

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)
)
 ELAINE GONZALES) Case No. 25471
)
 From termination without fault from)
 the position of Service Assistant)
 with the Department of Water)
 Resources at Bakersfield)

In the Matter of the Appeal by) Case No. 25472
)
 EDWARD D. CLARK) **BOARD DECISION**
) (Precedential)
 From termination without fault from)
 the position of Service Assistant) **NO. 91-02**
 with the Department of Water)
 Resources at Bakersfield) November 5, 1991

Appearances: Victor Manrique, Attorney, representing appellants, Elaine Gonzales and Edward Clark; Ralph W. Gatien, Attorney, Department of Water Resources, representing Respondent. Before Chavez, President; Burgener, Stoner, and Carpenter, Members.

DECISION

These consolidated cases are before the State Personnel Board (SPB or Board) for determination after the Board rejected the proposed decisions of the Administrative Law Judge (ALJ) in appeals by two Service Assistants who had been terminated without fault from their positions with the Department of Water Resources (Department) at Bakersfield. The ALJ, in two separate decisions, found that the appellants, Elaine Gonzales (Gonzales) and Edward D. Clark (Clark), each failed to meet the requirements of the class specification for Service Assistant and sustained the terminations. The ALJ declined to examine the propriety of each appellant's

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termination from the apprenticeship program on the grounds that such review would be the function of the Joint Apprenticeship Committee and not a function of the SPB.

The Board determined to decide the cases itself, based upon the record and additional arguments to be submitted both in writing and orally. After review of the entire record, including the transcripts and briefs submitted by the parties, and after having listened to oral argument presented on July 2, 1991, the Board rejects the proposed decisions of the ALJ for the reasons that follow.

FACTUAL SUMMARY

General Background

As more particularly set forth below, both Gonzales and Clark served first in the Service Assistant (Maintenance and Operations) classification, were appointed to the classification of Civil Maintenance Apprentice, failed the apprentice training program, were reinstated to the Service Assistant classification, and were thereafter terminated from that classification without fault. The SPB specification defines the purpose of the Service Assistant classification as follows:

Under close supervision, to learn and perform a wide variety of general operations and maintenance duties; to perform unskilled tasks and helper work; and to do other related work in preparation for promotion into an apprentice class in either electrical maintenance and mechanical maintenance, civil maintenance, or plant operations.

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The same specification defines the class as "a preapprenticeship class" designed to qualify incumbents for various named apprentice classes and describes the job characteristics, in pertinent part, as follows:

Employees in this class perform necessary and productive work under supervision while receiving comprehensive training in general operations and maintenance work. Incumbents are expected to maintain satisfactory progress in learning through on-the-job training and formal academic training to attain a level which would qualify for the apprenticeship class examinations. Failure to become qualified for appointment to one of the apprenticeship classes within a 24-month period will be considered evidence of unsatisfactory progress and cause for termination.

The SPB specification for the classification of Civil Maintenance Apprentice provides:

Under close supervision, as an indentured apprentice, to learn the progressively skilled work in the civil maintenance of facilities associated with the State Water Project and in flood control yards, and to do other work as required. This class is designed for entrance in an apprentice training program leading to journey level status as a Maintenance Journeyworker, Water Resources. Inability to maintain satisfactory progress in the academic and vocational work of the apprenticeship program is sufficient cause for separation from employment.

The record is far from clear as to the specifics of the relationship between the Service Assistant and Civil Maintenance Apprentice classes. Although the evidence demonstrated that employees who are in the Service Assistant class may take an examination to get on an eligibility list for appointment to the

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Civil Maintenance Apprentice class, there was no evidence presented to show the minimum qualifications or status necessary to take the examination. Once appointed to the Civil Maintenance Apprentice class, the employee signs an apprenticeship contract and is required to enter a training program which lasts three years. The training program requires the apprentices to complete successfully a number of academic classes and book work. Failure to pass any class may result in cancellation of the apprenticeship contract and termination from the program. An employee may appeal the cancellation of the apprenticeship contract in accordance with the provisions of the Shelley-Maloney Apprentice Labor Standard Act of 1939, Labor Code sections 3070 et. seq. As more fully explained below, once the cancellation of the apprenticeship contract becomes final, the Department should institute proceedings to terminate the employee without fault from the Civil Maintenance Apprentice class pursuant to Government Code section 19585.

