

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

In the Matter of the Appeal by	)	SPB Case Nos. 98-4118 and 99-0772
<b>DIANNA HENNING</b>	)	<b>BOARD DECISION</b>
	)	(Precedential)
From denial of request for reasonable	)	
accommodation from the position of	)	<b>NO. 05- 01</b>
Institution Artist/Facilitator and from medical	)	
demotion from that position to Business	)	January 11, 2005
Service Officer I, Specialist with the	)	
California Correctional Center, Department	)	
of Corrections at Susanville	)	

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**APPEARANCES:** Richard Werner, Attorney at Law, on behalf of appellant, Dianna Henning; Christopher E. Thomas, Labor Relations Counsel, Department of Personnel Administration, on behalf of respondent, Department of Corrections.

**BEFORE:** William Elkins, President; Maeley Tom, Vice President; Ron Alvarado, Sean Harrigan and Anne Sheehan, Members.

**DECISION**

This case is before the State Personnel Board (SPB or Board) to review: (a) whether the Department of Corrections (CDC or Department) illegally denied the request for reasonable accommodation submitted by Dianna Henning (appellant) and (b) whether CDC illegally medically demoted her from the position of Institution Artist/Facilitator to the position of Business Service Officer I.

In this decision, the Board: (1) finds that, under the substantially limited test in effect when appellant brought these appeals, taking into consideration mitigating measures, appellant qualified as an individual with a disability who was entitled to reasonable accommodation; (2) concludes that, while appellant was not entitled to either of the two particular accommodations she requested, CDC was obligated to engage with her in an interactive process to determine whether any alternative

reasonable accommodations were available; (3) grants appellant's appeal from the denial of her request for reasonable accommodation only to the extent that the parties are required to engage in an interactive process to determine whether appellant can be reasonably accommodated; (4) finds that, with respect to appellant's appeal from medical demotion, Government Code section 19253.5 requires that state agencies must engage in an interactive process with an employee, regardless of the employee's disability status, before invoking a medical demotion, transfer or termination; and (5) revokes the medical demotion because the Department failed to participate in an interactive process with appellant before medically demoting her.

## **BACKGROUND**

Appellant was appointed as an Institution Artist/Facilitator (IAF) for the Arts-In-Corrections program at the California Correctional Center (CCC) in Susanville on October 15, 1993. Prior to that time, she worked as a contract artist for the William James Association Prison Arts Project providing artist services to the Arts-In-Corrections program at Folsom State Prison.

As an IAF, Appellant oversaw the Arts-In-Corrections program at CCC. The Arts-in-Corrections program provides artistic activities for the prison's inmates with the idea that if the inmates are kept busy with productive activities, there will be less time to engage in destructive activities. In this program, the inmates learn about and produce various kinds of art, including the literary, visual and performing arts. Some of the inmates' works are used and enjoyed by the community at large. While appellant did teach some classes herself, appellant's primary duties included the following tasks:

preparing an annual arts plan to guide the expenditures of the program; administering the program; hiring and supervising the contract artists who teach many of the classes; purchasing, inventorying and securing the tools used in the program; overseeing the inmate workers assigned to assist with the classes; and ensuring appropriate inmate behavior during class time. Appellant's supervisor, at all relevant times, was the Community Resource Manager.

Appellant was also responsible for the inmate workers assigned to assist in the studio. These inmates performed various clerical and manual duties in and around the studio, as well as assisted fellow inmates with art projects. At the time of her departure, appellant was assigned five inmate workers and received approximately \$400 a month extra in salary for supervising these workers.

CCC divides inmates into housing units based upon the level of security needed for a particular inmate. For example, inmates placed in Levels I and II in the Cascade and Sierra units are deemed to require less supervision than Level III inmates housed nearby in Lassen Unit. The building containing the AIC program is located between the Cascade and Sierra Housing units so that the Level I and II prisoners can walk directly to their art classes without leaving the area. Level III prisoners housed at Lassen unit do not attend classes at the art studio with the others because of security concerns, but attend art classes in the Lassen unit.

The art studio is located within a building that also contains the prison's dry-cleaning facility. A solid wall divides the two facilities with a door leading between them. The facilities have always been on separate air filtration systems, so that the intake and output of the air circulated in these facilities is not mixed.

The art studio is a large room containing tables, chairs and sinks. Within the studio is a small, separate computer room containing several computers. Also within the studio is appellant's office. The walls of appellant's office are made of transparent plexiglas so that the IAF can supervise the studio while he or she works. Also contained within the studio is a secured, caged area where the art tools and supplies are kept under lock and key.

Appellant performed the majority of her duties as an IAF from her office within the art studio while overseeing the classes held in the studio. While many of the duties of an IAF include tasks that can be performed anywhere, such as preparing plans, purchasing supplies and reviewing contracts, appellant was required to be in or around the art studio to oversee the inmate workers, evaluate the performance of the contract teachers during class and provide supervision of the inmates during class.

Appellant has suffered from asthma for most of her life. Even though appellant maintains a healthy lifestyle, she must take many medications to adequately control it, including steroids such as prednisone. While her asthma does not generally prevent her from working, socializing, or performing most activities, she has occasionally suffered serious attacks, generally brought on by external factors such as poor air or pets. When she has an attack, she feels very sick and cannot work at all for a period of anywhere from one to a number of days. She also has occasional trouble sleeping because of her asthma. According to appellant, she must be very careful so as not to place herself in situations that may trigger an asthma attack.

