BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **ANDREW G. INGERSOLL** From denial of reasonable accommodation, discrimination based on disability, and constructive medical suspension from the position of Transportation Engineering Technician with the Department of Transportation at Redding	SPB Case No. 98-3517 **BOARD DECISION** (Precedential) **NO. 00-01** January 19, 2000

APPEARANCES: Kelley Stimpel Rasmussen, Attorney, on behalf of appellant, Andrew G. Ingersoll; Judith Ann Smith, Legal Analyst, Department of Transportation, on behalf of respondent, Department of Transportation.

BEFORE: Florence Bos, President; Ron Alvarado, Vice President; Richard Carpenter, William Elkins and Sean Harrigan, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) after the Board rejected the Proposed Decision of the administrative law judge (ALJ) to consider whether Andrew G. Ingersoll (appellant) was illegally denied a reasonable accommodation, discriminated against based upon a perceived disability, and/or constructively medically suspended when respondent, the Department of Transportation (Caltrans or Department), failed for almost 11 months to return him to his position as a Transportation Engineering Technician after his doctor released him for work, subject to certain limitations and precautions.

In this Decision, the Board finds that Caltrans constructively medically suspended appellant and engaged in illegal disability discrimination when it failed to respond for

almost 11 months to the return to work release issued by appellant's doctor. The Board awards appellant lost back pay and benefits, and $25,000 in compensatory damages.

BACKGROUND

Factual Summary[1]

(Employment History)

Appellant began his career with the State of California on March 31, 1980 as a Caltrans Toll Bridge Worker I. Appellant worked in a number of different positions at Caltrans before promoting to the position of Transportation Engineering Technician (TET) on April 1, 1991.

(Appellant's Neck Injury)

On August 21, 1995, while taking samples of asphalt for testing, appellant suffered an on-the-job injury to his neck and shoulder. At that time, appellant was assigned to a "field" position in the Construction Unit. Appellant filled out a "green slip" about the injury when he returned to the office on August 22, 1995. Caltrans sent appellant to the Redding Industrial Occupational Health Clinic (RIOHC) for examination. RIOHC diagnosed appellant's problem as tendonitis, and released him to work without restriction the next day.

Appellant continued to suffer pain, and in October 1995, he was referred to an orthopedic specialist who diagnosed a herniated neck disc. Appellant underwent discectomy surgery on his neck in November 1995.

[1] Some of this factual summary was taken from the Proposed Decision.

After rehabilitation, appellant returned to work in May 1996 to an "office" assignment in the Design Unit under Dan McElhinney's (McElhinney) supervision.[2] By July 1996, appellant was again experiencing the same symptoms that he had had before surgery: severe headaches, muscle spasms in his neck and shoulders, and marked weakness in both arms.

Appellant worked on and off between July and October 1996, when he was referred to another neurosurgeon. In November 1996, appellant had a second discectomy, during which a bone fusion was performed and a titanium plate and pins were installed in his neck. Appellant again underwent rehabilitation, and saw Dr. Lee Vranna (Dr. Vranna) for pain control and post-surgical follow-up.

(April 21, 1997: Release to Return to Work)

On April 21, 1997, Dr. Vranna, after examining appellant, gave him a work release. That work release had three boxes that could be checked: "Off Work," "Return to Work" and "Modified Work." On the release, the box labeled "Modified Work" was checked and, next to that box, the following was written:

> field work [without] neck extension [without] partial neck flexion [without] repetitive arm motion [with] arms held straight in front.

Dr. Vranna also provided a report that stated, among other things, that:

> I have released him for field work (I advised against office work, given his neck problem), avoiding overhead activity, repetitive upper extremity

[2] According to McElhinney, appellant was assigned to the Design Unit on a permanent basis, but had been loaned to the Construction Unit during the summer of 1995 to meet the needs of the District. McElhinney testified that TETs were assigned either to field positions or office positions depending upon Caltrans's work needs, and that it was common to rotate employees between field and office assignments.

> motion with his arms held straight out in front of him, and static partial neck flexion.[3]

After he left Dr. Vranna's office, appellant drove to Caltrans's office, and gave Dr. Vranna's release and report to Al Trujillo (Trujillo), the supervisor who had replaced McElhinney. Trujillo told appellant to go home, and he would be in touch with him.

(Caltrans's Response to Dr. Vranna's Release)

Dr. Vranna's release and report were forwarded to Caltrans's Workers' Compensation (WC) Unit. That Unit sent a memorandum dated April 24, 1997 to Dr. Vranna, requesting that he review a duty statement for appellant's previous position as a Design Technician in the Design Unit in light of the restrictions he had imposed. That memorandum explained that appellant worked primarily "at a drafting desk, a layout plan table or a computer workstation." The memorandum asked Dr. Vranna to respond by April 28. Caltrans did not receive a response to this request.

By memorandum dated April 29, 1997, without identifying appellant by name, Caltrans's WC Unit sent the following memorandum to three Caltrans supervisors, Trujillo, Gary Pursell (Pursell), and Chris Cummings (Cummings):

> Do we have any field lab work that would accommodate the following restrictions?
> Field work that wouldn't involve neck extension (tilting head straight up), without partial neck flexion (tilting head straight down), without repetitive arm motion with arms held straight in front.
> I need an answer ASAP.

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[3] On June 3, 1997, Dr. Vranna provided the State Compensation Insurance Fund (SCIF) with a Treating Physician's Report of Disability Claim Status that stated:

> Patient is able to perform at medium-heavy level of duty <u>without</u> repetitive neck movement. (Emphasis in the original.)

Trujillo, the Chief of the District 2 Design Unit, responded in writing to this memorandum as follows:

> Work involved in design requires an employee to tilt head down while working on design plans. It also requires an employee to use his/her arms repetitively when using the computer. That is the main part of our work.

Pursell, Construction Manager for the North Region, encompassing Districts 1,2, and 3, responded on April 30, 1997, that:

> Construction work requires both neck extension and neck flexion as described above. Furthermore, a full range of neck movement is critical for field employees to be alerted to and aware of the inherent risks of field construction such as excavations and trenches, overhead work such as cranes and falsework erection, moving equipment and activity in all directions, public traffic, etc., etc.

