BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 31638
	)	
THOMAS WARNER	)	**BOARD DECISION**
	)	(Precedential)
To Clear Name After Limited-Term	)	
Separation from the Position of	)	
Psychiatric Technician Trainee at	)	**NO. 93-31**
the Agnews Developmental Center,	)	
Department of Developmental	)	
Services at San Jose	)	September 7, 1993

Appearances: Thomas Warner representing himself; Margaret A. Fraser, Senior Staff Counsel, Department of Developmental Services, for respondent Department of Developmental Services.

Before Carpenter, President; Stoner, Vice President; Ward and Bos, Members.

DECISION

This case is before the State Personnel Board (Board) for consideration after the Board rejected the attached Proposed Decision of the Administrative Law Judge (ALJ), which denied the request of Thomas Warner (appellant) to have his name cleared after he was terminated for cause from the limited-term position of Psychiatric Technician Trainee at the Agnews Developmental Center, Department of Developmental Services (Department).

The Board originally rejected the attached Proposed Decision in order to review: 1) whether there were emergency or temporary limited-term appointments in appellant's class or layoff division, which would have required "cause" for appellant's termination under

Board Rule 282[1], and 2) the proper procedures for terminating limited-term appointments under Board Rule 282.

After a review of both the law and the record in this case, including the transcript, exhibits, and the written briefs of the parties[2], the Board adopts the attached Proposed Decision as its own Precedential Decision pursuant to Government Code section 19582.5.

The Board notes for the record, that under Rule 282, the Department could have terminated appellant without cause because there was no evidence in the record that there were emergency or temporary employees in limited-term positions who remained employed in the same class and same layoff division as appellant.

The Board agrees with the findings of the ALJ in her Proposed Decision that individual departments should be holding their own name-clearing hearings, as opposed to the Board holding such hearings. Therefore, the Board intends to provide by rule that the departments, are required to hold name-clearing hearings in those instances where a limited-term employee is terminated for cause pursuant to Board Rule 282.

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[1] Title 2, Division 1 of the California Code of Regulations, section 282. For text, see p.3 of proposed decision.

[2] There was no request for oral argument by either party.

ORDER

Upon the foregoing findings of facts of fact and conclusions of law and the entire record in this case, and pursuant to Government Code section 19582 and 19584, it is hereby ORDERED that:

1. Appellant's request that his name be cleared is denied;

2. The attached Proposed Decision, along with this Decision and Order of the Board, are certified for publication as a Precedential Decision of the Board pursuant to Government Code section 19582.5.

THE STATE PERSONNEL BOARD*

Richard Carpenter, President
Alice Stoner, Vice President
Lorrie Ward, Member
Floss Bos, Member

*Member Alfred R. Villalobos was not on the Board when this case was originally considered and did not participate in this decision.

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on September 7, 1993.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by THOMAS WARNER To clear name after limited-term separation from the position of Psychiatric Technician Trainee at the Agnews Developmental Center Department of Developmental Services at San Jose	Case No. 31638

PROPOSED DECISION

This matter came on regularly for hearing before Ruth M. Friedman, Administrative Law Judge, State Personnel Board, on August 25, 1992, at San Francisco, California.

The appellant, Thomas Warner, was present and was represented by Jay Salter, Consultant, California Associate of Psychiatric Technicians.

The respondent was represented by Frances Matson, Agnews Developmental Center.

Evidence having been received and duly considered, the Administrative Law Judge makes the following findings of fact and Proposed Decision:

I

The above termination of a limited-term employee effective June 8, 1992, and appellant's request for a name clearing hearing comply with the procedural requirements

of the State Civil Service Act.

II

Appellant was hired as a Psychiatric Technician Training Candidate on January 2, 1990, and as a Psychiatric Technician trainee on July 1, 1990. He was given increasing responsibilities in the care of patients. For a while he served as a group leader. All appointments to positions as Psychiatric Technician Trainees are made on a limited-term basis and incumbents do not attain permanent civil service status in this class.

III

Appellant was terminated "based on [his] failure to demonstrate merit and efficiency as evidence by [his] poor work performance, attitude and, relationship with people, and as demonstrated by [his actions of June 5, 1992, when [he was] sent home before the end of [his] shift."