### Factual Summary Prior To Appellant's Departure

Appellant testified that she had no problem working in the art studio from the time she began in 1993 until May 1997. Appellant first noticed problems with the studio air in May 1997 when a foul odor emanated from one of the sinks. She claims that, as a result of the odor, she became lightheaded and dizzy and experienced tingling in her hands. Garth Renaud, a Hazardous Materials Specialist at CCC, was called to the studio to examine the sink. Renaud conducted an investigation and concluded that the "p-trap" in the sink had become clogged over time and instructed appellant to have the inmate workers intermittently pour water down the sink. Renaud found nothing alarming as a result of investigating the odor and concluded that, at that time, nothing more needed to be done.

Appellant claims to have felt sick on and off from May 1997, although there is no evidence that she voiced a complaint to prison officials until November 1997. In or about November 1997, appellant told her supervisor, Community Resource Manager Theresa Young, that she was concerned with the air quality in the art studio. Two contract artists who taught at the studio, Petra Reese and Lori Collier, were also disturbed by the air quality in the art studio and testified that they attributed many physical symptoms they experienced at that time to the poor air quality in the studio. No evidence was presented that Young or anyone else took any action at that time about appellant's concerns.

In December 1997, perchloroethylene (an organic solvent) was spilled in the adjacent dry-cleaning facility. Appellant claims that the strong fumes from the spill were evident in the art studio and triggered a serious asthma attack. Appellant saw her

physician, Dr. Dozier, who prescribed prednisone to control her asthma. Prison officials took immediate action to clean up the spill.

At the beginning of 1998, Timothy Bruce was appointed as the Assistant Community Resource Manager. Because Theresa Young was out on leave for most of 1998, Bruce served as appellant's supervisor for much of that year. On January 12, 1998, Bruce served as appellant's supervisor for much of that year. On January 12, 1998, appellant wrote a memorandum to Bruce detailing her complaints concerning the air quality in the art studio. She specifically requested a "clean air environment" and, simultaneously, filed a claim for workers' compensation benefits.

Bruce discussed this memorandum with Renaud. Renaud informed Bruce that he had investigated the situation in May 1997 and found no serious problem with the air quality, but recommended that a team from Cal-OSHA inspect the art studio.

In the meantime, appellant's asthma became worse and Dr. Dozier excused her from work for several weeks starting on February 13, 1998. On March 2, Dr. Dozier released appellant to go back to work on the condition that she could not work in the area of the prison's dry cleaning facility, and therefore could not work in or about the art studio. Appellant reported back to work in Young's office on March 3, awaiting word as to where she would work. While awaiting instructions from Young, appellant drafted a memorandum to the CCC Chief Deputy Warden proposing the best way to address the problem of the air quality in the art studio. Appellant asked that the Department order a HEPA air filter for her office and requested that she be allowed to bring her own HEPA filter to work until CCC could purchase one.<sup>1</sup> Appellant also asked that she be allowed

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<sup>1</sup> A HEPA filter stands for High Efficiency Particulate Air Filter.

to switch her office with the computer room within the art studio. She stated that she believed that if these two requests were granted, her problems would be resolved. CCC granted appellant's requests and prison officials began to research the purchase of a HEPA air filter.<sup>2</sup>

In the meantime, CCC's Return To Work Coordinator, Lori Gaither, was faced with the task of determining where to place appellant, since appellant could not work in the art studio. Gaither believed that a light duty assignment was appropriate until the air quality issue could be resolved and decided to place appellant in the mailroom until she could resume her duties as an IAF. Gaither told appellant to report to the mailroom on March 4. Upset by what she considered a demeaning position, appellant reported to the mailroom on March 4, but left partway through the day to see Dr. Dozier. Dr. Dozier again took appellant off work, this time until March 18, citing appellant's poor emotional condition as a result of being placed in an unsuitable position.

Thereafter, Gaither wrote to Dr. Dozier on March 10 to inform him that an Industrial Hygienist was going to be hired to investigate the air quality in the studio and to acknowledge his restrictions against appellant working in the studio. Gaither also asked Dr. Dozier for a list of medical restrictions that precluded appellant from working a light-duty assignment, such as mailroom duty. On or about March 12, Dr. Dozier replied to Gaither's letter, stating that he had no list of restrictions other than appellant must work in a "clean air environment." When appellant returned to work on March 18,

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<sup>2</sup> The filter was purchased in April, but did not arrive until after appellant had departed from her position in May. There is no evidence in the record as to whether appellant ever switched her office with the computer room.

Gaither told her she could continue to work in her IAF position from the Community Resource Manager's office until OSHA could investigate the studio's air quality.

In the meantime, the Department followed Renaud's suggestion and hired a Certified Industrial Hygienist to perform a complete inspection of the air quality in the art studio.<sup>3</sup> On March 30 and 31, 1998, Paul Michalko, a Certified Industrial Hygienist who works with the State Compensation Insurance Fund, performed numerous tests on the air in the studio.

Although Michalko did not provide a written report of his findings until April 29, he immediately informed CCC officials after the inspection that there were a number of simple things that could be done to improve the quality of the air in the studio. First, Michalko noted that many of the air vents into the studio were blocked by cardboard. As it turns out, appellant had intentionally blocked these air vents because she felt that the air coming in was making her sick. According to Michalko, blocked air vents create unhealthy air and could be part of the reason appellant was feeling sick. He also recommended that grills be put in place to improve air circulation, that the piles of bird droppings lying near the air intake valves be cleared away, and that the air filters be thoroughly cleaned. According to Renaud's undisputed testimony, CCC quickly completed each of these recommended corrective actions. When Michalko issued a final report on April 29, he attested that the air was considered safe by Cal-OSHA's standards for all tested levels and that if all of the steps recommended were taken, there was no reason anyone should have problems with the air quality in the studio.