Cummings, Chief of the District 2 Materials Lab, on April 30, 1997 responded in writing as follows:

> Per your request, I have reviewed our field/testing work and have concluded that there is no available work that will not involve neck extension (tilting head straight up), neck flexion (tilting head straight down) or repetitive arm motion with arms held straight in front.

In June 1997, Victoria Matthews (Matthews) became the Manager of Caltrans's WC Unit. According to Matthews, Caltrans's standard practice is to try to return an injured worker to the position he or she held prior to injury. Even though appellant's position prior to his original neck injury in 1995 had been in the field, his last position in October 1996 when he went out on medical leave had been in an office job. Although Dr. Vranna's release and report stated otherwise, Matthews believed that an office position would be less physically demanding for appellant than a field position.

On June 21, 1997, after receiving Trujillo's, Pursell's and Cummings's responses, Matthews completed a Modified Job/Alternate Work Response Form on which she

checked the boxes for "Employee has not returned to work. Temporary light work is NOT available at this time" and "Employee has not returned to work. Permanent modified/alternate work is NOT available at this time." (Emphasis in original.) She also checked the box labeled "Other" and wrote, "Based on Dr.'s restrictions unable to accommodate @ this time." Matthews admitted that she did not speak to Dr. Vranna or any other health care providers, and did not look for any available positions for appellant outside the TET classification or the Redding area before reaching these conclusions. Matthews did not provide a copy of this form to appellant.

(June 27, 1997: Graff's Letter to Caltrans)

While appellant was off work between approximately late October 1996 and May 1997, he received industrial disability leave (IDL) benefits, which paid him approximately two-thirds of his $3,717 salary. In May 1997, his IDL benefits ceased. Having heard nothing from Trujillo, appellant contacted his workers' compensation claim attorney, Donald Belkin (Belkin). Belkin advised him to invoke his right to vocational rehabilitation benefits to have some funds coming in. The record indicates that in or about June 1997, appellant began receiving temporary disability (TD) payments from SCIF.

SCIF referred appellant to Donald Graff (Graff), a Vocational Rehabilitation Counselor. According to Graff, SCIF requested that he evaluate appellant and send a letter to Caltrans requesting alternative or modified employment. In response to SCIF's request, Graff sent a letter dated June 27, 1997[4] to Jane Norman (Norman), a Caltrans Personnel Analyst, which, in relevant part, stated:

[4] This letter was also copied to Belkin, appellant, and Sarah Norrington (Norrington), the adjuster assigned to appellant's claim at SCIF.

> It has been requested that I convey Mr. Ingersoll's request for consideration of alternative or modified employment with Cal Trans.

In that letter, Graff asked Caltrans to consider appellant for alternative or modified employment in a variety of locations[5] and positions. The letter indicated that appellant was most interested in returning to construction materials, construction, or survey-related employment, but was also willing to consider additional options. With his letter, Graff enclosed a copy of a Functional Capacity Evaluation (FCE) prepared by Jim Girt (Girt), a Physical Therapist. The FCE concluded:

> 1. Consider Andy able to function safely at a medium-heavy physical demand level. His greatest restriction being prolonged sitting in a head-forward task.
>
> 2. Encourage Andy to participate in an ongoing strengthening and conditioning program to maintain or improve his present physical demand level and to assist him in managing his symptoms.
>
> 3. Compare the results of this FCE with the job description to determine if reasonable accommodation can be provided.

(Caltrans's Response to Graff's Request)

Matthews testified that she did not respond to Graff's June 27, 1997 letter because she did not consider it to be a request for reasonable accommodation since appellant did not generate it. She stated that Caltrans only considered a document to be a formal request for reasonable accommodation if it were set forth on the applicable Caltrans form and signed by the requesting employee. Matthews did not explain this position to either Graff or appellant, nor did she send any materials to appellant to

[5] District 2 (the Redding area), Sacramento, the Bay Area, or areas north of Redding.

explain Caltrans's reasonable accommodation process so that he could access it and file a request himself. Matthews believed that SCIF would answer Graff's request.

Graff testified that he received no written response from Caltrans to his June 27, 1997 letter. He stated that his notes indicated that he received a call from Matthews on July 25, 1997, indicating that Caltrans would not return appellant to work because he was not cleared to return to work based upon emotional issues. Graff had received no report or indication from SCIF that appellant was not fit for duty for any psychiatric reasons.[6]

Because the two-month deadline was rapidly approaching when Graff had to submit a written vocational rehabilitation plan to SCIF,[7] Graff, appellant, Belkin, and Norrington agreed that appellant should suspend vocational rehabilitation services effective August 8, 1997, so that the viability of appellant returning to Caltrans could be determined.

(August 1997: Referral to Dr. Richard Powell)

Appellant testified that being out of work began to affect him emotionally. He was at a loss to understand why Caltrans would not let him work. He had trouble sleeping, his appetite was affected, and he became depressed.[8] He was worried about his

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[6] By this point in time, appellant had seen psychologist Michael Mongold, Ph.D. (Dr. Mongold), once, on a referral from Dr. Vranna for depression. As summarized in the AME's report, Dr. Mongold saw appellant once, and reported that he was depressed and had a suggestion of a bipolar disorder.

[7] The vocational rehabilitation process must be completed within certain timeframes. A written vocational rehabilitation plan must developed within two months, and the plan must be implemented within three months.

[8] Appellant's girlfriend, Denice Henderson (Henderson), who has lived with appellant since February 1996, corroborated these effects. She testified that appellant was "ecstatic" and "very pumped" when Dr. Vranna released him to return to work, but he grew increasingly depressed and despondent over the next ten months before he was returned to work.

finances, particularly after his IDL benefits ceased. Dr. Vranna referred appellant to a psychiatrist, Dr. Richard Powell.

Dr. Powell first met with appellant on August 28, 1997. According to Dr. Powell, appellant was depressed primarily because he was not working. Dr. Powell produced a report for SCIF dated September 8, 1997, in which he found appellant "temporarily totally disabled."[9] Dr. Powell testified that his use of this term indicated that appellant was not fully recovered from a psychiatric perspective, not that appellant was unable to work. On the contrary, Dr. Powell believed that work would aid appellant in his recovery. Dr. Powell testified that no one from Caltrans ever contacted him to discuss any concerns he or she might have about whether appellant was psychiatrically fit to return to work.

