three weeks.

On May 2, 2003, Quintanilla met with appellant to discuss his slower progress and higher error ratio on the sample audits. In a memo dated May 12, 2003, she explained her concerns and invited appellant to let her know if he needed any additional training.

Appellant continued to experience problems in meeting SCIF's performance standards. After June 4, 2003, when he started conducting audits on his own, his error rate was substantially higher and his production rate substantially lower than that of other new auditors. Throughout the period from June through December 2003, Quintanilla documented his performance deficiencies with memoranda informing him of his need to improve, placed him on a work improvement program that was extended from three to five months. Under the work improvement program, appellant was expected to maintain an error ratio of no more than 20% of completed audits, chargeable returned audits of no more than 2% of completed audits, and a level of production no less than the department's daily average and the average of auditors with similar experience. Appellant received training and one-on-one assistance from other auditors in using the office's automated software program to conduct audits, schedule appointments, and prepare progress reports. Quintanilla continued to make herself available for assistance and referred him to the EAP program.

In a December 15, 2003 memorandum extending appellant's work improvement program, Quintanilla informed appellant that, if he failed to meet any of the requirements of the work improvement program for the next 60 days, she would refer his performance to Human Resources for disciplinary action. Appellant's performance in December 2003

and January 2004 continued to fall well below the levels of other employees in his unit in terms of error rates and production levels.

On February 27, 2004, Quintanilla issued appellant a memo entitled "Referral to Human Resources for Disciplinary Action." The memo also contained a mandatory referral to the EAP program and instructed appellant to contact Eng-Beeman by March 1, 2004.

On March 1, 2004, appellant met with Eng-Beeman. She again referred him to Dr. Levine for the purpose of utilizing EAP benefits and Dr. Levine began treating appellant again on March 3, 2004. Because of the confidentiality of the EAP program, Quintanilla was unaware that Dr. Levine was treating appellant.

By letter dated March 17, 2004, Dr. Levine notified Eng-Beeman that he had diagnosed appellant with Attention Deficit/Hyperactivity Disorder (ADHD). That letter stated, in relevant part (emphasis added):

> As a result of this assessment I find that Mr. Silverman meets the full criteria for a diagnosis of Attention Deficit/Hyperactivity Disorder, combined type. …In addition Mr. Silverman suffers from several Obsessive Compulsive behaviors which cause him problems in both his job setting and his personal life. These behaviors do not reach the full criteria for Obsessive Compulsive disorder.
>
> It is also clear from my work with Mr. Silverman that his job performance problems are not the result of his unwillingness to comply, or a conscious desire to undermine the organization, <u>but are a direct result of this handicapping disorder</u>. …
>
> <u>I believe that with some cognitive/behavioral work directed toward his defense around his disorder, and some work place adaptations, that Mr. Silverman could be able to substantially improve his work performance</u>.

In addition to addressing appellant's condition with psychotherapy and work structuring, Dr. Levine referred appellant to Dr. Alexander Grinberg, M.D., a psychiatrist, so that appellant could be prescribed medication to help him focus.

After receiving Dr. Levine's letter, on March 18, 2004, Eng-Beeman sent Dr. Levine some forms for requesting reasonable accommodation for appellant. Dr. Levine contacted SCIF EEO Coordinator Richard Ridgeway, who also sent Dr. Levine a reasonable accommodation request form and other reasonable accommodation materials.

On March 22, 2004, Ridgeway informed Quintanilla that appellant would be seeking reasonable accommodation for a disability. On April 1, 2004, Ridgeway provided Quintanilla with information on reasonable accommodation for persons with ADHD. The next day, April 2, 2004, Quintanilla contacted the Job Accommodation Network (JAN) for more information. She did not discuss appellant's limitations with him, but initiated a weekly review of his work.

On or about April 12, 2004, appellant submitted a written request for reasonable accommodation. The request describes the effect of appellant's ADHD on his work and states:

> 1. I am suffering from a recently diagnosed Attention Deficit/Hyperactivity Disorder. This disorder has negatively impacted my work as well as my home life.
>
> 2. This impairment has led to problems in organizing tasks, as well as negatively impacting task pacing and focus. This disability has also led to short term memory problems. At work this impairment has resulted in; lengthening the time needed for audits, and has produced problems in the area of lost forms and missed details.

