

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

In the matter of the Appeal by	)	SPB Case No. 38025
	)	
<b>JULIE L. FOREMAN</b>	)	<b>BOARD DECISION</b>
	)	(Precedential)*
From non-punitive termination from the	)	
position of Psychiatric Technician at the	)	<b>NO. 98-04</b>
Lanterman Developmental Center, Department	)	
of Developmental Services at Pomona	)	June 2-3, 1998

APPEARANCES: Ken Murch, Consultant, California Association of Psychiatric Technicians, on behalf of appellant, Julie L. Foreman; Nancy Irving, Labor Relations Specialist, Department of Developmental Services, on behalf of respondent, Department of Developmental Services

BEFORE: Florence Bos, President ; Richard Carpenter, Vice President; Ron Alvarado, James M. Strock, and Lorrie Ward, Members

Government Code § 19585, the non-punitive termination statute, permits a Department to terminate, demote or transfer an employee when the only cause for action against the employee is the employee's failure to meet a requirement for continuing employment. In this case, appellant, a licensed Psychiatric Technician, who was off work because of a work-related injury, failed to complete the continuing education requirements needed to renew her license and the Department terminated her. Appellant requested a light-duty assignment, but was told by the Department that there would be no work for her until she was cleared to return to her normal duties.

\*Pursuant to Government Code §§ 19582.5 and 11425.60, this decision is designated as precedential in part and certified for partial publication in accordance with the Board's resolution adopted June 2-3, 1998.

In this decision, the State Personnel Board (Board) finds that the non-punitive termination statute cannot be invoked to deprive an employee of her permanent civil service status based on her failure to timely renew her license during a period when she was off work on an approved leave for a work-related injury and where the Department made it clear that there would be no work for her until she could return to her full duties. The Board also finds that, absent prejudice to the appellant, the fact that the properly titled "Notice of Non-Punitive Termination" cited the wrong code section does not render the notice defective.

## **BACKGROUND**

### Procedural Summary

This case is before the State Personnel Board for determination after the Board granted a Petition for Rehearing in the matter of the appeal of Julie Foreman from non-punitive termination from the position of Psychiatric Technician at the Lanterman Developmental Center, Department of Developmental Services at Pomona. The Administrative Law Judge (ALJ) who heard the appeal sustained the non-punitive termination. After a review of the record in this case, including the transcript, exhibits, and the written and oral arguments of the parties, the Board finds that the Department inappropriately invoked the non-punitive termination statute. The Board revokes appellant's dismissal and orders appellant immediately reinstated.

### Factual Summary

Appellant has worked as a Psychiatric Technician since her appointment November 7, 1988. The job specifications for Psychiatric Technician require an employee to maintain a license issued by the Board of Vocational Nurses and Psychiatric Technician Examiners (BVNPTE).

On April 15, 1995, the BVNPTE sent appellant written notice that her license renewal was due and that, if not renewed, her license would expire on July 28, 1995. The BVNPTE notified appellant that she had to complete 30 continuing education units and pay a \$160 fee in order to have her Psychiatric Technician license renewed.

On May 6, 1995, while appellant was working, a laundry cart fell on and injured her right hand. Appellant went off work on Industrial Disability Leave (IDL). Appellant asked her supervisor, Toni Kimberling, for light duty or alternative duty so that she could work while recovering from her injury but, after checking with the Nursing Coordinator and the Health and Safety Officer, Kimberling informed appellant that no alternative duty or light duty positions were available as long as appellant could not work as a psychiatric technician. Appellant was told that she would not be called to work until she was cleared to return to her normal duties. Appellant was not cleared to return to work until September 14, 1995.

Sometime in June and again in July, Kimberling reminded appellant that she needed to complete her continuing education requirements. Kimberling reminded appellant that, unless she had the license, she would not be able to work as a Psychiatric Technician.

As of July 28, 1995, appellant had yet to complete the necessary continuing education units. On July 28, 1995, the Department served a notice of termination on appellant which stated that appellant's non-punitive termination would be effective on August 4, 1995. The Department properly identified the notice as a "Notice of Non-Punitive Termination" but, instead of referring to Government Code § 19585, the non-punitive termination statute, the Department referred in error to Government Code § 19574, the statute which governs disciplinary action. On August 11, 1995, the Department served an amended notice correcting the statutory reference to conform to the heading.

Documentary evidence demonstrates that, as of July 25, 1995, appellant had paid the \$160.00 fee required by BVNPTE, but had not yet met her continuing education requirements. Linda Montoya, the Examination and Licensing Coordinator for the Vocational Nurse and Psychiatric Technician Program, testified at hearing that a person who pays the licensing fee but who has not yet completed the continuing education units is issued an inactive license. A licensee on inactive status may reactivate as soon as the licensee demonstrates that he or she has completed 30 units of continuing education.<sup>1</sup> Montoya testified that a licensee on inactive status may not practice as a Psychiatric Technician.

Since appellant paid her fee before her license expired but had not yet completed her continuing education units, BVNPTE placed her on inactive status. In his Proposed Decision, the ALJ found that appellant "made a diligent effort to complete [her continuing education] requirements in a timely manner" but that, because of her hand injury, was "unable to complete the continuing education requirements because she was unable to take the notes that she needed to help her learn the course material."