Dr. Powell wrote follow-up reports dated September 25[10] and November 3, 1997. In his November 3, 1997 report, Dr. Powell stated, "It appears that Mr. Ingersoll is now recovered from an emotional perspective. He has no residual permanent partial disability." According to Dr. Powell, he did not intend for this report to convey that

[9] Both Graff and Dr. Powell testified that "temporarily totally disabled" is a workers' compensation phrase meaning that the individual's condition is not yet permanent and stationary. That one is "temporarily totally disabled" does not necessarily mean the individual cannot return to work.

[10] Dr. Krohn, a SCIF physician, sent Dr. Powell a letter dated October 24, 1997, that requested clarification of Dr. Powell's assessment of the need for ongoing care. Dr. Krohn was in agreement with Dr. Powell that appellant was permanent and stationary, and took the position that there was no psychiatric condition that precluded appellant from working.

appellant was only able to work as of the report's date; in his opinion, appellant had been able to work from a psychiatric point of view when appellant first came to him in August 1997.

Although she never contacted Dr. Powell to discuss his reports with him, Matthews interpreted the term "totally temporarily disabled" as used in Dr. Powell's September 8, 1997 report to mean that appellant was unable to return to work, even though that report included no work restrictions. She considered the November 3,1997 report to be a release permitting appellant to return to work.

(Job Analyses and AME Selection)

On September 25, 1997, while vocational rehabilitation was on interrupt status, Norrington called Graff, and asked him to complete the job analyses they had earlier discussed.[11] She referred him to Trujillo and Pursell to discuss the physical requirements of the field and office TET positions.

On September 30, 1997, Graff was provided with a written job summary for a desk position prepared by Trujillo. Graff had a difficult time reaching Pursell regarding the field position, and then was out of his office with knee surgery.

In mid-December 1997, Belkin and SCIF agreed to send appellant to an Agreed Medical Examiner (AME), orthopedist Geoffrey M. Miller, M.D.

On January 16, 1998, after discussing the requirements with Pursell, Graff completed the job analyses, discussed those analyses with appellant, and forwarded

[11] SCIF had earlier asked Graff to complete a job analysis for both field and office positions at Caltrans for appellant. Graff discussed the possibility of these positions with appellant, who was willing to consider any job at Caltrans.

them to SCIF. At a conference with SCIF shortly thereafter, Norrington asked Graff to reiterate his request to Caltrans to place appellant in a modified or alternative job.

On January 26, 1998, Graff again discussed placement with Matthews, who told him that appellant's "emotional issues" had not been cleared up. This surprised Graff, and he sent her a copy of Dr. Powell's November 3, 1997 letter.

Matthews sent Graff a letter dated February 3, 1998, which stated that she had informed him that "modified work was not available based upon Mr. Ingersoll's orthopedic restrictions." (Emphasis in original.) In that letter, Matthews noted that Graff had yet to perform the job analysis,[12] which would be reviewed by the AME, and that:

> If Dr. Miller (AME) believes that Mr. Ingersoll is able to perform his usual and customary duties and/or he indicates permanent restrictions that Caltrans is able to accommodate, Mr. Ingersoll will be returned to work. Absent any change in Mr. Ingersoll's permanent restrictions, vocational rehabilitation is the only available option.

(February 22, 1998: Dr. Miller's AME Report)

After reviewing appellant's medical file and examining appellant on January 30, 1998, Dr. Miller submitted a report dated February 22, 1998 in which he stated, among other things, that:

> I reviewed job descriptions of Transport/Design Technician and Transportation/Engineering Technician, both of which appear to be congenial with patient's disability.
>
> The patient's permanent disability at this time is a preclusion to light work. . . mainly because of the patient's extensive spine history, including two cervical surgeries as well as a lumbar derangement.

[12] In fact, however, these had already been forwarded to SCIF and were later used by Dr. Miller in the AME evaluation of appellant.

(March 11, 1998: Appellant's Return to Work)

After receiving Dr. Miller's report, Caltrans returned appellant to work on March 11, 1998, in a TET position in the Design Unit. Matthews testified that Caltrans did not return appellant to work in response to Dr. Vranna's April 21, 1997 release because that release contained restrictions that Caltrans could not accommodate. Matthews admitted, however, that Dr. Miller's AME report also contained restrictions. Matthews testified that appellant would not have been returned to work even on March 11, 1998 had the AME evaluation not occurred.

Procedural Summary

On September 17, 1998, appellant filed a "Complaint for Damages" (Complaint) with the Board in which he asserted, among other things, that Caltrans had constructively medically suspended him, discriminated against him based on disability in violation of Government Code § 12940(a) of the California Fair Employment and Housing Act (FEHA), and failed to provide a reasonable accommodation in violation of Government Code § 12940(k) of FEHA.

During the evidentiary hearing, the ALJ noted that appellant had limited the scope of his appeal for constructive medical suspension and denial of reasonable accommodation to the time period between April 21, 1997, when Dr. Vranna released him to work with restrictions, and March 11, 1998, when Caltrans finally returned him to work. [13]

[13] In April 1998, appellant's physician requested that appellant be provided with an ergonomic keyboard, a mousepad mounted on the arm of his chair, and tilt boards on the filing cabinet so that appellant could look at plans and maps at a comfortable level. After those devices were obtained prior to the second day of hearing on March 2, 1999, appellant agreed to modify the dates of his denial of reasonable accommodation complaint to the dates set forth above.

After hearing, the ALJ issued a Proposed Decision that found that appellant had been constructively medically suspended and discriminated against based upon disability, and granted appellant back salary and benefits between April 21, 1997 and March 11, 1998, and $25,000 in compensatory damages for his emotional suffering.

The Board rejected the Proposed Decision and asked the parties to brief the following issues: (1) Did appellant establish that he was constructively medically suspended, and, if so, what is the appropriate remedy; (2) Did appellant establish that he was discriminated against based upon disability, and, if so, what is the appropriate remedy.

The Board has reviewed the record, including the transcripts, exhibits, and written arguments of the parties,[14] and heard the oral arguments of the parties, and now issues the following decision.