The request then asks for the following accommodations to assist appellant in increasing his audit performance:

> a. Purchase of a moderately priced personal digital assistant (PDA) that utilizes the windows operating system an can be synchronized with Microsoft Outlook. This will allow me to have my calendar, contacts, and notes all in one place and to be synchronized with my desktop computer.

b. Temporary relaxation of production levels while I work on rehabilitating my handicaps.

c. Assistance from senior auditors in developing an effective filing and tracking system.

d. When giving me detailed instructions ask me to write them down at the moment, either with paper note or the PDA.

e. Provide training to increase desktop, laptop and handheld computer competency.

f. Provide 1-2 hrs per week for therapy sessions oriented towards helping me develop the organizational structures and processes to increase production and decrease errors. Request extra EAP sessions to accomplish this goal. Allocate additional time to evaluate errors to see how they occurred and to develop procedures to prevent future occurrences.

g. Provide time for 1 hr/ month for appointment with psychiatrist for trials of medication that may ameliorate some of the symptoms of my disorder.

Dr. Grinberg signed the bottom of the reasonable accommodation request, stating that he agreed completely and that it was absolutely consistent with his clinical impression. At that time, Quintanilla was still not aware of Dr. Levine's involvement in treating appellant.

On April 16, 2004, Quintanilla met with appellant and granted all of his reasonable accommodation requests with the exception of the PDA (because the office's computer system already provided some of the requested functions and the PDA would not be compatible with that computer system) and the request to relax production standards further than she had already done. On April 19, 2004, Quintanilla provided appellant with a job description for him to provide to his doctor.

Appellant began taking medication prescribed by Dr. Grinberg in April 2004. Shortly thereafter, Dr. Levine began to have concerns that the medication was causing appellant to become anxious, irritable, impatient, and less able to focus. On April 22,

2004, Dr. Levine faxed Dr. Grinberg a letter expressing these concerns and notified him that appellant and Dr. Levine had agreed that appellant would stop taking the medication while both doctors worked on addressing appellant's symptoms.

On March 16, 2004 and May 18, 2004, appellant had two accidents with his state car, after which SCIF suspended his driving privileges. Thereafter, SCIF arranged for all of his audits to be accessible by public transportation, until it eventually permitted appellant to use his private vehicle.

On or about May 4, 2004, Quintanilla sent a letter to Dr. Grinberg asking him to complete a Physician's Evaluation for Reasonable Accommodation form. Included with that letter was a job description for appellant's position. After receiving no response from Dr. Grinberg, Quintanilla followed up with another letter dated June 30, 2004.

In late June or early July 2004, appellant began taking a new medication to address his ADHD symptoms. Dr. Levine testified that, at that point, they were still trying to see if the medications would work and to adjust them to meet appellant's needs. In a letter dated July 7, 2004, Dr. Levine requested that appellant be given sick leave for two days, and stated: "He has been prescribed new medication and will need some time for his physician and I to evaluate his response." SCIF granted the request for sick leave.

On or about July 14, 2004, Dr. Grinberg returned the Physician's Evaluation for Reasonable Accommodation to Quintanilla. On that form, Dr. Grinberg checked "yes" in response to the question whether appellant could perform each of the essential functions listed, including completing an average of 385 audits per year and ensuring that 98% of completed audits are error-free. Dr. Grinberg further stated on the form:

"The condition is permanent but with appropriate treatment Mr. Silverman will function well at work."

At appellant's request, on July 20, 2004, Quintanilla provided Dr. Levine with a copy of Dr. Grinberg's response and asked him to let her know whether he agreed with Dr. Grinberg's assessment and, if not, to fill out another Physician's Evaluation form. Dr. Levine did not provide a written response.

On August 4, 2004, Quintanilla spoke with Dr. Levine by telephone. During that conversation, Dr. Levine advised Quintanilla that Dr. Grinberg was dealing with the biochemical part of appellant's ADHD, while Dr. Levine dealt with psychological and occupational therapy to work around his disability. Dr. Levine told Quintanilla that appellant's medications were being adjusted and he wanted to know whether the medication was working to improve appellant's performance.