By August 4, 1995, the effective date of her termination, appellant had completed the necessary continuing education units and submitted the information to the Department but had not yet submitted the documentation to the BVNPTE. On August 11, 1995, the BVNPTE acknowledged receipt of appellant's documentation by issuing appellant a new license.

## **DISCUSSION**

### Mislabeled the Notice

Appellant argues that the Department's July 28, 1995 notice is defective because the Department erred in labeling the notice as an action taken under Government

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<sup>1</sup> Business and Professions Code § 2592.6

Code § 19574, the statute that governs disciplinary action, instead of Government Code § 19585, the non-punitive termination statute. All of the other information on the notice was correct: the action was identified as a non-punitive termination; the effective date was correct; and appellant's appeal rights were correctly articulated.

In Cagle Moore, after the Department mislabeled an action as being taken pursuant to the wrong code section, the Board found that the error had no significance because it caused the appellant no prejudice.<sup>2</sup> Likewise, in the present case, the Board finds that appellant has failed to demonstrate that she was prejudiced by the technical error in citation of the statute and finds the July 28, 1995 notice to be effective.

#### The Non-punitive Termination

A permanent employee may be non-punitively terminated under Government Code § 19585 when the only cause for action against the employee is the employee's failure to meet a requirement for continuing employment.<sup>3</sup> A department may non-punitively terminate, demote or transfer an employee who fails to meet the requirements for continuing employment prescribed by the Board in the specification for the class to which the employee is appointed.<sup>4</sup>

The facts are undisputed that appellant held the position of Psychiatric Technician and that, in order to work as a Psychiatric Technician, she was required to maintain her Psychiatric Technician license. The issue here, however, is whether appellant was required to keep her license current even though she was off work for a work-related injury and even through the

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<sup>2</sup> (1996) SPB Dec. No. 96-12.

<sup>3</sup> Government Code § 19585, subdivision (a).

<sup>4</sup> Government Code § 19585, subdivision (b).

Department had informed her that it had no work for her until she could return to her Psychiatric Technician duties.

The ALJ, who heard the testimony of the witnesses, found that appellant was diligent in her attempt to complete her licensing requirements, but was unable to do so because of her injury. Absent evidence in the record that a credibility determination is unworkable, the Board generally accepts the credibility determinations made by the ALJ.<sup>5</sup> Thus, the Board adopts the ALJ's determination as its own.

The Department argues that, pursuant to Government Code § 19585 and the Board's interpretation of that statute in George Lannes,<sup>6</sup> it has discretion to terminate appellant. Lannes concerned a 21-year employee who lost his driver's license after a drunk-driving conviction. Lannes was employed as a Structural Steel Painter, a classification that required possession of a valid California Class 1 driver's license. At the time of his termination, Lannes was at work, performing the duties of his position. Although Lannes had been assigned duties that did not require that he possess a driver's license, and although the Department could have continued to accommodate him, the Board found the Department was not required to do so and sustained Lannes' termination.

The Board finds the situation in Lannes to be easily distinguishable from the circumstances in this case. Government Code § 19585 applies when an employee is performing or expected to perform the duties of his or her position. As the Department notes in its brief to the Board, prior to passage of Government Code § 19585, departments were forced to use the disciplinary process to terminate employees whose only offense was failure

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<sup>5</sup>Linda Mayberry (1994) SPB Dec. No. 94-25.

<sup>6</sup>(1992) SPB Dec. 92-10.

to maintain a license. Thus, the purpose of the statute was to make it easier for a department to terminate an employee who, solely because of a lack of a license or other necessary professional qualifications, could not work because he or she no longer met the requirements for continuing employment as specified by the Board. Clearly, the Legislature intended that a department should not be saddled with an employee that the department cannot assign to work as it sees fit because the employee does not meet the job specifications.

Lannes was working at the time of the non-punitive termination. In his case, the Department's flexibility in assigning Lannes was limited because he lacked a driver's license.

In contrast, in this case, appellant was on an approved, industrial disability leave at the time of the non-punitive termination. Not only was appellant off work, she was specifically told she would not be called in to work for the duration of her injury. Thus, it was not appellant's failure to meet her job specifications that deprived the Department of the full range of appellant's services; it was her work-related injury and the Department's determination that she could not work in her position because of that injury. The evidence presented at hearing demonstrated that, *but for* her work-related injury, appellant would have continued to work and would have been able to maintain her license. We cannot accept that in enacting Government Code section 19585, the legislature intended that an employee lose her rights to permanent civil service status solely because she fails to keep her license current while off work on an approved industrial disability leave, having had her request to return to work denied.

The Board concludes that the Department erred in its non-punitive termination of appellant and orders appellant returned to work.

**[The remainder of this Decision is not precedential and is not certified for publication]**

**STATE PERSONNEL BOARD**

Florence Bos, President  
Richard Carpenter, Vice President  
Ron Alvarado, Member  
James M. Strock, Member  
Lorrie Ward, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on June 2-3, 1998.

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Walter Vaughn  
Executive Officer  
State Personnel Board

[FORMAN2.F.CEB.DEC]