

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)

M [REDACTED] S [REDACTED])

From non-punitive termination from the)
position of Correctional Officer with the)
Correctional Training Facility,)
Department of Corrections at Soledad)

SPB Case No. 99-1194

BOARD DECISION
(Precedential)

NO. 00-02

January 19, 2000

APPEARANCES: M [REDACTED] I S [REDACTED], appellant, In Pro Per; Edwin T. Shea¹, Senior Staff Counsel, Department of Corrections, on behalf of respondent, Department of Corrections.

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 (Board) after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) to consider the issue of whether appellant M [REDACTED] S [REDACTED] (appellant) was entitled to an award of back pay after the non-punitive termination taken against him was revoked.

Respondent Department of Corrections (Department) invoked the provisions of Government Code section 19585 (non-punitive termination) and dismissed appellant from his position as a correctional officer after appellant entered a plea of "nolo contendere" to a misdemeanor violation of Penal Code section 243(e)(1) (battery against a spouse). The Department contended that pursuant to Penal Code § 12021

¹ Counsel for the Department did not appear for oral argument, choosing instead to rely on written briefs submitted to the Board.

and the Federal Firearms Act (18 U.S.C. sections 921 *et seq.*) appellant was thereafter precluded from possessing a firearm – a requirement for continuing employment as a correctional officer.

In this decision, the Board substantially adopts the ALJ's findings of fact² and decision to revoke the dismissal, but rejects the ALJ's determination that appellant was not entitled to an award of back pay.

BACKGROUND

Appellant's Employment History

Appellant was first employed by the Department on January 3, 1998, at the McGee Training Academy. On February 14, 1998, he was assigned as a correctional officer at the Correctional Training Facility (CTF) at Soledad until his dismissal on March 27, 1999. Appellant has no history of discipline.

Factual Summary

On December 2, 1998, the District Attorney of Solano County filed a criminal complaint against appellant, charging him with a violation of Penal Code section 243(e)(1), for committing a misdemeanor battery upon his wife. On December 17, 1998, appellant attended an arraignment hearing. The matter was continued to February 22, 1999. On that date, appellant and a representative of the Solano County District Attorney reached an agreement that provided that in return for appellant entering a plea of *nolo contendere* to the charge, the following would occur:

² The findings of fact are taken substantially from the ALJ's proposed decision.

(1) appellant would be permitted to participate in the “Deferred Entry of Judgment” program whereby entry of the judgment of conviction would be suspended and the case dismissed if appellant attended 16 hours of anger management counseling; (2) appellant would agree to obey all laws; and (3) appellant would not violate an order that he refrain from annoying/harassing his wife.

In reliance on that agreement, appellant pled nolo contendere to the charged violation of Penal Code section 243(e)(1). However, the Solano County Superior Court ultimately imposed on appellant an additional requirement that he attend a 52-week battered women’s alternative program, and pay \$300.00. Upon learning that the plea bargain he had agreed to had not been accepted by the court, appellant made a motion to withdraw his plea of nolo contendere on April 2, 1999,³ on the grounds that the original plea agreement had not been accepted by the court. The court granted appellant’s motion and permitted him to withdraw his plea on that date. It then set the matter for another arraignment on August 23, 1999.

Having learned of appellant’s plea of nolo contendere on February 22, 1999, the Department determined that he had been convicted of a misdemeanor violation of Penal Code section 243. The Department further determined that since Penal Code section 12021 provides that a person so convicted who “owns or has in his or her possession or under his or her custody or control any firearm is guilty of a felony,” and since the official job specifications of the Correctional Officer classification require possession or control of a firearm, appellant was unable to continue in his job as he was unable to meet the

³ This appears to have been the earliest date available for appellant to have presented his motion to the court.

minimum qualifications for the position. As a result, the Department initiated non-punitive termination proceedings against appellant pursuant to the provisions of Government Code section 19585, non-punitively terminating appellant from his position effective March 27, 1999.

Procedural Summary

Appellant filed an appeal of his termination with the Board, and a hearing on the matter was conducted on June 15, 1999. After considering the evidence presented, the ALJ issued a Proposed Decision, wherein he determined that appellant had been improperly dismissed, as his plea of nolo contendere had been withdrawn and, as a result, he had not been convicted of a violation of Penal Code section 243. The ALJ further determined that, although appellant had been improperly dismissed and should be reinstated, appellant was not entitled to an award of back pay, as Section 19585 made no provision for such an award. At its meeting on August 3, 1999, the Board rejected the Proposed Decision of the ALJ in order to decide the case for itself.

ISSUES

1. Whether appellant's plea of nolo contendere to a misdemeanor violation of Penal Code section 243(e)(1) constitutes a "conviction" for purposes of either Penal Code section 12021 or 18 U.S.C. section 921 *et seq.*?
2. Whether termination of appellant was appropriate under Government Code section 19585?
3. If not, whether appellant is entitled to an award of back pay?