On August 12, 2004, Quintanilla again spoke to Dr. Levine and informed him that appellant's error rate had improved to the point of hardly any errors, but that he still needed to improve his production level, which was still greatly below that of an average auditor. On August 16, 2004, Quintanilla spoke to appellant and commended him for his decreased error ratio, but told him that he needed to "crank it up" on production.

Appellant continued to receive training and assistance after he submitted his reasonable accommodation request.

After appellant began taking his new medication in July 2004, his error rate decreased dramatically, from 32% between February and June 2004 to zero errors in

October and November 2004.[1] His production quantity continued to remain below the departmental average, however, although appellant asserts that he met the departmental average for November 2004 based upon a report showing the number of audits billed by the Insurance Services department for that month. According to Quintanilla, that report did not reflect the actual number of audits completed and most of the names of auditors whose production was lower than appellant's were senior auditors assigned to handle more complex and lengthy audits.

After August 12, 2004, Quintanilla had no further communication with either Dr. Levine or Dr. Grinberg concerning appellant. According to Quintanilla, she did, however, continue to ask appellant if he needed any further accommodation, but he did not request any. Quintanilla's notes do not reflect any further discussion of reasonable accommodation with anyone after August 2004. Quintanilla did not offer any further accommodation to appellant, nor did she consider reassigning appellant to a vacant position prior to taking disciplinary action.

On December 3, 2004, Quintanilla issued appellant a memorandum discussing his work performance issues. That memorandum acknowledges that, for the period July to November, 2004, appellant's performance improved to the point that his error rate for that period was only 8%, which was below the minimum 20% prescribed in his work improvement program.[2] The memorandum further acknowledges that appellant

[1] Appellant's error ratio was 12.5% in July, 10.5% in August and 13% in September.

[2] As noted above, appellant's error rate for the period February to June 2004 was 32%.

had an error rate of 0% for the month of October 2004.[3] The memorandum states, however, that while the frequency of errors was greatly reduced during this period, appellant continued to commit the same type of error, entering incomplete payroll information, resulting in delay in completing appellant's work. In addition, the memorandum expresses Quintanilla's continued concerns about appellant's ability to complete audits consistently without errors, and that other auditors with the same amount of experience are conducting audits with increasing complexity, few or no errors, and little guidance. The memorandum further states that appellant's performance during the period of February to November 2004 was still below the level of an average auditor and the quality of his audits continues to be unacceptable.

The memorandum further notes that there had been no improvement in appellant's completion rate for the period July to November 2004, and that his daily average of 1.47 audits during this period was well below the department average of 2.14.

Finally, the memorandum recites instances in which appellant was in involved in two accidents in the past, resulting in the suspension of his SCIF vehicle driving privileges and damage to and numerous instances of loss of SCIF equipment.

The memorandum concludes:

> These past ten months have clearly demonstrated that you have shown no significant improvement in your analytical, technical and organizational skills which are required of an auditor to function at an acceptable level
>
> If this poor work performance continues you may be referred to Human Resources for further formal disciplinary action.

[3] As noted above, appellant also had an error rate of 0% for the month of November 2004, and his error rates for July, August and September were also well below the 20% threshold established in his work improvement program.

One month later, January 3, 2005, SCIF served appellant with a notice of adverse action of dismissal, effective January 14, 2005. The record does not reflect appellant's performance for December 2004. Appellant testified, however, that he believed he had met or nearly met the departmental standard of 33 audits.

PROCEDURAL SUMMARY

Appellant filed an appeal of his dismissal in SPB Case No. 05-0078. After hearing, the assigned Administrative Law Judge (ALJ) issued a Proposed Decision recommending that the dismissal be sustained. At its meeting on May 23, 2006, the Board rejected the ALJ's Proposed Decision and determined to hear the case itself.