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<sup>3</sup> This request was made in conjunction with appellant's request for workers' compensation benefits.

In the meantime, appellant continued to work in the Community Resource Manager's office upon her return to work on March 18 until the issue of the air quality in the art studio could be resolved.<sup>4</sup> On April 28, 1998, a HEPA air filter was ordered for appellant. A few days later, appellant was informed, although she could not recall by whom, that the report from the Certified Industrial Hygienist had concluded that the air was safe and healthy and that she could now go back to the art studio to resume her duties. Appellant returned to work in the studio on May 4, the first time she had been in the studio since leaving in February, bringing her own HEPA filter with her to her office. By May 6, however, appellant claims to have felt sick once again and left work to see Dr. Dozier. Dr. Dozier placed appellant back on prednisone and excused her from work once again. Appellant continued to work on her arts program from home for several weeks thereafter, but was eventually told by the Community Resource Manager that she would no longer be allowed to work from home. Appellant has never attempted to return to work since that time.<sup>5</sup>

#### Factual Summary Since Appellant's Departure

On May 21, 1998, Gaither wrote to Dr. Dozier acknowledging Dr. Dozier's most recent medical release excusing appellant from work from May 4 until May 26. She also provided Dr. Dozier with a copy of the report of the physician who evaluated appellant's workers' compensation claim, which found there to be no occupational connection with

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<sup>4</sup> Excepting some days she was permitted to work at home and some days when she was home sick.

<sup>5</sup> Appellant filed for Non-Industrial Disability (NDI) leave which was granted and remained on NDI until it ran out in November 1998. Since that time, appellant has been on an unpaid medical leave. At the hearing, medical verifications signed by Dr. Dozier were introduced into evidence, revealing that appellant was fully disabled from work from February 26 through April 30, 1998, May 4 through December 20, 1998, and April 12 through July 3, 1999.

appellant's illness, and the report of the Certified Industrial Hygienist which found no safety violations at the studio. Gaither explained to Dr. Dozier that appellant was running out of sick leave, as well as running out of time allotted for a light-duty assignment.<sup>6</sup> Gaither and Dr. Dozier continued to exchange numerous letters for several months thereafter concerning the status of appellant's health. On May 27, Bruce, appellant's supervisor, asked that appellant no longer work at home and informed her that she was welcome to come back to work when her physician cleared her to do so. In June, the Department was finally forced to stop the Arts-In-Corrections program because of appellant's absence. Shortly thereafter, Cal-OSHA officials showed up unexpectedly to perform a surprise inspection of the air quality in the art studio. This investigation found that all levels of chemicals in the air were well below their maximum level allowed by law and the prison was declared to be in compliance with OSHA's air quality standards.

On or about July 15, 1998, Gaither sent appellant an "options" letter. In this letter, Gaither set forth various options that appellant could pursue. First, Gaither explained that appellant could elect to resign, apply for service retirement, apply for disability retirement or demote to another classification for which she was qualified. She also stated that in addition to these options, appellant could request to use existing leave balances or file a request for reasonable accommodation. Gaither's letter stated that if appellant was unable to work in her present classification, the Department would

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<sup>6</sup> According to Gaither's testimony, state employees are only permitted a limited amount of time to remain on light-duty assignment and at the time of appellant's departure, she had not exhausted her allotted time.

pursue a medical demotion to a currently vacant position. Specifically, the letter provided, in pertinent part:

You will be provided with a list of currently vacant suitable job opportunities review (sic). You may indicate which positions you are interested in, and, you will be given an opportunity to demonstrate your qualifications for those positions. CDC will make an effort to place you in the highest paying vacant position for which you are qualified, which is not promotional and which meets your medical restrictions. If you do not choose to participate in this medical demotion process, you will be assigned to a currently vacant position for which our records indicate you are minimally qualified which is closest to your current salary.

The letter also reminded appellant of her mandatory right to reinstatement to the position of IAF once she was no longer medically restricted from performing her duties.

The end of the letter finished with “Please notify Cheryl Gaither, Return to Work Coordinator... of your decisions and preferences within ten days of receipt of this letter.”

Appellant did not contact Gaither concerning the options letter, but did file a request for reasonable accommodation a week or two later. In the request for reasonable accommodation, appellant identified her limitation and the requested reasonable accommodation as the following:

May not work in an area where there is heavy dust and dry-cleaning chemicals. A satellite office would be a viable option or moving AIC to the Lassen Unit.

She further explained that this accommodation would allow her to run the Arts-In-Corrections program without interference of asthmatic attacks and illnesses.

Although Gaither did follow up with appellant’s request for reasonable accommodation, sending it to the main office in Sacramento for response and keeping in touch with appellant’s physician, Dr. Dozier, she did not contact the appellant or send her the vacancy list as promised in the options letter. According to Gaither’s testimony,

she felt that appellant had made her choice by filing the request for reasonable accommodation and did not want to participate in the medical demotion process.