ISSUES

1. Does the Board have jurisdiction to review appellant's Complaint?

2. If so, was appellant constructively medically suspended between April 21, 1997, when his doctor released him to work with certain restrictions, and March 11, 1998, when appellant returned to work?

3. Did Caltrans engage in illegal disability discrimination when it failed to return appellant to work after his doctor released him with certain restrictions?

[14] Attached to the brief Caltrans submitted to the Board were two exhibits that were not admitted into evidence during the evidentiary hearing before the ALJ: a June 25, 1997 report prepared by Dr. Mongold, and a May 20, 1998 Notice of Adverse Action. During oral argument, appellant objected to those documents. The Board hereby sustains appellant's objection. The Board has not reviewed those documents for purposes of this appeal.

DISCUSSION

Jurisdiction to Review Appellant's Complaint

In its brief, Caltrans asserts that appellant's claims for constructive medical suspension, disability discrimination and denial of reasonable accommodation should be dismissed because appellant failed to comply with the filing requirements and deadlines set forth in applicable Board rules.

Caltrans contends that, although appellant claims that he was constructively medically suspended on April 21, 1997, he did not file his Complaint with the Board until September 17, 1998. Caltrans claims that this late filing violates the 30-day limitations period set forth in Board Rule 51.2(e)(2).[15] Caltrans also contends that, although appellant claims that he was discriminated against based upon a perceived disability, he failed to exhaust his administrative remedies under Board Rules 53.1[16] and 54[17] by first filing his disability discrimination complaint with Caltrans, a condition precedent to filing a discrimination appeal with the Board.

From a review of the record in this matter, it appears that Caltrans did not raise either of these defenses at any time during the hearing before the ALJ. Instead, the

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[15] Board Rule 51.2(e)(2) provides that, in a case where the appointing power has not served and is not required to serve any notice, an appeal must be filed with the Board within 30 days after the event upon which the appeal is based.

[16] Board Rule 53.1 requires that state agencies establish and publicize a process for addressing their employees' merit issue complaints, and provides that an appeal to the Board from a merit issue complaint must be filed within 30 days after a state agency denies an employee's merit issue complaint

[17] Board Rule 54 sets forth the procedures that govern the filing of discrimination complaints with the Board. See also Board Rule 547.1, which provides that an employee's discrimination complaint must first be considered by the employee's appointing power before it can be filed with the Board, unless it involves matters that are not within the authority of the appointing power to resolve.

record reveals that the first time Caltrans raised these defenses was in its brief filed with the Board after the Board rejected the ALJ's Proposed Decision.

Statutes of limitation[18] and failure to exhaust administrative remedies defenses[19] are waived unless they are asserted at the proper time and in the proper manner. To reach its decision in this case, the Board has reviewed the record that was established during the evidentiary hearing before the ALJ, and the parties' written and oral arguments. To establish a complete hearing record, it was incumbent upon each party to have raised all legitimate issues and defenses before the ALJ so that the other party could have responded to those issues and defenses during the evidentiary hearing and the ALJ could have addressed them in her Proposed Decision. By failing to raise these defenses before the ALJ, Caltrans deprived appellant of the opportunity to oppose those defenses during the evidentiary hearing and the ALJ of the opportunity to make findings on them in the Proposed Decision, and caused the ALJ and the Board to expend considerable time and effort in reviewing issues that may have been disposed of on procedural grounds at a much earlier stage in the proceedings. The Board, therefore, finds, that by failing to raise its statute of limitations and exhaustion of administrative remedies defenses before the ALJ during the evidentiary hearing, Caltrans waived the right to assert those defenses before the Board.

Caltrans also asserts that appellant's appeal from denial of reasonable accommodation must be dismissed because appellant failed to comply with the time

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[18] Bohn v. Watson (1955) 130 Cal.App.3d 24, 36-37; Jenron Corp. v. Department of Social Services (1997) 54 Cal.App.4th 1429, 1437.

[19] Mission Housing Development Co. v. City and County of San Francisco (1997) 59 Cal.App.4th 55, 67.

limits set forth in Board Rule 53.2.[20] A review of the record reveals that Caltrans properly raised this defense during the evidentiary hearing before the ALJ.

Board Rule 53.2 provides that before an employee may file an appeal from denial of reasonable accommodation with the Board, he or she must first file a written request for reasonable accommodation with his or her appointing authority. Under this regulation, the appointing authority has 20 days to respond to the employee's request for reasonable accommodation. The regulation requires that the requesting employee file an appeal to the Board within 30 days after the appointing authority's 20-day period for responding has expired, even if the appointing authority has not yet issued a written response. The language of the regulation is mandatory – an employee must file an appeal with the Board within its time deadlines to establish a right to appeal.

If appellant considered Graff's June 27, 1997 letter to be a request for reasonable accommodation, under Board Rule 53.2, he should have filed his appeal with the Board within 30 days after Caltrans's 20-day period for responding to that letter had expired. Appellant filed his appeal from denial of reasonable accommodation with

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[20] Board Rule 53.2 provides:

> Requests for reasonable accommodation are requests from qualified disabled individuals for accommodation to known physical or mental limitations. These requests may be made concerning securing, retaining or advancing in employment in State service. Appointing authorities shall respond to such request within 20 days of receipt. Appointing authorities shall respond in writing and inform complainants of their right of appeal to the board, within 30 days of receipt of the department's response. Failure to respond to a request within 20 days shall be deemed a denial of the request by the appointing authority and shall release the complainant to file an appeal directly with the board. Such filing shall be done within 30 days of the exhaustion of the 20-day period. (Emphasis added.)

the Board on September 17, 1998, almost 15 months after Graff sent his June 27, 1997 letter to Caltrans. Appellant did not submit any evidence that showed that he had good cause for this delay. The Board finds that appellant's failure to file his denial of reasonable accommodation appeal with the Board within the time deadlines set forth in Board Rule 53.2 requires the dismissal of that appeal.[21]

Constructive Medical Suspension

Appellant asserts that he was constructively medically suspended between April 21, 1997, when Dr. Vranna released him to work, and March 11, 1998, when Caltrans finally returned him to work.

