

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 38664
)
 WILLIAM A. POGGIONE) **BOARD DECISION**
) (Precedential)
)
 From denial of request for) **NO. 96-13**
 mandatory reinstatement to the)
 position of Restoration Work)
 Specialist with the Department)
 of General Services at Sacramento) August 7-8, 1996

Appearances: Steven B. Bassoff, Attorney, California State Employees Association, on behalf of appellant, William A. Poggione; Kathleen A. Yates, Senior Staff Counsel, Department of General Services, on behalf of respondent, Department of General Services.

Before: Lorrie Ward, President; Floss Bos, Vice President; Ron Alvarado, Richard Carpenter and Alice Stoner, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of William Poggione (appellant) from denial of request for mandatory reinstatement to the position of Restoration Work Specialist with the Department of General Services (Department).

On July 11, 1995, the Board issued a Precedential Decision sustaining appellant's rejection during probation from the position of Staff Services Analyst but determining that appellant has mandatory reinstatement rights to the position of Restoration Work Specialist upon a showing that he is medically able to perform the essential functions of the position. William A. Poggione (1995)

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SPB Dec. No. 95-12 ("Poggione I"). In reaching that decision, the Board relied upon appellant's own admission that he was still medically unable to perform the job as of the date of hearing.¹ Subsequent to that decision, in her Proposed Decision, the ALJ concluded that "appellant has shown (proved) that he is able to perform the essential functions of his job as a Restoration Work Specialist, Office of the State Architect and, therefore, should be reinstated, pursuant to SPB Dec. No. 95-12." However, the ALJ declined to award back pay for the period prior to reinstatement.

The Board rejected the ALJ's Proposed Decision and asked the parties to brief the issue of appellant's entitlement to back pay.

After a review of the record in this case, including the transcript, exhibits, and the written and oral arguments of the parties, the Board concludes that appellant is entitled to back pay from the period between the Department's receipt of appellant's release to return to work in the position of Restoration Work Specialist to the date he is actually reinstated.

FACTUAL BACKGROUND

The history of this case is summarized in Poggione I. Following issuance of Poggione I, on August 11, 1995, appellant, through his representative, requested reinstatement to his former

¹Alternatively, had appellant's medical condition been in dispute, the Board could have ordered appellant mandatorily reinstated immediately, subject to the Department's right to require a medical examination under Government Code § 19253.5(a) after reinstatement.

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position of Restoration Work Specialist. In his request, appellant presented the Department with a medical report from Dr. Daniel B. Dunlevy, M.D., dated August 7, 1995, in which the doctor stated that he saw no medical reason why appellant should not be able to return to his job as Restoration Work Specialist, and that he "would give my clearance at this point for him to return to this job as he described it to me."

Following receipt of Dr. Dunlevy's August 7, 1995 report, the Department sent Dr. Dunlevy a letter requesting medical clearance based upon the actual duties to be performed by appellant in the position of Restoration Work Specialist. The letter enclosed a duty statement and specification for that position, as well as a position analysis. The position analysis consisted of a nine-page document prepared by appellant's former supervisor detailing the physical requirements of the job and the amount of time required to be spent performing each physical activity listed. The activities included standing, walking, sitting, crawling, climbing, carrying, bending, stooping, twisting, lifting, pushing, pulling, reaching, handling/grasping, and balancing. The analysis specifically stated that the job required frequent lifting of up to 90 pounds. The analysis contained spaces for the physician to indicate whether or not the patient may perform each activity as described, along with spaces for the physician to indicate any restrictions. The accompanying letter requested Dr. Dunlevy to list any limitations

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that the Department should be aware of in the event appellant is not able to return to full duty.

On August 23, 1995, Dr. Dunlevy faxed his response to the Department. The response consisted of a copy of the position analysis provided by the Department, with the spaces to be completed by the physician filled out and signed by Dr. Dunlevy. The response states without qualification that appellant is able to perform all of the listed requirements without restrictions.

The Department sent all of the information obtained from Dr. Dunlevy to the State's Medical Officer, Stephen G. Weyers, M.D., along with a request for medical clearance review. Dr. Weyers responded in writing on September 8, 1995. In his response he stated:

"Based on the information reviewed, it is my medical opinion that Mr. Poggione is medically able to perform the duties of his job, provided that he is not assigned duties that require repeated lifting over fifty pounds. Of course, he should use proper lifting techniques and modify his method of work to avoid lifting over fifty pounds when possible."

Dr. Weyers also stated:

"It is common medical practice to recommend that individuals with chronic back problems avoid lifting over 50 pounds. The [prior] doctors in this case have recommended similar lifting limits in the past, and it is prudent to continue these recommendations as a preventative measure in this case."

Despite the medical information obtained from Drs. Dunlevy and Weyers, the Department refused to reinstate appellant. On

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September 15, 1995, that the Department of General Services mailed appellant a letter which stated that the Department was "unable to accommodate" appellant's medical restrictions in the classification of Restoration Work Specialist.

The Department presented no current medical evidence at the hearing disputing the conclusions of Drs. Dunlevy and Weyers that appellant could perform the essential functions of his job. However, during the hearing before the ALJ in Poggione I, appellant admitted that, as of the date of that hearing (September 9, 1994) he was unable to perform the position of Restoration Work Specialist because he required surgery.

ISSUE

Whether appellant is entitled to backpay for any portion of the period following his rejection during probation from the position of Staff Services Analyst.