There is no specified ceiling on the number of times an employee may take the examination to get on an eligibility list for appointment to the Civil Maintenance Apprentice class. Thus, presumably, an employee who has failed the apprentice training program, and who has been removed from the Civil Maintenance Apprentice class, may attempt to re-establish eligibility for reappointment to an open position.

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Most employees who enter the Civil Maintenance Apprentice classification apparently complete the training program successfully. In the past, the Department has dealt with employees who failed to complete successfully the apprentice training program by reinstating them to the Service Assistant classification. In some cases, once so reinstated, the employee has been allowed to remain in the Service Assistant class until such time as he or she becomes eligible for reappointment to the Civil Maintenance Apprentice classification. The Department now takes the position that such employees should be terminated from their positions as Service Assistants without fault.

The relevant employment histories of each of the individual appellants follows.

Gonzales

Gonzales was appointed as a Mechanical Technical Occupational Trainee on March 12, 1984 and was appointed to the class of Service Assistant July 9, 1984.¹

¹The record produced at hearing does not reflect the precise date on which Gonzales was first appointed to the Service Assistant classification. Gonzales testified that she was appointed in 1985. Her Employee History Summary, however, indicates July 9, 1984 as the effective date of appointment. The Board takes official notice of Gonzales' Employee History Summary.

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On August 1, 1986, Gonzales entered the Maintenance and Operations Apprenticeship Program for the first time.² Gonzales' first apprenticeship contract was canceled on June 17, 1987, as a result of her having failed to pass the mathematics portion of the program, and she was reinstated to her position as a Service Assistant, effective July 1, 1987.

On December 21, 1987, Gonzales passed a written and oral examination that qualified her to become a Civil Maintenance Apprentice in the 1988 class and she began the program in January 1988. After failing the course in asphalt, concrete and cement, Gonzales was informed her apprenticeship contract was canceled and she was being returned to the Service Assistant class, effective October 13, 1988. Gonzales testified that although she was shown a copy of the letter canceling her apprenticeship contract, she never actually received a copy of the letter and was unaware of her right to appeal the cancellation to the Joint Apprenticeship Committee. On January 18, 1989, Gonzales was served with a letter terminating her without fault from her position as a Service Assistant, effective February 15, 1989.

At the time of the hearing, Gonzales had not retaken the examination for the apprenticeship program.

²The record does not reflect the date on which Gonzales first became eligible for appointment.

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Clark

Clark was also a Mechanical Technical Occupational Trainee before becoming a Service Assistant on June 21, 1985.³ He was appointed to the classification of Civil Maintenance Apprentice on December 21, 1987 and entered the apprentice training program for the first time in January 1988. His apprenticeship contract was canceled on September 16, 1988 based upon his failure to pass the mathematics course and he was reinstated to the class of Service Assistant effective that date. Clark testified that he was unaware that termination from the apprentice training program meant he would also be terminated from the Service Assistant position.

Clark subsequently reapplied for reinstatement to the Civil Maintenance Apprentice class. He took both the oral and written examination and achieved a score of 97% which placed him the first rank of an eligibility list dated November 17, 1988 with a duration of one year.⁴ On January 18, 1989, Clark was served with a letter terminating him without fault from his position as Service Assistant, effective February 15, 1989.

³The record at hearing does not reflect the exact date that Clark entered the Service Assistant classification. He testified that he became a Service Assistant in 1986. His Employee History Summary, however, indicates June 21, 1985 as the effective date of appointment. The Board takes official notice of Clark's Employee History Summary.

⁴At the time of the hearing, Clark had not seen the list but was hoping he would be readmitted to the program if a position opened up.

THE ALJ'S PROPOSED DECISIONS

In his proposed decisions, the ALJ concluded:

Respondent correctly alleges that appellant had failed to meet the requirement of the class specifications to make adequate progress in learning. The class specification for Service Assistant deals directly with the failure to achieve apprenticeship status and the class specification for Civil Maintenance Apprentice deals directly with a failure to maintain apprenticeship status.

Thus, the ALJ found that by failing the apprenticeship training program, Appellants failed "to meet a requirement for continuing employment" and were therefore justifiably terminated pursuant to Government Code section 19585.