PRINCIPLES OF LAW

In an appeal to the Board from disciplinary action under Government Code section 19574, the appointing authority bears the burden of proving, by a preponderance of evidence, that the employee engaged in the conduct on which the disciplinary action is based, and that such conduct constitutes one or more of the legal causes for discipline set forth under Government Code section 19572.[4] The employee may defend the adverse action by establishing that the conduct did not occur, was justified, or did not merit the level of penalty imposed.[5]

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[4] See *California Correctional Peace Officers Assoc. v. State Personnel Board* (1995) 10 Cal. 4th 1133, 1153, *citing* Government Code section 19572; *Steen v. City of Los Angeles* (1948) 31 Cal.2d 542, 547; *Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113.

[5] *See Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 204. *See also* Gov't Code § 19584.

Both the federal Americans with Disabilities Act (ADA)[6] and the California Fair Employment and Housing Act (FEHA)[7] aim to insure equal employment opportunity for people with physical and mental disabilities by requiring employers to make reasonable accommodation for their employees with physical and mental disabilities, and by prohibiting employers from discriminating against employees on the basis of disability. In addition, the State Civil Service Act specifically prohibits state departments from denying any employment opportunity to a qualified applicant or employee who is an individual with a disability if the basis for the denial is the department's need to make reasonable accommodation to the applicant or employee's known physical or mental limitations.[8]

Therefore, while a state employer may generally discipline an employee for performance deficiencies, and may hold an employee with a disability to the same standards of conduct as other employees, it may not discipline an employee for performance deficiencies that are related to a disability that the employer has failed to reasonably accommodate. To prevail on a claim of unlawful discharge under the ADA or FEHA, the employee must establish that he is a qualified individual with a disability and that the employer terminated him because of his disability.[9] Generally, to establish a denial of reasonable accommodation before the Board, an employee first must prove that he or she is a qualified individual with a disability and, second, must show that he or

[6] 42 U.S.C. section 12101 et seq.

[7] Government Code section 12900 et seq.

[8] Government Code section 19230.

[9] *Humphrey v. Memorial Hospitals Association* (9th Cir. 2001) 239 F.3d 1128, 1133 (citing *Cooper v. Neiman Marcus Group* (1997) 125 F.3d 786, 790).

she can perform the essential functions of the position with or without reasonable accommodation.[10]

The State Civil Service Act defines an "individual with a disability" to mean any individual who has a physical or mental disability as defined in Section 12926 of the Government Code.[11] Section 12926 is part of FEHA. Subdivision (i) of section 12926 defines “mental disability” as including, but not limited to:

> (1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. For purposes of this section:
>
> (A) "Limits" shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.
>
> (B) A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult.
>
> (C) "Major life activities" shall be broadly construed and shall include physical, mental, and social activities and working.[12]

Once an individual is determined to have a physical or mental disability, an employer must make “reasonable accommodation” for the known physical and mental limitations of an otherwise qualified employee.[13] Once an employer becomes aware that an employee with a disability has requested a reasonable accommodation, the employer has a mandatory obligation to engage in an interactive process with the

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[10] *Diana Henning* (2005) SPB Dec. No. 05-01 at p. 15; *Sylvia C. Solis* (2000) SPB Dec. No. 00-07 at p. 11.

[11] Gov. Code, § 19231.

[12] Subdivision (i) also includes other conditions not relevant here, as well as having a record of or being regarded as having a mental disability.

[13] *Henning*, *supra,* at p. 17; Gov. Code, § 12940(m).

employee to identify and implement appropriate reasonable accommodations.[14] Reasonable accommodation may include such measures as: making existing facilities readily accessible to and usable by individuals with disabilities; job restructuring; reassignment to a vacant position; part-time or modified work schedules; acquisition or modification of equipment or devices; adjustment or modification of examinations, training materials or policies; the provision of qualified readers or interpreters; and other similar actions.[15]

The duty to engage in the interactive process is a continuing one. Moreover, even if an employee cannot perform the duties of his or her position even with reasonable accommodation, the employer has a duty to consider reassignment to a vacant position as a reasonable accommodation. As stated by the Board in *Henning*:

> The fact that an employee can no longer perform the duties of his or her position does not mean that he or she is no longer entitled to reasonable accommodation, as a qualified individual with a disability includes an individual who can perform the essential functions of a "reassigned" position, with or without reasonable accommodation, even if he or she cannot perform the essential functions of his or her current position.[16]

In order to be considered for reassignment as a reasonable accommodation, the position must be one that is funded, vacant, and for which the employee is qualified under applicable civil service rules.[17]

Furthermore, amendments to FEHA enacted in 2001 impose a specific, affirmative obligation on employers to engage in a timely, good faith interactive process

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[14] *Humphrey, supra,* 239 F.3d at p. 1137, citing *Barnett v. U.S. Airlines* (9th Cir. 2000) 228 F.3d 1105, 1114.