In the meantime, Gaither received a letter from Dr. Dozier dated July 29, 1998, stating that appellant suffered from occupational asthma caused by the art studio and that she should never return to work in the art studio. Dr. Dozier supported appellant's request for reasonable accommodation by asking that the art studio be moved or that appellant be provided with a satellite office from which to work.

Gaither discussed both of these options with the various officials at CCC in charge of space planning. These officials determined that there was no other appropriate place to locate the art studio within the prison. In addition, CCC officials reviewed appellant's request for a satellite office, but determined that appellant could not adequately perform many of her job duties as an IAF away from the art studio. The Department eventually denied appellant's request for reasonable accommodation on April 13, 1999.<sup>7</sup> In the interim, appellant filed an appeal from denial of reasonable accommodation with this Board on October 13, 1998, because the Department had not yet responded to her request for reasonable accommodation.

Before notifying appellant that her request for reasonable accommodation had been denied, the Department began processing the medical demotion referenced in Gaither's July 15 letter. In February 1999, Gaither obtained a list of vacancies at CCC

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<sup>7</sup> On September 7, Gaither confirmed in writing to appellant that her request for reasonable accommodation had been forwarded to the Office of Environmental Health & Safety Management (OEHSM) in Sacramento for review. The next day, Gaither sent a memorandum on behalf of the Warden to OEHSM recommending that appellant's request be denied. While a representative of the Department in Sacramento notified CCC's warden on January 11, 1999 that the request for reasonable accommodation was to be denied, appellant was not notified of this fact until April 13, 1999.

for the purpose of determining an alternative position for appellant. Gaither reviewed only a CCC vacancy list, because she assumed that appellant would not wish to move from the area. Gaither reviewed this list without sending it to appellant and ultimately chose to demote appellant to the position of a Business Service Officer I (BSO I). Gaither testified that she chose this particular position because it was the vacant position that was closest in salary to what appellant had been making as an IAF for which appellant was qualified.<sup>8</sup> On February 5, 1999, appellant was served with a notice of medical demotion, demoting her from the position of IAF to BSO I effective 20 days plus 5 working days later.

On March 2, 1999, Dr. Dozier wrote to Gaither, informing her that appellant was physically able to return to work on March 19 in the Administration building. Appellant did not return to work on that date, but submitted another letter from Dr. Dozier on April 13 explaining that she was not physically able to work at all until July 3, 1999 and was excused as “fully disabled” until then. Since that time, there is no evidence that Dr. Dozier has released appellant to work, nor has appellant attempted to return to work in any capacity.

At the hearing, appellant admitted that she is no longer comfortable working in the art studio, although she believes she is otherwise capable of returning to work as an IAF or in another capacity. Since leaving CCC, appellant has worked intermittently as a teacher in various schools.

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<sup>8</sup> The salary for an IAF at the time was approximately \$3,838.00, including the approximate \$400 additional salary she received for supervising inmates. The salary that appellant would receive as a BSO I was \$3,619.00.

## Procedural Summary

The appeal from denial of reasonable accommodation dated October 13, 1998 and the appeal from medical demotion dated March 2, 1999 were consolidated for hearing and decision. A hearing was held on June 2 and December 7, 1999, and on January 7, 2000. The Board rejected the proposed decision of the Administrative Law Judge and determined to decide these appeals itself.

At its meeting on April 5-6, 2001, SPB issued a precedential decision (SPB Dec. No. 01-01) in this matter. In accordance with the opinion issued by the Third Appellate District on September 3, 2004 in California Department of Corrections v. State Personnel Board (2004) 121 Cal App. 4th 1601, the Board has vacated that earlier precedential decision and is issuing this precedential decision in its place.

## **ISSUES**

The following issues are before the Board for consideration:

1. Was appellant an individual with a disability entitled to reasonable accommodation and, if so, was appellant entitled to either of the accommodations she requested?
2. Was the Department entitled to medically demote appellant to the position of BSO I?
3. If the Department was not entitled to medically demote appellant to the position of BSO I, how much backpay, if any, is appellant owed?

## DISCUSSION

### Request for Reasonable Accommodation

Both the federal Americans with Disabilities Act (ADA)<sup>9</sup> and the California Fair Employment and Housing Act (FEHA)<sup>10</sup> aim to insure full opportunity for people with physical and mental disabilities by requiring employers to make reasonable accommodation for their employees' physical and mental disabilities.<sup>11</sup> In addition, the State Civil Service Act specifically requires a state agency to make reasonable accommodation to the known physical and mental limitations of an otherwise qualified employee who is an individual with a disability, and provides a mechanism from which to appeal denials of reasonable accommodation.<sup>12</sup>

Generally, to prevail on an appeal from 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 she can perform the essential functions of the position with or without reasonable accommodation.<sup>13</sup>

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<sup>9</sup> 42 U.S.C. section 12101 et seq.

<sup>10</sup> Government Code section 12900 et seq.

<sup>11</sup> 42 U.S.C. section 12101 et seq.; Government Code section 12900 et seq. The U.S. Supreme Court recently held in Board of Trustees of the Univ. of Alabama v. Garrett (2001) 531 U.S. 356, that suits in federal court by state employees to recover damages for failure to comply with the ADA are barred by the 11<sup>th</sup> Amendment to the U.S. Constitution. This case does not affect the Board's review of reasonable accommodation appeals under the FEHA or ADA as provided by Government Code sections 19230 and 19702.

<sup>12</sup> Government Code section 19230; Title 2, California Code of Regulations, section 53.2.

<sup>13</sup> Sylvia C. Solis (2000) SPB Dec. No. 00-07 at p. 11.