In addressing the appellants' contentions that their terminations from the apprentice training program were unjustifiable, the ALJ stated:

Appellant has raised the issue of the propriety of his [her] termination from the apprenticeship program. Review of this would be the function of the Joint Apprenticeship Committee and not a function of the State Personnel Board.

In finding that the appellants could not challenge the propriety of their terminations from the apprenticeship program, ALJ found, in effect, that failure of the apprenticeship training program is grounds for automatic termination from the Service Assistant class.

ISSUES

1. To what extent, if any, may the State Personnel Board review the factual basis for an appellant's termination from the

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apprenticeship program including the reasonableness of any action taken by the California Apprenticeship Council?

2. Did the Department act lawfully in: (1) reinstating Gonzales and Clark to the Service Assistant class after they failed to complete successfully the apprenticeship training program; and (2) thereafter applying the non-punitive termination statute (Government Code section 19585) to remove Gonzales and Clark from the Service Assistant class based on their failure to meet a "requirement for continuing employment?"

DISCUSSION

Cancellation of Apprenticeship Contract

The ALJ noted that the appellants raised in the hearing the propriety of their termination from the apprenticeship program, and concluded that review of that termination was a function of the Joint Apprenticeship Committee and not a function of the State Personnel Board. We agree.

The Shelley-Maloney Apprentice Labor Standards Act of 1939 (Act), located at Chapter 4 of Division 3, Sections 3070 et seq., of the Labor Code (See also 8 Cal Code of Regs. Section 200 et seq.) provides a uniform approach for training of individuals in skilled occupations through formal apprenticeship programs. Apprentices are trained under the supervision, administration and guidance of the California Apprenticeship Council and Joint Apprenticeship Committee in accordance with State law.

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The California Apprenticeship Council is within the Division of Apprenticeship Standards in the Department of Industrial Relations (Section 3070.) The Council's role is to aid the Director of Industrial Relations in "formulating policies for the effective administration of this chapter" (Section 3071). The administrator of the Act is the chief of the Division of Apprenticeship Standards (Section 3073). The function of a joint apprenticeship committee "... shall be to establish work processes, wage rates, working conditions for apprentices, the number of apprentices which shall be employed in the trade under apprentice agreements, and aid in the adjustment of apprenticeship disputes in accordance with standards for apprenticeship set up by the California Apprenticeship Council" (Section 3076).

An apprentice agreement is signed by the apprentice and representatives of a joint apprenticeship committee. Each apprenticeship agreement shall contain specific contents and statements as proscribed by Labor Code Section 3078. Under Section 3078, subdivision (g), the following statement must be contained in the apprentice agreement, "... after the probationary period the apprentice agreement may be terminated by the administrator by mutual agreement of all parties thereto, or canceled by the administrator for good and sufficient reason." An agreement must also, under Section 3078, subdivision (h), contain a provision that "all controversies or differences concerning the

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apprentice agreement which cannot be adjusted locally, or which are not covered by collective-bargaining agreement, shall be submitted to the administrator for determination as provided for in Section 3081." (See also 8 Cal Code Regs Sections 201 and 251.)

All administrative remedies as set forth in the Act must be exhausted before an individual can commence action in court for the enforcement of an apprentice agreement or damages for the breach of any apprentice agreement (Section 3085). Sections 3081 through 3085 provide administrative remedies to redress violations of apprentice agreements. Once a complaint has been made by any interested person, the administrator may, in accordance with Section 3081, hold hearings, inquiries and other proceeding necessary to any investigations and determinations under the authority of the reasonable rules and procedures prescribed by the California Apprenticeship Council. (See also 8 Cal Code of Regs Section 202.) "Any person aggrieved by the determination or action of the administrator may appeal therefrom to the California Apprenticeship Council, which shall review the entire record and may hold a hearing thereon after due notice to the interested parties." (Section 3082.) (See also 8 Cal Code of Regs Section 203.) "The decision of the California Apprenticeship Council as to the facts shall be conclusive if supported by the evidence and all orders and decisions of the California

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Apprenticeship Council shall be prima facie lawful and reasonable."

(Section 3083.)