The Board has long recognized that it has jurisdiction to adjudicate appeals that assert that an appointing power has wrongfully subjected an employee to a constructive medical termination in violation of the requirements of Government Code § 19253.5.[22] The Board applies the same analysis to appeals asserting wrongful constructive medical suspensions as it applies to constructive medical termination appeals.

In order to establish that he was constructively medical suspended on April 21, 1997, appellant must show all three of the following: (1) Caltrans refused to allow him to work in his prior position for asserted medical reasons; (2) he asserted to Caltrans that he was ready, willing and able to work under circumstances that indicated that he, in all good faith, wished to continue to perform all the duties and responsibilities of his job; and (3) he had a legal right to return to his prior position after Dr. Vranna released him

[21] Because the Board is dismissing appellant's denial of reasonable accommodation appeal, it does not need to reach the issue of whether Graff's June 27, 1997 letter constituted a valid request for reasonable accommodation.

[22] See, C[redacted] M[redacted] (1993) SPB Dec. No. 93-08, pp. 5–6.

to work on April 21, 1997, notwithstanding the restrictions Dr. Vranna included in that release.[23]

Appellant has met the first prong of this test: he has shown that Caltrans refused to allow him to return to the position he had occupied before his medical leave based on the medical restrictions included in Dr. Vranna's release.

The evidence is more uncertain with respect to the second and third prongs of this test. While the evidence, taken as a whole, indicates that appellant was ready and willing to return to work, given the restrictions Dr. Vranna included in the release, it is less clear as to whether appellant was able to perform all of the duties of his prior position, and as to whether he had a legal right to return to that position.

In both C[redacted] M[redacted],[24] and D[redacted] J[redacted],[25] the Board found that an employee had a legal right to return to work after the Public Employees' Retirement System (PERS) denied an application for disability retirement filed on that employee's behalf. The Board made clear that an appointing authority could not refuse to reinstate an employee to the payroll once PERS had determined that the employee was not entitled to disability retirement, even if the appointing authority had medical information that indicated that the employee was not fit for duty. If the appointing authority believed that this medical information precluded the employee from working, it could appeal PERS's decision and assert its position during that appeal.

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[23] Jalal Emami (1999) SPB Dec. No. 99-07, pp. 6-7.

[24] (1993) SPB Dec. No. 93-08.

[25] (1993) SPB Dec. No. 93-01.

In Susan Alexander[26] and Doris Jones,[27] the Board held that employees who are out on medical leave cannot condition their return to work upon their appointing power's first making significant job modifications to their job responsibilities, and then claim that they were constructively medically terminated when their appointing power refused to make those modifications. Rather, employees who assert that they cannot work unless significant modifications are first made in their job responsibilities must seek those modifications through their appointing power's reasonable accommodation process, and appeal to the Board only after the appointing power has either denied their reasonable accommodation request or failed to respond in a timely manner.

Extrapolating from these decisions, the issue in this case is whether Dr. Vranna's April 21, 1997 release required Caltrans to immediately return appellant to his position, or whether it conditioned his return upon Caltrans's first making significant modifications to his job responsibilities. A review of Dr. Vranna's release shows that it included restrictions that limited the amount of neck and arm movement appellant could engage in while performing his job duties; it did not, however, mandate that any of appellant's job duties be changed or eliminated to accommodate those restrictions. While the release and accompanying report clearly opined that a field job would be preferable to an office job given appellant's neck injury and surgery, they did not prohibit appellant's return to office work. When read together with his report, Dr. Vranna's release could be interpreted as authorizing appellant to return to his regular job functions, but cautioning

[26] (1999) SPB Dec. No. 99-04.

[27] (1999) SPB Dec. No. 99-06.

that he must be very careful when using his neck and arms when performing those functions.

Thus, Dr. Vranna's release and report did not condition appellant's return to work upon Caltrans's first providing specified job modifications. In addition, when he presented Dr. Vranna's release and report to Trujillo, appellant did not condition his return to work on Caltrans first modifying his duties in any specified ways.

Relying on Doris Jones and Susan Alexander, Caltrans asserts that it did not have to return appellant to work in response to Dr. Vranna's release because that release included restrictions. The facts in Doris Jones and Susan Alexander are clearly distinguishable from the facts in this case. The employees in those cases only wished to return to work if their appointing authorities first made significant job modifications to accommodate their work restrictions. In contrast, neither appellant nor his doctor requested significant job modifications as preconditions to appellant's return to work. We recognize that the limitations and precautions included in appellant's work release may not have been entirely clear to Caltrans and may have raised questions as to whether appellant might require an accommodation to perform all his work responsibilities. The mere fact that those limitations and precautions were included in appellant's work release, however, did not permit Caltrans to conclude summarily and without further inquiry that it was not legally required to return appellant to work.

Caltrans asserts that it was justified in not returning appellant to work in response to Dr. Vranna's release because Dr. Vranna never responded to its request for clarification as to how the release's restrictions applied given appellant's job duties. The Board disagrees. Dr. Vranna's failure to respond to Caltrans's request for clarification

does not justify Caltrans's ignoring Dr. Vranna's work release. When Caltrans did not receive a response from Dr. Vranna to its request for clarification, it should have followed up with Dr. Vranna, or sought input from either appellant or another doctor through a fitness for duty examination.

Caltrans contends that it reasonably interpreted Dr. Vranna's release as including restrictions that were too extensive to accommodate. We disagree. The record shows that, without input from either appellant or his doctor, Caltrans made incorrect assumptions about the extensiveness of the release's provisions. Caltrans interpreted the release as preventing appellant from doing any work that required him to bend his neck or hold his arms up. A review of Dr. Vranna's report shows, however, that while appellant could not bend his neck or hold his arms out straight repetitively or over long periods of time, he was not completely precluded from doing either of these activities. Moreover, the fact that Caltrans was able to return appellant to his prior position after it received the AME's report, which seemingly included more extensive restrictions than Dr. Vranna's release (a preclusion to light duty versus a restriction to a medium-heavy level of work), shows that Caltrans misinterpreted the scope of Dr. Vranna's restrictions and appellant's ability to perform his job duties notwithstanding those restrictions.