[15] *Henning,* at p. 17; Gov. Code, § 12926(n).

[16] *Henning*, *supra*, at p. 17, citing *Barnett v. U.S. Airlines*, supra, at p. 1111.

[17] See *Hastings v. Department of Corrections* (2003) 110 Cal.App.4th 963, 972-977.

with disabled employees who request reasonable accommodation. The duty 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.[18] 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] The law does not, however, prohibit an employer from discharging an employee with a disability where, because of the disability, the employee is unable to perform the essential functions of his or her position even with reasonable accommodation.[20]

The State Civil Service Act also provides a process for terminating a state civil service employee who, for medical reasons, is unable to perform the duties of his or her position or any other position in the agency, and who waives or is ineligible for disability retirement.[21] Under Government Code section 19253.5, however, an appointing power must first determine whether there are any vacant positions to which the employee could transfer or demote before considering termination. The appointing power bears

[18] *Id.*

[19] *Id.,* citing *Humphrey v. Memorial Hospitals Association, supra*.

[20] Gov. Code, § 12940(a)(1).

[21] Gov. Code, § 19253.5.

the burden of proving that the employee is unable to perform the work of his position or any other available position before medically terminating the employee.[22]

ANALYSIS

The parties do not dispute that appellant is an individual with a disability within the meaning of the FEHA and the Civil Service Act. Clearly, SCIF undertook extensive efforts to accommodate appellant's disability when it first learned of appellant's ADHD diagnosis in March 2004. It granted nearly all of appellant's reasonable accommodation requests and had legitimate reasons for denying appellant's request for a PDA and for a further relaxation of performance standards beyond that which it had already done. It provided appellant with extensive additional training and one-on-one assistance in a good faith effort to enable appellant to perform the essential functions of his position.

Unfortunately, the interactive process that SCIF engaged in so diligently when it first learned of appellant's disability broke down after July 2004, just at the time when appellant was trying to adjust his medications to enable him to improve his performance. In fact, between July and October 2004, the new medication appeared to be working, at least to some extent, as appellant's error rate dropped from 32% to zero by October 2004. On July 7, 2004, Dr. Levine told Quintanilla that appellant would need some time for both Dr. Levine and Dr. Grinberg to evaluate his response to the new medication. On August 4, 2004, Dr. Levine again told Quintanilla that appellant's medications were being adjusted and that he was waiting to see whether they had an

[22] *G[redacted] M[redacted]* (1996) SPB Dec. No. 97-05, citing *Newman v. State Personnel Board* (1992) 10 Cal.App.4th 41, 49 and *Overton v. State Personnel Board* (1975) 46 Cal.App.3d 721, 725.

effect on improving appellant's performance. On August 12, 2004, Quintanilla told Dr. Levine that appellant's error rate had improved but that his production level was still unacceptable. At that point, all communication concerning reasonable accommodation ceased. Rather than continue to engage in an interactive process with appellant and his treating providers to see whether the new medication was working or whether any further accommodation would enable him to perform the essential functions of his position, Quintanilla simply documented appellant's performance between July and November 2004 in preparation for dismissing him in January 2005.

The statements made by Dr. Grinberg on July 14, 2004 on the Physician's Evaluation Form, that appellant could perform the specific identified functions listed on the form, did not relieve SCIF of its obligation to continue to engage in the interactive process. On that form, Dr. Grinberg stated that appellant will function well at work "with appropriate treatment," but provided no information about whether or not further treatment or accommodations would be required.