The right of an aggrieved party to appeal the decision of the California Apprenticeship Council is set forth in Section 3084, which provides:

Any party to an apprentice agreement aggrieved by an order or decision of the California Apprenticeship Council may maintain appropriate proceedings in the courts on questions of law. The decision of the California Apprenticeship Council shall be conclusive if the proceeding is not filed within 30 days after the date the aggrieved party is given notification of the decision.

The Act does not give any person or entity (other than the administrator and the California Apprenticeship Council) the authority to review the factual basis for the termination of an apprentice agreement. Thus, the State Personnel Board does not have the authority to review the factual basis for the appellant's termination from the apprenticeship program including the reasonableness of any action taken by the Department's Joint Apprenticeship Committee.

In these cases, Appellants failed to appeal the cancellation of their apprenticeship contracts through the proper channels. Appellants should have litigated those cancellations through the proper channels and, having failed to do so, cannot challenge those

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cancellations before this Board.⁵ In deciding this case, this Board takes as a given the fact that the appellants failed the apprenticeship training program. Our inquiry does not end there, however: in order to ascertain the propriety of the Department's non-punitive termination of Appellants from the Service Assistant class, we must first examine whether the Department's removal of Appellants from the Civil Maintenance Apprentice Class and reinstatement to the Service Assistant class complied with the civil service statutes and regulations.

Reinstatement to and Termination From
Service Assistant Class

The Department has admitted its uncertainty as to the status of employees who fail to complete the apprentice training program and as to the procedure for terminating them. Both the testimony of the Department's Personnel Manager at hearing and the representations made by the Department's attorney during oral argument reflect a general confusion as to what should happen to employees who are appointed to an apprenticeship class, but who are unsuccessful in completing the apprentice training program.

We find that the language and apparent intent of the specification for the Service Assistant class provide some guidance

⁵Appellants' argument that they did not receive proper notice of their right to appeal the cancellation of their contracts should have been brought to the attention of the Administrator of the Act once appellants learned they had that right and, if necessary, raised in a court proceeding after exhaustion of the administrative remedies set forth in the Act.

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as to the status of the employee who maintains satisfactory progress in learning while in the Service Assistant class, passes an apprenticeship examination and is appointed to an apprentice class, but for some reason fails to complete the apprentice training program. The specification itself provides support for the Department's characterization of the Servant Assistant class as an up-and-out class, designed to serve only as a stepping stone to an apprentice class. As noted more particularly above (see Factual Summary), the specification defines the class as a "pre-apprenticeship class" and requires incumbents of the Service Assistant class to maintain:

...satisfactory progress in learning...to attain a level which would qualify for the apprenticeship class examinations. (Emphasis added.)

The specifications further provide that:

Failure to become qualified for appointment to one of the apprenticeship classes within a 24-month period will be considered evidence of unsatisfactory progress and cause for termination. (Emphasis added.)

Clearly, in the eyes of the Department, the appellants in the instant case maintained progress in learning sufficient to enable them to qualify for the apprenticeship class examinations and for appointment to an apprenticeship class.

The appellants did not, however, meet the expectations set forth in the specification for Civil Maintenance Apprentice in that they did not:

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"...maintain satisfactory progress in the academic and vocational work of the apprenticeship program..."

Their failure to maintain such progress constituted, pursuant to the specification, "...sufficient cause for separation from employment."

Thus, the Department had grounds to institute non-punitive termination proceedings against Appellants to terminate them from the Civil Maintenance Apprentice class under Government Code section 19585, which provides, in part:

(a) This section shall apply to permanent and probationary employees and may be used in lieu of adverse action and rejection during probation when the only cause for action against an employee is his or her failure to meet a requirement for continuing employment, as provided in this section. (emphasis added)...

(b) An appointing power may terminate, demote, or transfer an employee who fails to meet the requirement for continuing employment...

(d) For purposes of this section, requirements for continuing employment shall be limited to the acquisition or retention of specified licenses, certificates, registrations, or other professional qualifications, education, or eligibility for continuing employment or advancement to the fully qualified level within a particular class series....

(f) The employee shall receive at least five days' written notice of the termination, demotion or transfer and shall have the right to appeal the action to the board...

(g) When the requirements for continuing employment have been regained, terminated, demoted, or transferred employees may be reinstated pursuant to Section 19140...