We find that had Caltrans communicated with appellant about his returning to work after it received Dr. Vranna's release, it most likely would not have misinterpreted that release. Because the extent and scope of the release was not entirely clear on its face, Caltrans should have engaged in a flexible, informal "interactive process" with appellant during which the parties could have discussed appellant's work restrictions, if any, and possible solutions that could be implemented to address those restrictions. If it

had engaged in an informal, flexible interactive process before reaching a conclusion that appellant could not return to work, Caltrans would have significantly lessened the possibility that it might misinterpret Dr. Vranna's release and make an incorrect decision about appellant's ability to return to work.[28]

Alternatively, or in conjunction with the interactive process, Caltrans, immediately upon receipt of Dr. Vranna's work release, could have put appellant back on the payroll and, pursuant to Government Code § 19253.5(a), sent him for a fitness for duty examination. If that examination showed that appellant was not fit to return to his position, Caltrans could then take action consistent with the requirements of Government Code § 19253.5 to medically demote, transfer, or terminate appellant, or apply for disability retirement on his behalf.[29]

The Board finds that, because neither Dr. Vranna nor appellant conditioned appellant's return to work upon Caltrans first making significant modifications to appellant's job, Caltrans should have immediately put appellant back to work, or at least back on the payroll, upon receipt of appellant's work release. Caltrans's failure to respond to that release for almost 11 months constituted a constructive medical suspension.

[28] As stated in Jalal Emami, although the Board strongly encourages an appointing power to engage in an interactive process, the failure to engage in such a process will not, in itself, constitute grounds for finding that a constructive medical termination has occurred

[29] See, William A. Poggione (1996) SPB Dec. No. 96-13, pp. 8–9.

Disability Discrimination

Applicable Law

Appellant claims that Caltrans illegally discriminated against him based upon a perceived disability when it failed to return him to work for almost 11 months after his doctor released him for work. In his Complaint, appellant asserts that this illegal disability discrimination violated Government Code § 12940(a) of FEHA.

Under the California Constitution,[30] the Board is charged with enforcing, among other laws, the Civil Service Act.[31] Section 19702[32] of the Civil Service Act prohibits discrimination against state employees or applicants on the basis of, among other things, physical or mental disability. That section specifically requires the Board to look to the definitions of disability set forth in the federal Americans with Disabilities Act of 1990 (ADA)[33] when those definitions offer broader protection to the employee than the definitions set forth in the Civil Service Act.[34]

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[30] Cal. Const. Art. VII, § 3(a).

[31] Government Code § 18500 et seq.

[32] Government Code § 19702(a).

[33] 42 U.S.C. § 12101 et seq.

[34] Government Code § 19702, in relevant part, provides:

> (b) As used in this section, "physical disability" includes, but is not limited to, impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment that requires special education or related services.
>
> (c) As used in this section, "mental disability" includes, but is not limited to, any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
>
> (d) Notwithstanding subdivisions (b) and (c), if the definition of disability used in the Americans with Disabilities Act of 1990 (Public Law 101-336) would result in broader protection of the civil rights of individuals with a mental disability or physical

While the Board is not specifically charged with enforcing all the provisions of the ADA or FEHA,[35] state employers are bound not only by the Civil Service Act's anti-discrimination laws, but also by the ADA and FEHA. Because the Legislature, in enacting Government Code § 19702, intended to provide state employees the broadest civil rights and anti-discrimination protections available under the law, [36] the Board has traditionally looked for guidance to both the ADA and FEHA in determining whether an individual who files an appeal with the Board under the anti-discrimination provisions of the Civil Service Act has stated a claim for relief. Thus, the Board interprets the anti-discrimination provisions of Government Code § 19702 broadly to give effect to the law that is most protective of the civil rights of state employees under the particular circumstances, whether it is the provisions of the Civil Service Act, the ADA or FEHA.

Because appellant has asserted that Caltrans discriminated against him in violation of FEHA, we will begin our analysis by reviewing his appeal using the definitions of disability set forth in FEHA. If we find that he does not qualify for relief

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> disability, as defined in subdivision (b) or (c), then that broader protection shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (b) and (c). The definitions of subdivisions (b) and (c) shall not be deemed to refer to or include conditions excluded from the federal definition of "disability" pursuant to Section 511 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12211).

[35] Government Code § 12940 et seq.

[36] The Legislature amended Government Code § 19702 in 1992 as part of Stats. 1992, c. 913 (A.B. 1077). In Section 1 of that act, the Legislature stated that:

> It is the intent of the Legislature in enacting this act to strengthen California law in areas where it is weaker that the [ADA] and to retain California law when it provides more protection for individuals with disabilities than the [ADA].

under those definitions, we will then look to the Civil Service Act and ADA to determine whether those acts may offer appellant additional protections.

Under FEHA, in order to demonstrate that he was illegally discriminated against based upon a perceived disability, appellant must prove that: (1) Caltrans regarded him as having a disability; (2) he was qualified to do his job; and (3) he was subjected to an adverse employment action because of his perceived disability.[37]

"Regarded As" Disability Analysis

Appellant asserts that, although he did not have an actual disability when he sought to return to work, Caltrans "regarded" him as having a disability, and discriminated against him based upon this perception.

Section 12926(k) of FEHA defines "physical disability" to include:

> (1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:
> (A) Affects one or more of the following body systems:… musculoskeletal…
> (B) Limits an individual's ability to participate in major life activities. …
> (2) Any other health impairment not described in paragraph (1) that requires special education or related services.
> (3) Being regarded as having or having had a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2)….

In order to meet this definition, appellant must show that Caltrans regarded him as having a physiological condition that affected one or more of his body systems and

[37] Deschene v. Pinole Point Steel Company (1999) 76 Cal.App.4th 33; Pensinger v. Bowsmith, Inc. (1998) 60 Cal.App.4th 709, 719. The analysis under the ADA is similar. Barnett v. U.S. Air (9th Cir. 1998) 157 F.3d 744, 748;

limited his ability to participate in a major life activity.[38] In this case, it appears that appellant is contending that Caltrans considered him as having a physiological condition that affected his musculoskeletal system and limited his ability to participate in the major life activity of working.

