

In the Matter of the Appeal by

RANDALL CURTIS
v.
CALIFORNIA DEPARTMENT OF
PUBLIC HEALTH

Appeal from Demotion

Case No. 07-3861PA

BOARD DECISION
(Precedential)

SPB Dec. No. 10-03

August 23, 2011

APPEARANCES: Kathleen Morgan, Attorney, for Appellant, and Appellant Randall Curtis; Lynda D. Williams, Senior Staff Counsel, for Respondent California Department of Public Health.

BEFORE: Maeley Tom, President; Patricia Clarey, Vice-President; Richard Costigan, Anne Sheehan, and William Fox, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) after the Board granted Respondent California Department of Public Health's (DPH) Petition for Rehearing. Upon reviewing the record and hearing the oral argument, and as set forth below, the Board adopts the Administrative Law Judge's (ALJ) findings of fact and legal conclusion that DPH's Notice of Adverse Action (NOAA) was untimely served. The Board, however, rejects the ALJ's reasoning of the untimely service. In this Decision, the Board seeks this opportunity to clarify its Precedential Decision *Ming Liu* (1997) SPB Dec. No. 97-02, as pertaining to Government Code section 19635.

SUMMARY OF FACTS AND PROCEDURES¹

Appellant, Randall Curtis, was a Senior Staff Information Systems Analyst (Supervisor) in the Genetic Disease Branch (GDB) of DPH. The GDB operates statewide newborn prenatal programs to screen for genetic diseases.

GDB's Berkeley site hosted three computers containing information gathered by the screenings since the early 1980s. The computers, known as "the Ducks," were serviced and maintained under a contract with a private company named Data General/EMC. As a Senior Information Systems Analyst, Appellant was involved in the contract management for GDB.

In early 2003, GDB decided to transfer the information contained in Ducks to a Screening Information System or "SIS," a more advanced computer system, in its new campus in Richmond. During the transition, the Ducks remained operative at the Berkeley site. However, GDB's lease at the Berkeley site was abruptly terminated, and the need to move the Ducks to Richmond became imminent.

Fearing the Ducks would not withstand the move and critical data would be lost, GDB management examined alternatives. One of the alternatives involved building two new computers, or "the Dogs," to which data from the Ducks would be transferred. Important in this case, Dr. George Cunningham, then Chief of GDB and Appellant's supervisor, approved the billing of the cost of the Dogs through the existing service contract with Data Genetic/EMC. In an email dated April 3, 2003, Leticia Rivera, a manager at GDB, requested the

¹ Most of the findings of fact are adopted from the ALJ's Proposed Decision.

approval from Cunningham to use the “alternative” method of purchasing the Dogs through the existing contract, which, Rivera noted, was “not specifically covered” under the contract. In the same email, Rivera also requested confirmation that Cunningham was “authorizing Jim Hoffman and Randy [Appellant Randall Curtis]” to order the Dogs via the “alternative” method. The email was electronically carbon copied to Appellant. Switching from the Ducks to the Dogs was also discussed at the SIS Steering Committee meetings, where higher level personnel at GDB were involved.

In June 2003, the Dogs were placed into service. Data General/EMC subsequently submitted two invoices for payment of building the Dogs under the existing contract. Each invoice explicitly stated “time and materials service not covered under the terms and conditions of your service agreement... Time and materials not covered under the terms and conditions of the regular maintenance agreement.” On August 28, 2003, Cunningham approved and signed the invoices for the costs of the Dogs.

In 2004, the California State Auditor (CSA) received an anonymous complaint under the California Whistleblower Protection Act alleging that GDB improperly paid for the Dogs. CSA found that the Department of Health Services² circumvented the State procurement procedures when it purchased the Dogs through the existing Ducks service contract. The CSA report did not identify the staff responsible for the wrongdoing.

² Before 2007, GDB was part of the Department of Health Services (DHS). In 2007, DHS was divided into two departments: the Department of Public Health and the Department of Health Care Services, and GDB became part of the Department of Public Health.