As determined by the Board in *Henning* and the court in *Humphrey*, an employer may not abandon the interactive process if an attempted reasonable accommodation is not working. Instead, an employer has an affirmative obligation to continue to engage in the interactive process to determine whether another accommodation may be effective. If no reasonable accommodation is available that would enable the employee to perform the essential functions of his current position, the employer must consider reassignment to a vacant position as a reasonable accommodation. If such a vacant position exists for which the employee is qualified and can perform, with or without reasonable accommodation, the employer must offer reassignment as a reasonable

accommodation, and cannot simply dismiss an employee who, for reasons related to a disability, cannot perform the essential functions of his job.

Once it became apparent that appellant was still not meeting the SCIF's performance standards despite the change in his medication in July 2004 and the accommodations already provided, SCIF had an affirmative obligation to engage in the interactive process to explore other possible accommodations. If appellant could not be reasonably accommodated in his current position, SCIF then had to consider reassignment as a reasonable accommodation. If, after engaging in an interactive process over such a reassignment, the parties were unable to reach an agreement, SCIF would then be free to consider options to terminate appellant's employment, such as medical demotion, transfer, or termination pursuant to Government Code section 19253.5, if appellant waives or is ineligible for disability retirement.

As the Board held in *M* [redacted], departments have an affirmative obligation to attempt to minimize the impact of a medical disability on an employee's job status. While the Board strongly recommends that departments utilize the provisions of section 19253.5 when available, the language of that statute is permissive and does not mandate use of that procedure to terminate an employee whose performance fails to meet the employer's standards.[23]

Therefore, as an alternative, if, after engaging fully in the interactive process, a department cannot reasonably accommodate an employee's disability either in the current position or by reassignment, it could pursue disciplinary action based upon the

[23] See *M* [redacted], *supra* (department is not required to waive minimum qualifications to reassign an employee with a disability).

performance deficiencies. Because SCIF utterly failed to consider whether any other options existed that would have allowed appellant to remain employed, appellant's dismissal must be revoked.

CONCLUSION

There is no question that SCIF initially made substantial, good faith efforts to reasonably accommodate appellant's disability by temporarily relaxing performance standards and providing additional training and assistance in an effort to enable appellant to perform the essential functions of his job. Significantly, appellant substantially reduced his error rate to a more acceptable level. Once it became apparent that those accommodations were insufficient, however, to address appellant's productivity issues, SCIF had a continuing obligation to engage in the interactive process to determine whether any other reasonable accommodations would enable appellant to perform the essential functions of his job. If no such accommodations were available, SCIF had an obligation to consider reassignment as a reasonable accommodation rather than summarily terminating appellant's employment.

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 Jonathan Silverman from the position of Workers' Compensation Payroll Auditor, Range B, with the State Compensation Insurance Fund, is revoked;

2. The State Compensation Insurance Fund shall reinstate appellant to his position as a Workers' Compensation Payroll Auditor, Range B;
3. The State Compensation Insurance Fund shall pay to Jonathan Silverman all back pay and benefits, if any, that would have accrued to him/her had he/she not been dismissed, plus interest at the rate of seven (7) percent per annum;
4. The State Compensation Insurance Fund shall engage in an interactive process with appellant to determine whether, with reasonable accommodation, he can perform the essential functions of his position as Workers' Compensation Payroll Auditor, Range B;
5. If, following the exhaustion of the interactive process, appellant cannot be reasonably accommodated in the position of Workers' Compensation Payroll Auditor, Range B, the State Compensation Insurance Fund shall consider whether reassignment to a vacant position is available as a reasonable accommodation of appellant's disability;
6. If, following the exhaustion of the interactive process with respect to reassignment, appellant cannot be reasonably accommodated by reassignment to any other position within SCIF, SCIF may invoke the provisions of Government Code section 19253.5 or Government Code section 19572 to terminate appellant's appointment, provided, however, that appellant shall retain all rights, remedies and defenses available under those provisions;

7. 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 salary and benefits due appellant.
8. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD

Sean Harrigan, President
Anne Sheehan, Vice President
William Elkins, Member
Maeley Tom, Member
Patricia Clarey, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on January 9, 2007.

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Floyd D. Shimomura
Executive Officer
State Personnel Board

[Silverman-dec]