



## **BACKGROUND**

### Factual Summary<sup>1</sup>

#### (Employment History)

Appellant has been a state employee for more than ten years. For the last eight years, she has been employed as an Office Technician with the Department.

#### (Notice of Adverse Action)

Appellant was served with an Amended Notice of Adverse Action (NAA) dismissing her from State service effective as of the close of business on February 2, 1998. Appellant timely appealed to the Board from the NAA. On April 21, May 28, June 22, July 23 and August 5 and 6, 1998, a Board Administrative Law Judge (ALJ) held a hearing on appellant's appeal. During the post-hearing briefing period, appellant informed the ALJ that, effective February 1, 1998, or "at the open of business" on February 2, 1998, the Public Employees' Retirement System (PERS) granted her application for disability retirement.<sup>2</sup>

### Procedural History

Relying upon Vera Worlds,<sup>3</sup> a non-precedential, administrative law judge proposed decision adopted by the Board, the ALJ in this case, in his Proposed Decision, found that since appellant's disability retirement became effective before the effective date of her dismissal, it precluded her dismissal from ever becoming effective

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<sup>1</sup> The factual summary is taken substantially from the Proposed Decision.

<sup>2</sup> The Department does not dispute that appellant's disability retirement became effective before her dismissal. The Department does dispute, however, appellant's assertions as to when she applied to PERS for disability retirement. The date on which appellant may have applied to PERS for disability retirement is not relevant to this Decision.

<sup>3</sup> (1994) SPB Dec. No. 30840.

and caused her appeal to become moot. The Board granted the Department's Request for Rehearing to reconsider the issue of whether appellant's applying for disability retirement and/or PERS's granting her disability retirement application precluded her dismissal from becoming effective and divested the Board of jurisdiction to consider her appeal from dismissal.

The Board has reviewed the record, including the transcripts, exhibits, and written arguments of the parties, and heard the oral arguments of the parties, and now issues the following decision.

### **ISSUE**

Did appellant's disability retirement, which became effective before the effective date of her dismissal, preclude her dismissal from becoming effective and divest the Board of jurisdiction to hear her appeal?

### **DISCUSSION**

In 1957, the Attorney General issued an opinion that concluded that a state civil service employee who resigned prior to the effective date of a dismissal could not thereafter be dismissed by his or her appointing authority.<sup>4</sup> In reaching that opinion, the Attorney General reasoned that a person who had already resigned from his or her

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<sup>4</sup> 29 Ops.Cal.Atty.Gen. 115 (April 5, 1957)

civil service position was no longer an employee subject to dismissal. As the Attorney General explained:

Resignation is designated as a method of permanent separation from the civil service relationship, and, as discussed above, is effective upon compliance with established procedure. Thus, upon resignation the employer-employee relationship is permanently severed.<sup>5</sup> (Emphasis added.)

Unlike a resignation, a disability retirement is not a separation that permanently severs the employment relationship between a civil service employee and his or her appointing authority. By law, a covered state employee who meets the applicable eligibility requirements may apply to PERS for disability retirement.<sup>6</sup> PERS reviews the application and makes the determination as to whether an applicant qualifies for disability retirement and, if so, the effective date of retirement.<sup>7</sup> Once PERS has approved an employee for disability retirement, that employee is entitled to remain on disability retirement only so long as he or she remains incapacitated for duty in the position held at the time his or her disability retirement became effective. If, after medical examination, PERS determines that the employee is no longer incapacitated for duty in that position, the employee's entitlement to disability retirement ends, and the employee has a right to reinstatement to his or her prior position in the civil service.<sup>8</sup> Since an employee may remain on disability retirement only as long as he or she

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<sup>5</sup> Id. at pp. 117-8.

<sup>6</sup> See Government Code § 21152(d).

<sup>7</sup> See generally, Government Code § 21150 et seq.