IV

At the hearing, the Department produced witnesses who established that appellant had a pattern of appearing angry and intimidated and upsetting clients and staff with his bad moods. His termination was precipitated by his behavior on June 5, 1992, when he was upset about a request to get a urine sample from a client, was angry when a doctor who got the sample with a catheter got some urine on him and "retaliated" by stalling on a subsequent request to get a client ready for a visit. Later, he left his assigned area without permission, thereby leaving his clients without supervision.

One client was left alone on the toilet, apparently for an hour or more. There was also testimony that appellant treated clients well when he liked them, and did his work well except when he was angry. The testimony about the circumstances of his termination was extensive and identical to the type of evidence that would have been presented had appellant been terminated from a permanent civil service position.

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PURSUANT TO THE FOREGOING FINDINGS OF FACT THE ADMINISTRATIVE LAW JUDGE MAKES THE FOLLOWING DETERMINATION OF ISSUES:

State Personnel Board Rule 282 (Title 2 California Code of Regulations Section 282) provides, in relevant part, that

> "A limited term employee may be separated at any time prior to the expiration of the term for which appointed by advising the employee either orally or in writing of the separation; provided, however, a limited-term employee may not be separated except for cause. . . If separated for cause, the appointing power shall given the employee, on or before the date of separation, written notice setting forth the reasons therefor. . . *The employee has no appeal from the action of the appointing power in terminating the limited-term employment*. . . [emphasis added].
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> "The executive officer [of the Board] shall not again certify for limited-term employment in the same class the name of a person who has been separated for cause unless, after investigation, it is determined by the executive officer that the reason for separation should not bar the person from such further employment.
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> "Cause as used in this rule shall include failure to demonstrate merit, efficiently, fitness, and moral responsibility."

The Board's rule reflects the settled law that an employee does not have a vested right in a civil service position that is not permanent, and therefore, may dismissed from such a position without a hearing and without judicially cognizable good cause. *Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d340,345

However, there is an exception to the rule that a hearing is not required. The exception, based on the portion of the Fourteenth Amendment to the United States Constitution prohibiting states from depriving any person of liberty. . .without due process of law,

> "...will be applied where the probationary employee's job termination or dismissal, is based on charges of misconduct which 'stigmatize' his reputation or 'seriously impair his opportunity to earn a living (*Paul v. Davis* 424 U.S. 693, 702) or which might seriously damage his standing or association in his community."
> (*Board of Regents v. Roth* 408 U.S. 564, 573)...
>
> "Where there is such a deprivation of a 'liberty interest' the employee's remedy mandated by the Due Process Clause of the Fourteenth Amendment is 'an opportunity to refute the charge [and] 'to clear his name (*Codd v Velges* 429 U.S. 624,627)." *Lubey v City and County of San Francisco* (1979) 98 Cal.App. 3d at 346.

The line between what reasons for termination require a "name clearing hearing" and which do not is not a clear one. Most courts that have considered the issue distinguish between issues of competency, which do not require a hearing, and issues relating to morality, which do require a hearing. So in *Murden v County of Sacramento* (1984) 138 Cal. App. 3d 812, the Court found that an employee was not entitled to a name clearing hearing on charges that he was unable to learn the basis duties of his job and that he did not get along with co-workers, but was entitled to a hearing on charges based on complaints by female employees about conversations the employee initiated about inappropriate sexual activities. In *King v. Regents of the University of California* (1982) 138 Cal. App. 3d 812, the Court held that a college teacher denied tenure because his colleagues did not consider that his work met their standards of excellence did not have a liberty interest and was not entitled to a hearing because the failure to

grant him tenure did not impose on him "a stigma or other disability that foreclosed his freedom to take advantage of other employment in State Universities." *Ibid.* at 816 In *Shepard v Jones*, (1982) 136 Cal. App. 3d 1049, the Court held that the executive director of a housing authority had no liberty interest in refuting public allegations of incompetence because "mere allegations related to inadequate job performance do not infringe on a person's liberty interest" 136 Cal. App. 3d at 1060, but accusations of dishonesty or corruption, disloyalty, chronic alcoholism, immorality, lack of intellectual ability or manifest racism would infringe on a liberty interest and entitled an employee to a name clearing hearing. In spite of his apparently clear language, however, the line between cases where a hearing is required and where it will not be required could often raise questions. For example, in the present case, appellant's behavior in leaving his patients without supervision could be classified as absence without leave, which would not require a name clearing hearing, or patient abuse, which would require it. His pattern of anger could be classified as misconduct, which would not entitle him to a hearing, or abusiveness of character, which would.