Following the CSA report, DPH initiated its own investigation. On January 26, 2006, the DPH investigation report was completed. Similar to the CSA investigation, the report found that GDB's purchasing of the Dogs circumvented the State procurement processes. Appellant was named in the DPH report as: (1) a recipient of Leticia Rivera's email to Dr. Cunningham requesting Dr. Cunningham's approval of the "alternative" method of purchasing the Dogs through the existing Ducks service contract, and (2) the person that authorized Jim Hoffman to utilize the "alternative" method. On September 17, 2007, DPH served Appellant with the NOAA alleging that he was responsible for purchasing the Dogs through the existing contract in violation of the state procurement policy. Appellant timely appealed the NOAA.

Prior to the hearing, Appellant moved to dismiss the case on the ground that the September 17, 2007, NOAA was served more than three years after the alleged misconduct occurred,³ in violation of Government Code section 19635. The parties argued the motion before the Presiding Administrative Law Judge (PALJ). The PALJ denied the motion and ordered the parties to present evidence at the hearing to ascertain when DPH should have discovered the misconduct that subjected Appellant to discipline.

The evidentiary hearing before the ALJ followed.⁴ At the hearing, Appellant again moved to dismiss the case. DPH argued that Appellant engaged

³ The parties appeared to agree that the August 28, 2003, date when Dr. Cunningham signed off on the invoices for Dogs was the date misconduct occurred, even though the subject of NOAA was Appellant, not Dr. Cunningham.

⁴ Respondent filed a post-hearing motion to disqualify the ALJ. Respondent's motion was denied.

in fraudulent activity and therefore DPH was permitted to bring the adverse action three years from the discovery of the misconduct, i.e., January 26, 2006, when DPH completed its investigation. In the Proposed Decision, relying on *Ming Liu, supra*, SPB Dec. No. 97-02, which states that “the fraud exception does not apply if, by exercising due diligence, the department should have discovered the fraud within the statutory time limit,” the ALJ found that since the alleged fraudulent misconduct occurred on August 28, 2003,⁵ and DPH discovered it on January 26, 2006, within three years of the alleged misconduct, DPH should have served the NOAA within three years from that misconduct, or by August 28, 2006. The ALJ thus dismissed the case on the basis that the NOAA was untimely served.

The Board initially adopted the ALJ’s Proposed Decision. Upon DPH’s petition for a rehearing, the Board decided to hear the case on its own, inviting the parties to present briefs and oral argument particularly to address the statute of limitations under Government Code section 19635, and the interpretation of the Board precedential decision *Ming Liu, supra*, SPB Dec. No. 97-02 and *Steven Perez* (1996) SPB Dec. No. 96-09.

Following the submission of written and oral arguments by the parties, the Board now issues this Decision.

ISSUES

In this Decision, the Board resolves the following issues:

1. Where an NOAA is based on fraud, embezzlement, or the

⁵ The parties did not identify what was purportedly the alleged fraudulent conduct.

falsification of records, what is the statute of limitations and when the statute of limitations starts to accrue, in light of Government Code section 19635, the Board Precedential Decisions *Ming Liu, supra*, SPB Dec. No. 97-02 and *Steven Perez, supra*, SPB Dec. No. 96-09?

2. Has DPH met the burden of proving that Appellant engaged in fraud in this case?

PRINCIPLES OF LAW AND ANALYSIS

WHEN A CASE IS BASED ON FRAUD, EMBEZZLEMENT, OR FALSIFICATION OF RECORDS, THE STATUTE OF LIMITATIONS IS THREE YEARS FROM THE DATE OF DISCOVERY, OR FROM WHEN THE FRAUDULENT MISCONDUCT SHOULD HAVE BEEN DISCOVERED.

The discussion begins with an examination of Government Code section 19635, which provides:

No adverse action shall be valid against any state employee for any cause for discipline based on any civil service law of this state, unless notice of the adverse action is served within three years after the cause for discipline, upon which the notice is based, first arose. **Adverse action based on fraud, embezzlement, or the falsification of records shall be valid, if notice of the adverse action is served within three years after the discovery of the fraud, embezzlement, or falsification.** (Emphasis added.)