Trujillo's, Pursell's and Cummings's responses to the WC Unit's inquiry and Matthew's interpretation of those responses make clear that Caltrans perceived that appellant was significantly impaired in the major life activity of working. When looked at as a whole, these responses show that Caltrans believed that appellant could not perform any work in design, construction or field/testing positions given his perceived inability to bend his neck or use his arms. This information shows that Caltrans considered appellant to be significantly restricted in his ability to perform a broad range of jobs as compared to the average person having comparable training, skills and abilities.[39]

Even though appellant may not have been actually disabled at the time he sought to return to work, it is apparent from the evidence that Caltrans regarded appellant as having a disability that precluded him from returning to work.

Appellant's Qualifications to Perform his Job

Appellant must also prove that he was qualified to perform his job.

[38] Government Code § 12926(k).

[39] Since the Board finds that Caltrans discriminated against appellant because it regarded him as having a physical disability as defined by FEHA, it does not need to reach the question of whether Caltrans also may have discriminated against appellant because it regarded him as having a mental disability in violation of Government Code § 19702, the ADA or FEHA.

Both Dr. Vranna's medical evaluations and Girt's FEC concluded that appellant could perform medium to heavy physical work so long as he did not have to sit for prolonged periods of time in a head-forward position or engage in repetitive neck movement. Neither Dr. Vranna nor Girt, however, specifically analyzed the essential job duties of appellant's TET position to determine whether appellant was able to perform them. When Caltrans received no response from Dr. Vranna to its request for clarification as to how his release's limitations and precautions impacted appellant's ability to perform his job duties, without talking to either Dr. Vranna, Girt, Graff or appellant, Caltrans made its own determination that it could not accommodate what it perceived to be appellant's job restrictions.

Caltrans, however, on March 11, 1998, returned appellant to his prior position after it received the AME's report, even though the restrictions imposed by the AME appeared to be more extensive than those imposed by either Dr. Vranna in his release or Girt in his FEC. That appellant was able to return to work in his previous position on March 11, 1998 under the AME's more extensive restrictions is a clear indication that he could have returned to work on April 21, 1997 under Dr. Vranna's less extensive restrictions. The Board, therefore, finds that appellant has shown that he was qualified to perform his job.

Adverse Employment Actions Because of Perceived Disability

Finally, in order to order to establish that Caltrans illegally discriminated against him, appellant must show that he suffered an adverse employment action because of his perceived disability. According to appellant, Caltrans subjected him to numerous adverse employment actions that demonstrate that it was engaging in illegal disability

discrimination: (1) it refused to return appellant to work despite the release it had received from Dr. Vranna authorizing his return with certain precautions and limitations; (2) it ignored Graff's June 27, 1997 letter because it was not submitted by appellant himself on Caltrans's reasonable accommodation form; (3) it ignored Girt's FCE because Girt was a physical therapist and not a doctor; (4) it concluded that appellant was not emotionally able to return to work, although none of the psychological reports it had received opined that appellant was precluded from working because of his mental condition; (5) until the AME rendered his decision, it refused to respond to appellant's request to return to work while his workers' compensation case was pending; and (6) it reached conclusions about appellant's inability to return to work without consulting appellant, his doctor, his vocational rehabilitation counselor or his physical therapist, or considering whether appellant was able to perform in an alternative position and/or in another location. Appellant asserts that, taken together, these actions show that Caltrans discriminated against him because it perceived him to be disabled.

The Board agrees. These facts show that Caltrans made decisions about appellant's ability to return to work based upon misperceptions and assumptions about appellant's physical and mental condition that were not supported by the information it had received from his doctors and vocational rehabilitation counselor. One of the primary purposes of the disability discrimination law is to protect individuals with actual or perceived disabilities "from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."[40]

[40] 42 U.S.C. § 12101(a)(7).

Caltrans's inaction for almost 11 months was based upon such assumptions, and constituted illegal disability discrimination.[41]

Caltrans's inaction was also based upon its erroneous belief that it was not required to respond to appellant's request to return to work until after appellant had been released in his workers' compensation case. Caltrans had separate and distinct obligations under the ADA, FEHA and Government Code §§ 19230 and 19702, independent of the workers' compensation laws, to determine whether appellant was entitled to be returned to work as soon as it received Dr. Vranna's release.[42] Caltrans should have complied with these independent legal obligations, instead of improperly relying solely upon the workers' compensation process to resolve appellant's work return rights.

The Board finds that Caltrans's failure to return appellant to work for almost 11 months after his doctor released him constituted illegal discrimination based upon perceived disability in violation of Government Code § 19702.

Remedies

Caltrans's failure to return appellant to work in his TET position on April 21, 1997 when it received Dr. Vranna's release constituted an illegal constructive medical suspension in violation of Government Code § 19253.5 and disability discrimination in violation of Government Code § 19702. In remedy of this wrongful behavior, appellant is entitled to any back pay and benefits he may have lost between April 21, 1997, when

[41] Because the Board finds that Caltrans's actions violated the disability discrimination provisions of FEHA, it does not need to reach the issue of whether those actions also violated the disability discrimination provisions of the Civil Service Act or the ADA.

[42] See, Doris Jones (1999) SPB Dec. No. 99-06, at pp. 13-14.

he was released to return to work, and March 11, 1998, when he was reinstated, minus any IDL or TD payments he may have received during that time.[43]

Appellant also asserts that Caltrans should pay him compensatory damages to recompense him for the emotional distress Caltrans's illegal failure to return him to work caused him. Government Code § 19702(f)(1) authorizes the Board to award compensatory damages if the Board finds discrimination in violation of Government Code § 19702.[44]

During closing arguments before the ALJ, citing to City of Moorpark v. Superior Court,[45] Caltrans questioned the Board's authority to award compensatory damages to appellant, arguing that the workers' compensation laws are his exclusive remedy. The Board disagrees. The court in City of Moorpark specifically found that the workers' compensation laws did not establish an exclusive remedy that precluded an employee with a work-related injury from bringing a disability discrimination claim under FEHA or a common law wrongful termination claim.[46]

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[43] See, William A. Poggione (1996) SPB Dec. No. 96-13, p. 9; C[redacted] M[redacted] (1993) SPB Dec. No. 93-08, p. 9; Government Code § 19702(f)(1).