At the time when CDC engaged in the actions that are the subject matter of the consolidated appeals before the Board, the State Civil Service Act in Government Code section 19231, subdivision (a)(1), defined an "individual with a disability" to mean:

any individual who (A) has a physical or mental impairment which substantially limits one or more of that individual's major life activities, (B) has a record of the impairment, or (C) is regarded as having such an impairment.

An individual with a disability is "substantially limited" if he or she is likely to experience difficulty in securing, retaining, or advancing in employment because of a disability.<sup>14</sup>

There appears to be no dispute that appellant suffers from asthma and that, from time to time, her asthma substantially limits her ability to breathe. When appellant suffers from an asthma attack, she cannot work. The evidence presented in this matter shows that, even when appellant was taking her prescribed medications and the Department was undertaking efforts to clean the air in the Arts Facility, appellant was still subject to serious asthma attacks that adversely impacted her ability to perform her job. Since breathing and working constitute "major life activities," and since appellant's asthma substantially limits her in the conduct of these major life activities even when mitigating measures are taken into consideration, we find that appellant's asthma constituted a physical "disability" under the State Civil Service Act as it was drafted prior to 2001.<sup>15</sup>

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<sup>14</sup> Effective January 1, 2001, Government Code § 19231 was amended to provide:

As used in this article, "individual with a disability" means any individual who has a physical or mental disability as defined in Section 12926.

Section 12926 is in the FEHA.

<sup>15</sup> Such a conclusion is consistent with similar conclusions reached by courts analyzing both the FEHA and the ADA. See, e.g. Ackerman v. Western Electric Co. (9<sup>th</sup> Cir. 1988) 860 F.2d 1514; County of Fresno v. FEHC (1991) 226 Cal.App.3d 1541. Cassidy v. Detroit Edison Co. (6<sup>th</sup> Cir. 1998) 138 F.3d 629; Homeyer v. Stanley Tuchin Assoc. Inc (7<sup>th</sup> Cir. 1996) 91 F.3d 959; contra, Nugent v. Rogosin Institute (E.D.N.Y. 2000) 105 F.Supp.2d 106.

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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

Recent changes in the law now require that employers faced with a request for reasonable accommodation or made aware of the need to accommodate an employee have a duty to communicate with that employee concerning the need for an accommodation. Last year, the California Legislature amended the FEHA, effective January 1, 2001, to provide that employers must engage in a timely, good faith, “interactive process” with disabled employees who request reasonable

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<sup>16</sup> Government Code section 12940(m).

<sup>17</sup> Government Code section 12926(n).

<sup>18</sup> Barnett v. U.S. Airlines, Inc. (9<sup>th</sup> Cir. 2000) 228 F.3d 1105, 1111 .

accommodation.<sup>19</sup> FEHA was further amended to expressly recognize that the interactive process to be implemented is that process that has been articulated by the Equal Employment Opportunity Commission (EEOC) in its interpretive guidance of the ADA.<sup>20</sup>

Employers who attempt to determine unilaterally, without seeking input from the affected employee, not only whether an employee has a disability but, whether the employee can perform the essential functions of their job or any other available position with a reasonable accommodation, not only run the risk of violating the law, but also make the job of determining an appropriate reasonable accommodation more difficult for themselves. Without obtaining input from the employee, the employer may not fully understand the limitations imposed by the employee's medical condition and may not know what the employee needs in terms of an appropriate accommodation. Similarly, an employee usually does not know what kinds of accommodations by the employer may be possible or what alternative positions may even exist. As is often the case when parties fail to communicate, misunderstandings arise and the parties may end up unnecessarily locked in adversarial positions. It is for these reasons that a flexible, "interactive" process with an employee is crucial when attempting to address issues of reasonable accommodation.

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<sup>19</sup> Government Code section 12940(n).

<sup>20</sup> Government Code section 12926.1.

The Ninth Circuit Court of Appeals recently discussed the interactive process required by the EEOC in interpreting the ADA in the case of Barnett v. U.S. Airlines.<sup>21</sup> In Barnett v. U.S. Air, the Ninth Circuit held that the interactive process is a mandatory, rather than a permissive obligation on the part of the employer under the ADA. The obligation 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.<sup>22</sup> 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.<sup>23</sup>

The purpose of the interactive process according to Barnett's interpretation of the EEOC guidelines is to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."<sup>24</sup> In Barnett, the court noted the four steps to the interactive process as prescribed by the EEOC. The first step is to identify the barriers caused by the disability, including examining the essential versus nonessential duties of the position. The second step is to identify all possible accommodations. The third step is to assess the reasonableness of each accommodation in terms of effectiveness and equal opportunity for the

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<sup>21</sup> (9<sup>th</sup> Cir. 2000) 228 F.3d 1105. We note that even though state employees can no longer sue the state in federal court under the ADA pursuant to Board of Trustees of the Univ. of Alabama v. Garrett, *supra*, cases decided under the ADA are still persuasive, particularly where they interpret obligations imposed by the FEHA.

<sup>22</sup> Id. at 1112.

<sup>23</sup> Ibid. citing EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Compliance Manual (CCH), section 915.002 (March 1, 1999), at 5438.