DISCUSSION

We conclude that, as of August 23, 1995, appellant made a sufficient showing that he was medically able to perform the essential functions of the position of Restoration Work Specialist. The Department presented no medical evidence to the contrary at the hearing. Accordingly, we shall order appellant reinstated to that position effective August 23, 1995.

We disagree, however, with the ALJ's conclusion that appellant is not entitled to back pay. As we determined in Poggione I,

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appellant was entitled to mandatory reinstatement to the position of Restoration Work Specialist upon a showing that he was medically able to perform the essential functions of the job. Although there is no specific remedy provided in Government Code § 19140.5 for a department's unlawful refusal to reinstate an employee who is entitled to mandatory reinstatement, we note that such a remedy has been recognized implicitly by the courts. Thus, in Wilkerson v. City of Placentia (1981) 118 Cal.App.3d 435, 443, the court stated: "California courts have consistently held that a public employee who has been deprived unlawfully of his position is entitled to recover the full amount of the salary which accrued to him from the date of his unlawful discharge to the date of his reinstatement..." Accordingly, because the Department's refusal to reinstate appellant unlawfully deprived him of that position, we conclude that an award of backpay for the period of unlawful deprivation of his position is appropriate.

Alternatively, the Department's actions may be viewed essentially as a constructive medical termination. We have defined a constructive medical termination as arising "when an appointing power, for asserted medical reasons, refuses to allow an employee to work, but has not served the employee with a formal notice of medical termination, and the employee challenges the appointing power's refusal to allow the employee to work under circumstances where the employee asserts that he or she is ready, willing, and

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able to work and has a legal right to work." C. M., SPB Dec. No. 93-08, at p. 6 (footnote omitted).

Pursuant to Government Code § 19253.5(g), an employee who is medically terminated is entitled to back pay under the standards provided in Government Code § 19584, which provides in relevant part:

Whenever the board revokes or modifies an adverse action and orders that the employee be returned to his or her position, it shall direct the payment of salary and all interest accrued thereto, and the reinstatement of all benefits that otherwise would have normally accrued.

* * *

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

These standards apply equally in this case in which the Department has refused to reinstate appellant for asserted medical reasons, without serving a formal notice of medical termination, where appellant was ready, willing and able to work and had a legal right to work. Pursuant to our decision in Poggione I, once appellant made a showing that he was medically able to perform the essential functions of the position, the Department was obligated to reinstate him to that position. Its refusal to do so warrants an award of back pay. C. M., supra; Robert DeFord (1992) SPB Dec. No. 92-05.

The undisputed evidence at the prior hearing before the ALJ established that between June 20, 1994 and at least September 9,

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1994, appellant was unable to perform the essential functions of the position of Restoration Work Specialist. Poggione I, at p. 8.

Appellant further testified that, at that time, he believed his restriction from lifting would be permanent if he did not have back surgery. No evidence was presented in the record to establish that appellant was able to perform the essential functions of the position of Restoration Work Specialist prior to August 11, 1995.

Following our decision in Poggione I, appellant presented evidence of his medical ability to perform the essential functions of the position of Restoration Work Specialist. On August 11, 1995, appellant first furnished to the Department the report of Dr. Dunlevy releasing him to return to work with no restrictions.

The Department requested further information from appellant's doctor to confirm that appellant was able to perform the essential functions of the position in accordance with the Department's own job specifications and position analysis. However, once Dr. Dunlevy confirmed on August 23, 1995, after considering appellant's medical condition in light of the specific job requirements furnished by the Department, that appellant could perform the job without restriction, the Department no longer had any excuse not to reinstate him. At that point, if the Department still disputed appellant's ability perform the job, the Department should have reinstated appellant and then required him to submit to a fitness for duty examination pursuant to Government Code § 19253.5(a). If,

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after the examination, the Department concluded appellant was unable to perform the duties of any position, and was not eligible for disability retirement, it could then have invoked medical termination proceedings under Government Code § 19253.5(d).² The Department was not free, however, simply to disregard the Board's order that appellant be reinstated upon a showing of his medical ability to perform the essential functions of the job. By refusing to reinstate appellant, the Department deprived him of his mandatory reinstatement rights as well as the right to contest, in an evidentiary hearing, the Department's assessment of his medical condition.

CONCLUSION

We conclude that appellant was entitled to reinstatement in the position of Restoration Work Specialist as of August 23, 1995, when Dr. Dunlevy provided a full release to return to work based upon the Department's job specifications. Furthermore, we conclude that appellant is entitled to back pay and benefits that he would have earned for the period August 23, 1995 through the date he is reinstated by the Department, in accordance with Government Code section 19584.

²Pursuant to Government Code § 19253.5(c) and (d), prior to medically terminating appellant, the Department would first have had to investigate whether appellant could perform the duties of any other position in the agency and, if so, take the appropriate medical action to place him in another position.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code sections 19140.5, 19253.5 and 19584, it is hereby ORDERED that:

1. The Department of General Services shall reinstate William A. Poggione to the position of Restoration Work Specialist.

2. The Department of General Services shall pay to William A. Poggione all back pay and benefits that would have accrued to him in the position of Restoration Work Specialist for the period August 23, 1995 through the date he is reinstated to that position.

3. 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 appellant.

4. This decision is certified for publication as a Precedential Decision. (Government Code section 19582.5).

THE STATE PERSONNEL BOARD

Lorrie Ward, President

Floss Bos, Vice President

Ron Alvarado, Member

Richard Carpenter, Member

Alice Stoner, 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 August 7-8, 1996.

C. Lance Barnett, Ph.D.
Executive Officer
State Personnel Board