Wherever this line is drawn between the type of charges that entitle employees to a name clearing procedure and charges where such a hearing is not required, it is clear that the employee is not entitled to a full scale judicial-type hearing with an opportunity to hear and confront witnesses. *Murden v. County of Sacramento*, supra, 160 Cal. App. 3d at 211. In *Murden*, the Court held that the employee was afforded a meaningful and adequate opportunity to refute the charges and clear his name when he

was appraised of the charges against him, was permitted to see the evidence, had an opportunity to explain his behavior before officers of the Department, was allowed to submit a detailed written response and was not precluded from conducting his own investigation or presenting his own evidence.

Murden 160 Cal. App. 3d at 312.

The procedure that the *Murden* Court found adequate to provide an opportunity for name clearing is remarkably similar to the ideal version of the Skelly hearings routinely required by Board Rule 52.3[3] as the hearings to which permanent employees are entitled before they are disciplined. All departments of State government are familiar with these hearings.

Given the limited scope of the name clearing hearing, no sensible purpose is served in having these hearings before the State Personnel Board. If the Board is required to decide whether there was good cause for the termination, there is no way to prevent the parties from conducting a full hearing, identical to the hearing in a dismissal hearing. There is no way to confine these hearing to charges involving "moral turpitude" or some such category, because then inevitably someone will have to decide

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[3]Rule 52.3 (Title 2 California Code of Regulations Section 52.3) states:

"(a) Prior to any adverse action, rejection during the probationary period or the transfer, demotion, or termination or transfer between classes of an employee for medical reasons, the appointing power...shall give the employee written notice of the proposed action....The notice shall include: (1) the reasons for such action (2) a copy of the charges for adverse action, (3) a copy of all materials upon which the action is based, (4) notice of the employee's right to be represented in proceedings under this section, and (5) notice of the employee's right to respond to the person specified in subsection (b).

(b) The person whom the employee is to respond to in subsection (a)(5) shall be above the organizational level of the employee's supervisor who initiated the action unless that person is the employee's appointing power, in which case the appointing power may respond to the employee or designate another person to respond.

(c) the procedure specified in this section shall apply only to the final notice of proposed action.

whether the charges fall into the category, a decision that can hardly be made without hearing the whole case.

The more sensible procedure would be to require all Departments to conduct a "hearing" or "name clearing" on all terminations for cause of limited term appointments, in the same manner as the Departments conduct Skelly hearings under Rule 52.3 for permanent and probationary employees. The procedure should provide employees with the opportunity to respond to the charges in writing and should provide that the writing be retained in the employee's personnel file so the employee's version is available for review in case he or she makes a request for recertification to the class and the executive officer of the Board makes an investigation, as required by rule 282. At such a hearing, a representative of the Department who was not directly involved in the action, would have a duty to listen to and consider the information provided by the employee, but would not be required to write a decision or determine whether the name was "cleared". It would be sufficient to let the employee's written statement appear as part of the record.

Due process does not require a formal adjudication, and such an adjudication is especially pointless because after a department has decided on a termination, the Board has no authority to change the decision or impose a remedy. If the department has actually proceeded with a termination because of a mistake in facts, only the Department has the authority to change its mind. In these cases, an employee will actually be better off appearing before a representative of the Department than appearing before the Board.

In the present case, however, the hearing established that the reasons stated for the termination were true. Appellant's name is not cleared.

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WHEREFORE IT IS DETERMINED that the action of the appointing power in terminating Thomas Warner from his limited-term appointment is final and his name is not cleared.

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I hereby certify that the foregoing constitutes my Proposed Decision in the above-entitled matter and I recommend its adoption by the State Personnel Board as its decision in the case.

DATED: October 13, 1992

RUTH M. FRIEDMAN

Law

Ruth M. Friedman, Administrative Judge, State Personnel Board