<sup>24</sup> 29 C.F.R. section 1630.2(o)(3)

employee. Finally, the fourth step is to implement the accommodation most appropriate for both employee and employer that does not impose an undue hardship on the employer's operation. The expressed choice of the employee should be given primary consideration unless an alternative accommodation exists that would provide a meaningful equal employment opportunity. The employer and the employee are obligated to participate in the interactive process in good faith and are required to communicate directly and exchange essential information so as to work towards the shared goal of identifying a reasonable accommodation.

We leave to each department the details of how it will satisfy the requirement that it engage in an interactive process. In some cases, particularly in a small department, ongoing discussions held in good faith between an employee and his or her supervisor concerning the employee's disability and possible accommodations may be sufficient to satisfy the interactive process requirement. Some departments may wish to adopt internal guidelines for a structured interactive process that begins when the Department is first made aware that an accommodation may be necessary. The interactive process need not be complex nor must it be separate and apart from communications that may already be taking place between the employee and the department in an effort to determine an appropriate reasonable accommodation. What is important is that the department is attempting, in good faith, to enter into and maintain ongoing communication with an employee to identify his or her limitations and discuss all of the potential accommodations that may overcome those limitations.

In the instant case, when the issue of the poor air quality arose, the Department began, in good faith, to engage in an interactive process to attempt to reasonably

accommodate appellant's asthma by trying to improve the air in the studio. The Department consented to allow appellant to bring in her own HEPA filter while it researched purchasing one for her office. The Department also gave her permission to switch her office in the studio with the computer room. Finally, when Dr. Dozier restricted appellant from working in the studio, the Department immediately moved appellant to another location (without change in pay or status) while it called in experts to investigate the air in the studio. The Department then followed the recommendations of a Certified Industrial Hygienist in making the recommended repairs and received a determination from OSHA that the air was safe for all tested levels. Thus, until appellant's departure in May, it appears that the Department was acting in good faith and engaged appellant in an ongoing interactive process to resolve her work limitations.

An employer's obligation to engage in the interactive process, however, 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.<sup>25</sup> After appellant filed her formal request for reasonable accommodation at the end of July 1998 seeking to have the department either move her office or move the art studio, the Department was obligated to continue to engage appellant in an interactive process. Unfortunately, the Department ceased all attempts to communicate with appellant concerning her new requests for reasonable accommodation, dismissing appellant's request eight months later without any discussion. Had the Department contacted appellant and explained in

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<sup>25</sup> Humphrey v. Memorial Hospitals Association (9<sup>th</sup> Cir. 2001) 239 F.3d 1128, cert. denied ( 2002) 535 U.S. 1011.

a timely manner why it would not be granting the reasonable accommodations she requested and fully explored remaining alternatives with her, it is possible that the parties would have been able to find a solution to meet both their needs.<sup>26</sup> Since the Department made no attempt to communicate with appellant after she filed the formal request for reasonable accommodation, the Board grants appellant's appeal to the extent that we now require the Department to engage appellant in an interactive process to determine whether she can otherwise be reasonably accommodated.<sup>27</sup>

As to the particular accommodations requested by appellant in her formal request for reasonable accommodation, we deny appellant's appeal. Appellant's first request, that the Department relocate the art studio, was discussed internally at length during several meetings with various CCC officials including the Warden and Chief Deputy Warden, as well as individuals from the Space Planning and Operations office. According to Gaither's testimony, CCC officials deemed the request to move the art studio to be unfeasible, because there was no other appropriate space for the studio available within the prison, nor was there any office that would have been appropriate to switch with the studio's location. In addition, evidence was presented by both Gaither and Bruce that there were legitimate concerns with security if the art studio were moved

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<sup>26</sup> Other possible options that might have been explored include filtering the air in the entire studio, as opposed to just filtering the air in appellant's office, transferring appellant to another position, or transferring appellant to a different institution.

<sup>27</sup> The State Personnel Board's State Employee Mediation Program is available to assist the parties in this process at their mutual request.

to a different area of the prison. The art studio was located between two lower-security inmate housing facilities, allowing the easy transfer of these inmates between the studio and the housing facility. Moving the art studio to the Lassen Unit as suggested, or to another area in the prison, would require a realignment of the entire security plan of the prison. Given these factors, we conclude that forcing the prison to move the art studio to a different location would not be a “reasonable” accommodation and, thus, was not legally required.

The alternative accommodation requested by appellant was for the Department to allow her to work as an IAF from a satellite office outside the studio. Appellant argues that many of her duties as an IAF include tasks that can be performed from outside the art studio, including such duties as retaining contract artists, ordering supplies, and preparing the plan for the AIC program. While it appears that these particular duties can be performed outside the art studio, many equally important duties require appellant’s presence in the art studio.

As listed in the Duty Statement for the position of IAF, and as testified to by appellant’s supervisor, there are a number of duties that require appellant’s presence in the studio on a regular basis. These duties include evaluating the contract artists teaching in the studio, overseeing the inmate workers assigned to assist in the studio and maintaining and securing the tools and supplies used by the inmates. While appellant was free to go in and out of her office during the day, the walls of the IAF’s office were purposefully made of transparent material so that the IAF could monitor the classes and inmate workers while performing other duties in the office. Supervision of the inmate workers is particularly important as the contract teachers, while receiving

minimal training, are responsible only for teaching classes and not for the security of the institution. It would be impossible for appellant to perform some of her essential duties while working out of a separate building away from the art studio.