Generally, an adverse action against an employee must be served within three years from when the alleged misconduct occurred. Exception exists, however, when the adverse action is based on fraud, embezzlement, or falsification. This exception is known as the fraud exception. The fraud

exception allows the departments to discipline an employee within three years after the department discovers the employee's fraudulent misconduct.

In *Ming Liu*, the Board held that "the 'fraud exception' does not apply if the Board determines that, by exercising due diligence, the department should have discovered the fraud within the statutory time limit." (*Ming Liu, supra*, SPB Dec. No. 97-02, at p. 8.) The ALJ interpreted this language to mean that when the department should have discovered the fraud within three years of the misconduct, the action must be taken within three-years from when the misconduct occurred. In reading *Ming Liu* in its entirety, against the backdrop of the Board's Decision in *Steven Perez* (1996) SPB Dec. No. 96-09, it becomes clear that this interpretation lacks legal support. The correct reading should be that the "fraud exception" allows the appointing power three years from the date of discovery to serve the adverse action unless, with exercise of due diligence, the appointing power should have discovered the fraud earlier, and in that case, "fraud exception" does not apply and the three-year limitation period commences not from when the department discovered the fraudulent conduct, but from when the department should have discovered it.

This holding is consistent with the Board's ruling in *Steven Perez, supra*, SPB Dec. No. 96-09. In *Perez*, the Board addressed the issue of when the statutory limitations period begins when the cause involves fraudulent misconduct. It looked to California Code of Civil Procedure section 338 for guidance. Section 338 provides that the statutory period for a fraud action

commences when the plaintiff discovers the act.⁶ The Board set forth a two-part process for determining when the limitation period is triggered when fraud or concealment is involved. First, the department must plead when it actually discovered the misconduct, as well as facts that show it lacked actual or presumptive knowledge of it at an earlier time.

Second, the department must be prepared to present evidence at the hearing that would enable the hearing officer to determine “whether, with due diligence, the fraud should have been discovered sooner.” (*Perez, supra*, SPB Dec. No. 96-09, at p. 13, citing *Sides v. Sides* (1953) 190 Cal.App.2d 349.) This language logically leads to the conclusion that, if, with due diligence, the fraud should have been discovered sooner, the statute of limitations would commence sooner, i.e., from when the fraud should have been discovered and not from when the fraud was actually discovered.

The Board’s approach is widely supported by case law. The courts have consistently held that, where an action is based on fraud or mistake, the limitations period begins when the aggrieved party has information that would put a reasonable person on inquiry. (*Kline v. Turner* (2001) 87 Cal.App.4th 1369, 1374).⁷ Applying the rule followed by the courts, in cases based on fraud, similar to other non-fraud based cases, the department would have three years from the discovery of or when it should have discovered the fraud to thoroughly investigate and take necessary actions. The employee’s concealment of the

⁶ This is also known as the “discovery rule.”

⁷ See also *Moreno v. Sanchez* (2003) 106 Cal.App.4th 1615, in cases involving fraud, a cause of action accrues when the plaintiff either (1) actually discovered his injury and its negligent cause or (2) could have discovered injury through the exercise of reasonable diligence.

misconduct would not shield him or her from adverse action. To hold otherwise would make the application of the statute of limitations impossibly uncertain and work to benefit the individual committing the fraud. For instance, if a department exercised due diligence and discovered the fraudulent misconduct one day shy of three years from when the fraud occurred, the department would have only one day to serve an adverse action. Consequently, the employee could dodge the adverse action by carefully concealing the fraud.

As such, in a case where the department alleges fraud, embezzlement, or falsification of records, the three-year statute of limitations commences when the department discovers the misconduct or when the department, in exercising due diligence, should have discovered the misconduct sooner. Any other interpretation under *Ming Liu, supra*, SPB Dec. No. 97-02, inconsistent with this Decision, is disapproved by this Board.