<sup>8</sup> Government Code §§ 21192 and 21193. But see D. [REDACTED], J. [REDACTED] (1996) SPB Dec. No. 96-03, which found that an employee may voluntarily waive his or her mandatory right to reinstatement.

remains incapacitated for duty in his or her prior position, and has a right to reinstatement to that prior position when PERS finds him or her no longer to be incapacitated, disability retirement is deemed to be only a temporary separation from state service.<sup>9</sup>

Temporary separations, such as disability retirement, do not result in a loss of permanent civil service status. An employee who had permanent civil service status before a period of temporary separation will return to permanent civil service status at the termination of the temporary separation period, unless that employee is otherwise permanently separated from civil service.<sup>10</sup>

Unlike disability retirement, dismissal does effect a permanent separation from state civil service. An employee who is dismissed not only permanently loses his or her job, his or her name is removed from all employment lists on which it may appear, and he or she may not take any state civil service examination or be certified to any position in the state civil service without the prior consent of the Board's Executive Officer or the Board.<sup>11</sup>

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<sup>9</sup> See 2 Cal. Code of Regs. § 446, which provides:

Temporary separations from state service shall include all types of leave of absence including leave under Section 599.785, military leave, suspension, termination for medical reasons, termination of permanent or probationary employee by layoff, termination by displacement, and disability retirement. Permanent separations from state service shall include dismissal; resignation; automatic resignation (AWOL); rejection during probationary period; termination for failure to meet conditions of employment; termination of limited-term, temporary authorization, emergency, Career Executive Assignment, or exempt appointment; and service retirement. (Emphasis added.)

<sup>10</sup> See Kuhn v. Department of General Services (1994) 22 Cal.App.4th 1627, 1639.

<sup>11</sup> Government Code §§ 18935 and 19583.1; 2 Cal. Code of Regs., § 211. See R. [REDACTED] v. N. [REDACTED] (1998) SPB Dec. No. 98-10.

If a temporary separation, such as a disability retirement, were allowed to supercede a permanent separation, such as a dismissal, an employee would be able to avoid the consequences of a dismissal merely by disability retiring before the effective date of dismissal and then, upon recovery, seeking reinstatement after the three-year statute of limitations period on the dismissal allegations had expired.<sup>12</sup> An employee who followed this course of action might effectively retain permanent civil service status without ever having to answer for serious allegations of misconduct that might have otherwise resulted in a dismissal precluding reinstatement. The Board will not interpret the law to permit an employee to avoid the consequences of his or her misconduct while still retaining his or her permanent civil service status.

The Board, therefore, finds that appellant's disability retirement, which became effective before the effective date of her dismissal, did not preclude her dismissal from becoming effective or divest the Board of jurisdiction to hear her appeal. This matter will be remanded to the ALJ to issue a proposed decision on appellant's dismissal. If her dismissal is sustained, appellant will lose all the civil service rights that civil service employees lose as a result of dismissal, most importantly, the right to reinstatement. Appellant's disability retirement will not, however, be adversely affected.

## **CONCLUSION**

Since appellant's disability retirement is a temporary separation, it does not preclude her subsequently effective dismissal from becoming effective or divest the

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<sup>12</sup> See Government Code § 19635. The Board has never addressed, and does not here seek to resolve, the issue of whether the statute of limitations would be tolled under such circumstances.

Board of jurisdiction to hear her appeal from that dismissal. This matter is, therefore, remanded to the ALJ to issue a proposed decision on the merits of appellant's appeal.

**ORDER**

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

1. This matter is remanded to the Administrative Law Judge to issue a proposed decision on the merits of appellant's appeal.

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

**STATE PERSONNEL BOARD**

Florence Bos, President  
Ron Alvarado, Vice President  
Richard Carpenter, Member  
William Elkins, Member  
Lorrie Ward, 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 June 8, 1999.

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Walter Vaughn  
Executive Officer  
State Personnel Board

[Gray-dec]