Although restructuring a job's duties is one form of reasonable accommodation, any requirement to restructure job duties is limited to reallocating the "marginal" and not the "essential" functions of a job.<sup>28</sup> Because appellant's request would require that essential duties be eliminated, we conclude that the Department was not required to accommodate appellant by establishing a permanent satellite office away from the art studio. The Department appropriately denied these specific requests. Where the Department failed in its obligations was not in refusing these specific requests, but in ceasing to interact with appellant after she filed her formal request for reasonable accommodation.

#### Appeal From Medical Demotion

After appellant was off work for several months awaiting the Department's response to her request for reasonable accommodation, rather than complete the interactive process, the Department served appellant with a notice of medical demotion. Effective March 3, 1999, the Department demoted appellant from the position of IAF to the position of Business Service Officer (BSO) pursuant to Government Code section 19253.5.<sup>29</sup>

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<sup>28</sup> Title 2, California Code of Regulations, section 7293.9(a)(2)

<sup>29</sup> The notice of medical demotion was served February 10, 1999. The notice stated that the demotion was effective 15 days plus 5 working days from the date of service of the notice. According to Gaither's February 26, 1999 letter to Dr. Dozier, the effective date of the medical demotion was March 3, 1999.

Section 19253.5 allows a department to require an employee to take a medical examination and further provides that after considering the conclusions of the medical examination and “other pertinent information,” the department may conclude that an employee is unable to perform the work of his or her position and may demote or transfer the employee to another position.<sup>30</sup> (Emphasis added.) Subdivision (d) similarly permits a department to terminate an employee only after considering the conclusions of the medical examination or medical reports from the employee’s physician and “other pertinent information” if the employee can no longer perform his or her position or any other position in the agency and is not eligible or waives the right to retire for disability. (Emphasis added.) An employee’s input as to his or her ability to perform his or her current position, as well as his or her ability and desire to perform other available positions in the department is “other pertinent information” that should be sought out and must be considered by a department before seeking to medically demote, transfer or terminate the employee under section 19253.5.

The Department concluded that a medical transfer or demotion was appropriate based upon Dr. Dozier’s July 28<sup>th</sup> letter that barred appellant from working in the art studio on a permanent basis. While the Department properly based its determination to transfer or demote appellant based upon Dr. Dozier’s medical reports, it failed to seek out and consider “other pertinent information” before it effectuated the medical

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<sup>30</sup> Government Code section 19253.5, subdivision (c). Subdivision (e) of section 19253.5 allows a department to invoke a medical action against an employee without a medical examination by relying on a written statement or medical reports submitted by an employee to the department.

demotion. Gaither told appellant she would send her a list of vacancies to solicit her input about available positions, but never sent her any such list or otherwise attempted to contact her to discuss positions that she would be willing and able to perform. While Gaither properly considered the BSO I position because it was the highest paying position available at CCC for which appellant appeared to be qualified, she should have discussed that option with appellant, as well as others, before implementing the demotion.<sup>31</sup>

Without seeking input from the affected employee as to his or her needs or desires, a department taking a medical action under section 19253.5 will not have the information necessary to consider the impact on the employee of the action contemplated. Unlike an adverse action, a medical action under section 19235.5 is not disciplinary in nature. Rather, it is a vehicle that allows departments to reassign employees to other positions when they are physically or mentally unable to perform the duties of their current position, until such time as they are once again able to perform the duties. As we stated in our decision in G [REDACTED] M [REDACTED]<sup>32</sup>, section 19253.5 must be construed as imposing an affirmative obligation on departments to attempt to minimize the impact of a medical disability on an employee's job status. While the

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<sup>31</sup> The search for alternative positions must be department-wide, and not limited to the employee's current geographical location if the employee is willing to consider a change in location.

<sup>32</sup> G [REDACTED] M [REDACTED] (1997) SPB Dec. No. 97-05 at p. 9. A Petition for Writ of Mandate filed by Mr. M [REDACTED] challenging the Board's decision was denied by the Sacramento Superior Court on February 1, 1999. An appeal of that decision is pending before the Court of Appeal, Case No. C032331.

financial impact of a demotion may be paramount to most employees, for other employees, financial impact may not be the only consideration. Thus, we construe section 19253.5 to require departments to engage employees in the same interactive process already required for disabled employees in order to seek out “other pertinent information” that may be relevant to their decision-making process before invoking a medical action.

As previously noted, the FEHA and the State Civil Service Act already mandate employers to engage in a timely, good faith, interactive process when they are aware that a disabled employee has a need for an accommodation. The law also requires that a disabled employee who can no longer perform his or her position with or without a reasonable accommodation is entitled to reassignment to a vacant position as one form of reasonable accommodation. Thus, a disabled employee who is reassigned to a position pursuant to section 19253.5 is already entitled by law to an interactive process prior to the reassignment. It makes little sense for departments to engage some employees in an interactive process prior to instituting a medical action, but not other employees whose medical conditions render them similarly unable to perform their position but who may not meet the legal definition of “disability.” Requiring departments to use an interactive process anytime an employee needs a reassignment for medical reasons under section 19253.5 increases the probability that the parties can reach a mutually satisfactory resolution to the problem of the employee no longer being able to perform their job. It further reduces a department’s risk of error should it fail to properly assess an employee’s disability status under the law and thereby neglect to provide a disabled employee with the benefit of an interactive process.

In the instant case, the record reveals that appellant was unhappy with being placed in a BSO I position and failed to report for work upon the effective date of the demotion. It further appears from appellant's testimony that her failure to report as a BSO I was due, at least in part, to the fact that the position did not utilize her teaching skills. While we do not condone appellant's refusal to report for work in the BSO I position, we note that had the Department sought appellant's input in the process of choosing a new position, the parties may have agreed on a reassignment to a position that paid less than a BSO I, but brought appellant more personal fulfillment, obviating the need for the instant appeal. Completion of the interactive process in this case may well have benefited all parties.