DPH'S ACTION IS DISMISSED
BECAUSE IT FAILED TO PROVE THAT ITS CASE WAS BASED ON FRAUD

DPH argued that the fraud exception applied and therefore the NOAA was timely served. Upon challenge by Appellant, DPH has the burden of proving Appellant's misconduct involved fraud, embezzlement, or falsification (*Perez, supra*, SPB Dec. No. 96-09.)

Fraud is defined as a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. (Blacks Law Dictionary, (9th Ed. 2009).) It usually involves a breach of duty, trust, or confidence, and which is injurious to another, or by which an undue advantage

is taken of another. (*People v. Sisuphan* (2010), 181 Cal.App.4th 800, citing *People v. Talbot* (1934) 220 Cal. 3.)

DPH failed to prove that Appellant knowingly misrepresented the truth in this case. The facts irrefutably establish that almost four months before Appellant submitted the invoices, his direct supervisor, Dr. Cunningham, was specifically warned that the procurement of the Dogs was not covered under the existing contract. His approval was explicitly requested *before* the Dogs could be ordered. At the hearing, Dr. Cunningham conceded that it was his and Leticia Rivera's idea to use the contract for building the Dogs—not Appellant's.

In addition, Dr. Cunningham knew or should have known that the purchase of the Dogs through the existing contract was, at best, questionable procurement method because Ms. Rivera informed him of the purchase method being “on shaking [sic] ground” and that “GDB be discreet and not share our [GDB's] resolution with others.” Dr. Cunningham approved the purchase anyway. Dr. Cunningham had to know that after his approval, the Dogs would be built and the invoices were forthcoming, and he admitted such at the hearing. While it is unknown whether Dr. Cunningham was the ultimate decision maker in utilizing the unlawful procurement method,⁸ it is nonetheless clear that the decision was made at a level above Appellant and Appellant did no more than what he was told to do.

Notwithstanding, Dr. Cunningham, testified that he was under the

⁸ The evidence established that switching from the Ducks to the Dogs was discussed at the SIS Steering Committee meetings, but it was uncertain whether the Committee discussed how the billing of the Dogs would be handled.

impression that Appellant had amended the existing contract to include the technical language for their solution to build the Dogs. Yet, the facts established that Appellant did not amend the contract as directed by Dr. Cunningham and in fact, Appellant received a verbal reprimand from Dr. Cunningham for failing to do so. At no time did Appellant try to misrepresent the source of funding for the Dogs to Dr. Cunningham. Therefore, DPH failed to prove Appellant committed any fraudulent activity.

The Board recognizes that Appellant's signing off on the invoices as the contract manager was inexcusable misconduct because he should have known that the transaction was suspect under the procurement protocols. However, this conduct does not rise to the level of intentional concealment of a material fact. As such, DPH failed to prove that Appellant engaged in fraudulent conduct. Without such proof, the action was untimely and must be dismissed.

CONCLUSION

Pursuant to Government Code section 19635, when an action is based on fraud, embezzlement, or falsification, the three-year limitations time is tolled until the department discovers or with due diligence, should have discovered the misconduct, whichever occurs sooner. DPH did not provide sufficient evidence that its action was based on fraud and thus is required to serve the notice of adverse action within three years after the alleged misconduct occurred. Failing to do so, DPH's action is dismissed.

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 ALJ's findings of facts and the conclusion dismissing the action in the Proposed Decision are adopted by the Board.
2. The ALJ's January 21, 2010, Proposed Decision is attached hereto and shall be provided to the parties.
3. DPH shall pay to Appellant back pay and benefits, if any, that would have accrued him.
4. This matter is referred to the Chief Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due Appellant.
5. This Decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD⁹

Maeley Tom, President
Patricia Clarey, Vice President
Anne Sheehan, Member
Richard Costigan, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on August 23, 2011.

Suzanne M. Ambrose
Executive Officer
State Personnel Board

⁹ Pursuant to Government Code section 19582, subdivision (c), Board member Will Fox's vote was not taken into account since the oral argument before the Board occurred before his appointment to the Board.