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After the appellants failed the apprentice training program, the Department sent them notification of the cancellation of their apprenticeship agreements, "demotion" from the Civil Maintenance Apprentice class and "reinstatement" to the Service Assistant class. The notification provided, in part, as follows:

...Because of your removal from the apprenticeship program, you will be demoted to Service Assistant..., the classification in which you last held permanent status...

The Notice of Personnel Action subsequently received by Appellants indicated their mandatory reinstatement to the civil service permanent full time position of Service Assistant.

Although the Department was correct in its assumption that, having failed the apprentice training program, the Appellants were no longer entitled to remain in the Civil Maintenance Apprentice Class, the Department erred in attempting to demote them into the Service Assistant class.⁶ Since the Service Assistant class is an up-and-out class, instead of demoting Appellants back to the Service Assistant class, the Department should have terminated

⁶The record is unclear as to what, if any, civil service mechanism the Department was relying on when it demoted Appellants. The letter notifying Appellants of cancellation of the apprenticeship agreements and demotion to the Servant Assistant class did not identify the action taken as a "non-punitive demotion" under Government Code section 19585. The letter did not advise Appellants of their right of appeal to the SPB of their demotion from the Civil Maintenance Apprentice class to the Servant Assistant class, but only advised them as to their right to appeal the cancellation of their Apprenticeship Agreement to the Department of Industrial Relations, Division of Apprenticeship Standards pursuant to Labor Code section 3081.

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Appellants based on their "failure to advance to the fully qualified level within a particular class series." The Appellants would then have had the opportunity to appeal their non-punitive terminations and/or to reapply for reinstatement to the Civil Maintenance Apprentice class by re-establishing their eligibility for reappointment.

By demoting Appellants back to the Service Assistant class, the Department misled the appellants into believing that they could continue working in the Service Assistant class. Nothing in the Notice of Personnel Action received by Appellants indicated that Appellants' employment in the Service Assistant class would be terminated; in fact, both the notice of cancellation of apprenticeship agreement and the Notice of Personnel Action appear to presume continuing employment. A few months after their reinstatement, Appellants were, however, without warning, terminated from their Service Assistant positions. Appellants both testified that they were unaware that cancellation of their apprentice contracts also meant termination of their employment as Service Assistants. In fact, the Department actually allowed the appellants to continue to work as Service Assistants for several months before terminating them.

CONCLUSION

We find the demotion of Appellants to the Service Assistant class was improper for a number of reasons: the "demotion" from

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the Civil Maintenance Apprentice class to the Service Assistant class frustrated the purpose and intent of the Service Assistant class which was designed as a pre-apprenticeship, up-and-out class; the "demotion" was procedurally incorrect as Appellants were not notified that they had a right to appeal, at the time it occurred, from the Department's action against them which could only be construed as a "non-punitive demotion" into the Service Assistant class; the appellants were misled into believing they were entitled to continued employment in the Service Assistant class after the putative demotion had occurred.

Since we find that the Department erred in demoting Appellants to the Servant Assistant class, we have no choice but to put the parties back into the positions they would have been in had the error not occurred. We need not decide the issue of whether the Department erred in terminating Appellants from the Service Assistant class since we find they should never have been demoted to their positions in that class in the first place. For all of the reasons set forth above, we order that the appellants each be reinstated to the Civil Maintenance Apprentice class with back pay and benefits as appropriate. This order is made, however, without

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prejudice to the Department's right to institute non-punitive termination proceedings upon proper notice to Appellants.

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 above-referenced non-punitive terminations taken against ELAINE GONZALES (SPB Case No. 25471) and EDWARD D. CLARK (SPB Case No. 25472) are revoked.

2. The Department of Water Resources shall reinstate said Appellants to their respective positions in the classification of Civil Maintenance Apprentice.

3. The Department shall pay Appellants all back pay and benefits that would have accrued to them had they not been wrongfully terminated, less any compensation they earned or reasonably might have earned from the time of the unlawfully executed terminations from the Civil Maintenance Apprentice class to the date of reinstatement.

4. This matter is hereby referred to the 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 Appellants.

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5. This opinion is certified for publication as a precedential decision (Government Code section 19582.5).

STATE PERSONNEL BOARD*

Richard Chavez, President
Alice Stoner, Vice-President
Clair Burgener, Member
Richard Carpenter, Member

*Member Lorrie Ward did not participate in this decision

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on November 5, 1991.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board