For all of these reasons, the Board finds that the "other pertinent information" that must be considered by departments taking medical actions under section 19253.5 includes the information that would be gathered from an interactive process, whether or not a reassignment is contemplated pursuant to an obligation to reasonably accommodate a qualified individual with a disability. Medical actions that are taken without providing for opportunity for input from the affected employee prior to the taking of the action must be revoked. If, after engaging in an interactive process, the parties cannot agree on a position for reassignment or upon whether the employee should be reassigned at all, the department can still take the medical action it deems appropriate and the appellant retains the right to appeal the action.<sup>33</sup>

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<sup>33</sup> If an employee does not choose to participate in the interactive process with the department, the department is still bound to place the employee in a position that pays a salary as close as possible to what the employee received and is most "equivalent" in terms of status and geographical location. *M* [REDACTED], *supra*, at pp. 9-10.

While the options letter from Gaither was an attempt to begin to engage appellant in the interactive process of finding an alternative position, Gaither failed to go the next step and provide appellant with the list of vacancies as she had promised or otherwise obtain input from her on the various reassignment options.<sup>34</sup> Since the Department failed to communicate with the appellant at all once appellant filed her formal request for reasonable accommodation and prior to imposing the medical demotion, we revoke appellant's demotion to BSO I.

### Backpay

Government Code section 19253.5(g) provides that, whenever the Board revokes or modifies a medical action, it shall direct the payment of salary to the employee calculated on the same basis and using the same standards as provided in Government Code section 19584. Section 19584 provides, in pertinent part:

Salary shall not be authorized or paid for any portion of a period ... that the employee was not ready, able and willing to perform the duties of his or her position...(emphasis added.)

The burden of proving that an employee was not "ready, able and willing" rests with the department.<sup>35</sup>

Clearly, appellant was not ready, able and willing to perform her regular job duties as an IAF, or any other position in the institution, during the period between April 12 and July 3, 1999, as a medical verification in the record declares her to be "fully

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<sup>34</sup> In this particular instance, the Department promised appellant it would send her a list of vacancies to solicit her input and failed to do so. Therefore, the Department is estopped to deny that appellant was not entitled to participate in the process of selecting an alternative position. If Gaither had sent appellant a list of vacancies for her input and appellant had failed to respond, the interactive process requirement would likely have been fulfilled.

<sup>35</sup> Deanna J. Davies (2000) SPB Dec. No. 00-04.

disabled” from all work during that time. Accordingly, no backpay and benefits are owed to appellant for this time.

Whether appellant is entitled to backpay for the periods March 3 through April 11, 1999 and July 4, 1999 through the date of this decision, turns on whether appellant was ready, able and willing to perform the duties of a BSO I position, the position to which she was demoted. The record reflects that appellant refused to show up to work and perform that position. Notwithstanding her disagreement with the Department’s choice of reassignment, appellant was obligated to report for work in the position to which she was medically demoted under section 19253.5, until such time as the Board rules that such a reassignment was improper.

When the Board revokes a demotion, whether a disciplinary or medical demotion, an employee is generally entitled to the difference between the salary they made before the demotion and the salary they made in the demoted position. Since appellant was not ready and willing to work as a BSO I, however, any backpay award she receives must be offset by the amount of money that she could have earned in this position.

In conclusion, appellant is owed backpay and benefits as a result of the revocation of the medical demotion from IAF to BSO I, excluding the period of April 12 through July 3, 1999, and less the amount of money she would have received had she worked as a BSO I. This case is remanded to the Chief Administrative Law Judge to set for hearing in the event that the parties cannot agree on the exact amount of backpay and benefits owing to appellant.

## **CONCLUSION**

This is a case where engaging in the interactive process may have resulted in a speedy, mutually-desired resolution. Unfortunately, after appellant left work on sick leave, the communication between the two parties deteriorated until it eventually broke down completely.

If, after engaging in the interactive process, the parties still can not agree upon a reasonable accommodation for appellant's disability, including, but not limited to a reassignment, then the Department may invoke its rights under Government Code section 19253.5 to medically demote or transfer appellant to a vacant position for which she is qualified, including the BSO I position.

## **ORDER**

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The appeal of reasonable accommodation from the position of Institutional Artist/Facilitator is granted only insofar as the parties are required to engage in the interactive process to determine whether appellant can be reasonably accommodated, but denied as to the two specific accommodations requested by appellant in her Request for Reasonable Accommodation;
2. The medical demotion of appellant from Institutional Artist/Facilitator to Business Service Officer I is revoked;
3. The appellant shall be entitled to all back pay and benefits owing to appellant as a result of the revocation of the medical demotion except for the period of April 12, 1999 through July 3, 1999 when the appellant was fully disabled and

less the amount of money that appellant could have received as a BSO I had she worked in that capacity;

4. This case is hereby referred to the Chief Administrative Law Judge to be reset 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.
5. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

**STATE PERSONNEL BOARD**

William Elkins, President  
Maeley Tom, Vice President  
Ron Alvarado, Member  
Sean Harrigan, Member  
Anne Sheehan, 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 January 11, 2005.

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Floyd Shimomura  
Executive Officer  
State Personnel Board

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