[44] Government Code § 19702(f)(1) provides:

> If the board finds that discrimination has occurred in violation of this part, the board shall issue and cause to be served on the appointing authority an order requiring the appointing authority to cause the discrimination to cease and desist and to take any action, including, but not limited to, hiring, reinstatement, or upgrading of employees, with or without backpay, and compensatory damages, which, in the judgment of the board, will effectuate the purposes of this part. (Emphasis added.)

[45] (1998) 18 Cal.4th 1143.

[46] See also, Fretland v. County of Humboldt (1999) 69 Cal.App.4th 1478.

The Board is a constitutional agency authorized by the Legislature to adjudicate claims of discrimination brought by state employees[47] and to make such awards as "will effectuate the purpose of [the law]".[48] Government Code § 19702(f)(1) grants the Board the authority to make compensatory awards for nonquantifiable damages such as pain and suffering and emotional distress to accomplish the Board's mission to eliminate illegal discrimination in state employment. No court has ruled that the Board does not have the power under the express statutory authorization set forth in Government Code § 19702(f)(1) to award compensatory damages in disability discrimination cases.[49]

In determining the appropriate amount of compensatory damages to award under Government Code § 19702(f)(1), the Board will follow the guidelines that the Fair Employment and Housing Commission (FEHC) has established for awarding compensatory damages to employees who have been subjected to illegal discrimination in violation of FEHA.[50] To obtain compensatory damages for illegal discrimination in violation of Government Code § 19702, employees must show that they suffered pain, fear, emotional distress, shame, humiliation, or similar injury as a result of their appointing authorities' illegal discrimination. An employee must also demonstrate that the injury he or she suffered was caused by the appointing authority's unlawful conduct. In determining the amount of damages, the Board will not indulge in speculation or

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[47] See, Perry Farm Inc. v. Agricultural Labor Relations Board (1978) 86 Cal.App.3d 448, 460.

[48] Government Code § 19702(f)(1).

[49] See, Walnut Creek Manor v. Fair Employment and Housing Commission (1991) 54 Cal.3d 245, 265, n. 12; Peralta Community College District v. Fair Employment and Housing Commission (1990) 52 Cal.3d 40, 48, n. 4.

[50] This analysis is taken substantially from DFEH v. Aluminum Precision Products, Inc. (1988) FEHC Dec. No. 88-05, at pp. 10-13.

guesswork; the extent and nature of the injury must be proven by credible evidence. Although the Board will not set a precise standard or formula that will govern the assessment of this injury, the Board will look to the totality of the circumstances in each case and to all the evidence of the presence or absence of harm, and endeavor to fix a just and reasonable amount.

To determine the extent of an employee's injury, the Board will consider evidence of the effect of the wrong on a variety of factors, including the employee's feelings, emotions and mental well-being; physical well-being; personal integrity, dignity and privacy; ability to work, earn a living and professional future; capacity to live a successful and happy life; personal and professional reputation; relationship with family including status as a parent or spouse; and access to job and ability to associate with co-workers and peers. In addition, the Board will look to the egregiousness of the appointing authority's conduct to assess its effect on the injured employee. The Board will also recognize that emotional injury may be caused where an appointing authority fails adequately to respond to or correct discriminatory practices, and the employee knows this and feels helpless and emotionally distressed as a result. Finally, the Board will look to the duration of the emotional harm in assessing its gravity.

Because emotional distress is inherently personal, an employee's testimony about his or her injury provides the starting point in any review of the evidence. The Board will also look at the testimony of other percipient witnesses - such as friends, relatives, and co-workers - to assist in measuring the extent of injury and the reliability of the employee's own account. And while there is no requirement that evidence of the employee's injury be corroborated by expert opinion, such evidence may be highly

probative of the presence or absence of harm. In appropriate cases, the Board may also infer that injury has occurred from the nature of the unlawful conduct itself. But the Board will not find a legally compensable injury from such an inference alone.

With these principles in mind, we turn to the evidence offered in support of appellant's claim for compensatory damages. Appellant testified that his emotional condition deteriorated due to Caltrans's failure to return him to work: he became frustrated, depressed, confused, experienced loss of both sleep and appetite, became withdrawn and had increased anxieties regarding his financial condition. Given his deteriorating emotional state, he asked Dr. Vranna to refer him to a psychiatrist. The psychiatrist to whom he was referred, Dr. Powell, testified that appellant was depressed primarily because Caltrans had not returned him to work after he was released. Dr. Powell documented appellant's feelings of worthlessness, depression, helplessness and his suicidal thoughts because of his inability to work. Appellant's girlfriend described how appellant grew increasingly depressed during the months that he was out of work after Dr. Vranna had released him, and the effect appellant's depression had on their relationship. The record clearly establishes that appellant suffered significant emotional distress due to Caltrans's failure to return him to work for almost 11 months after Dr. Vranna released him for duty. The Board finds that the just and proper action to effectuate the purposes of Government Code § 19702 is to award appellant $25,000 in compensatory damages to recompense him for almost 11 months of emotional distress.

CONCLUSION

The Board finds that Caltrans's failure to return appellant to work for almost 11 months after his doctor released him for duty constituted a constructive medical

suspension and illegal disability discrimination. The Board, therefore, awards appellant the back pay and benefits he would have received between April 21, 1997 and March 11, 1998 had Caltrans returned him to work when he was released, minus any IDL and TD benefits he did receive during that period, plus $25,000 in compensatory damages for his almost 11 months of emotional distress.

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 Department of Transportation cease and desist from discriminating against Andrew G. Ingersoll based upon his perceived disability.

2. The Department of Transportation shall pay to Andrew G. Ingersoll all back pay and benefits, together with interest thereon, determined in accordance with Government Code § 19584, that he would have earned had he worked as a Transportation Engineering Technician between April 21, 1997 and March 11, 1998, minus any IDL and TD payments he may have received during that time.

3. The Department of Transportation shall pay appellant Andrew G. Ingersoll $25,000 in compensatory damages.

4. This matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing upon written request of either party in the event the parties are unable to agree as to the back pay, benefits and interest due Andrew G. Ingersoll.

5. 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
Sean Harrigan, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on January 19, 2000.

_____
Walter Vaughn
Executive Officer
State Personnel Board

[Ingersolldec]