DISCUSSION

Effect of the Plea Agreement

There is no dispute that on February 22, 1999, appellant entered a plea of nolo contendere to a violation of Penal Code section 234(e)(1). It is well-settled that a plea of nolo contendere is the equivalent of a plea of guilty to the charged offense.⁴ What is less clear, however, is whether entering a plea of nolo contendere or guilty constitutes a “conviction” of the charged offense. The ambiguous effect of entering such a plea has previously been addressed by the California courts:

As appears in the case law, the terms ‘convicted’ or ‘conviction’ do not have a uniform or unambiguous meaning in California. Sometimes they are used in a narrow sense signifying a verdict or guilty plea, some other times they are given a broader scope so as to include both the jury verdict (or guilty plea) and the judgment pronounced thereon.⁵

Of paramount importance in this case is whether the term “conviction” should be used in a narrow sense, or given a broader scope. That is particularly so as Penal Code section 12021 provides that a conviction under Penal Code section 243 results in a disqualification from possessing firearms for a ten-year period.⁶ Since the right to possess a firearm is a requirement for continuing employment as a correctional officer, if appellant’s plea constitutes a “conviction” of Section 243(e), he may be unable to meet the requirement for continuing employment in that capacity. If that is the case, he

⁴ Penal Code § 1016.

⁵ Boyll v. State Personnel Board (1983) 146 Cal.App.3d 1070, 1073-74.

⁶ In addition, the Federal Firearms Act (18 U.S.C. § 922(g)(9)) makes it a felony for individuals convicted of a crime of domestic violence to own or possess any firearm or ammunition sold or shipped through interstate commerce. Because the Department ships and receives all of its firearms and ammunition through interstate commerce, the Federal Firearms Act is applicable in this case.

may properly be terminated pursuant to the provisions of Government Code section 19585. For the reasons set forth below, however, we find that in this case appellant's plea of nolo contendere to a violation of Section 243(e)(1) did not constitute a conviction for purposes of either Section 12021 or 18 U.S.C. section 921 *et seq.*

(State Law)

An integral component of appellant's plea agreement of February 22, 1999, was that he would be permitted to participate in the "Deferred Entry of Judgment Program," which is a form of pre-trial diversion. Penal Code section 1001.50 defines the parameters of such a program as follows:

As used in this chapter, "pretrial diversion" means the procedure of postponing prosecution either temporarily or permanently at any point in the judicial process from the point at which the accused is charged ***until adjudication.***⁷

Penal Code section 1001.51 further provides:

This chapter shall not apply whenever the accusatory pleading charges the commission of a misdemeanor:

Which involves the use of force or violence against a person, ***unless*** the charge is a violation of Section 241 or 243.⁸

This language clearly indicates that the Legislature intended that defendants charged with a violation of Penal Code section 243, such as appellant, would be permitted to participate in pre-trial diversion programs.

⁷ Penal Code § 1001.50(c) (emphasis added).

⁸ Penal Code § 1001.51(c)(4) (emphasis added).

These programs require progress reports from the county probation department concerning the participant's progress in the program.⁹ More importantly, the program specifically provides that, "[i]f the divertee has performed satisfactorily during the period of diversion, at the end of the period of diversion, the criminal charges **shall be dismissed**."¹⁰ Such language, when read in conjunction with the provisions of Section 1001.50(c), indicates a legislative intent that a mere plea of nolo contendere or guilty shall not constitute a "conviction" in those cases where the defendant is afforded an opportunity to participate in pre-trial diversion. Instead, adjudication of the matter is suspended and the charges are dismissed if the defendant successfully completes the diversion program. A "conviction" only occurs in those cases where the defendant does not successfully complete the diversion program, thereby necessitating a resumption of the judicial proceedings and judgment being entered against him based on his prior plea.

Moreover, Penal Code section 1001.55 provides that:

- (a) Any record filed with the Department of Justice shall indicate the disposition in those cases diverted pursuant to this chapter. Upon successful completion of a diversion program, the arrest upon which the diversion was based shall be deemed to have never occurred. The divertee may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or diverted for the offense, except as specified in subdivision (b). A record pertaining to an arrest resulting in successful completion of a diversion program shall not, without the

⁹ Penal Code § 1001.54. Similarly, the Deferred Entry of Judgment Program at issue here required progress reports concerning appellant. (See Respondent's Exhibit 1, "Criminal Docket Misdemeanor - Deferred Entry Progress Report.")

¹⁰ *Id.* (emphasis added).

divertee's consent, be used in any way that could result in denial of any employment, benefit, license, or certificate.¹¹

This language clearly indicates that not only does successful completion of the diversion program result in no conviction being entered against the defendant, but the fact that he had previously been arrested for the charged violation cannot be used to deny him employment.

It is apparent, therefore, that the term "conviction" should be given a broad scope so as to include actual entry of judgment against the individual, at least in those cases where the individual is permitted to participate in a pre-trial diversion program concerning the charged offense. Since as of March 27, 1999 – the date appellant was dismissed from his position as a correctional officer – appellant had not been convicted of a violation of Penal Code section 243(e)(1), he was not precluded from possessing a firearm pursuant to the provisions of Penal Code section 12021. As a result, it was improper for the Department to cite that section as providing justification for appellant's termination under Government Code section 19585. We now turn to the issue of whether appellant's plea of nolo contendere constitutes a "conviction" for purposes of the Federal Firearms Act.

(Federal Firearms Act)

Pursuant to the provisions of 18 U.S.C. section 922:

(g) It shall be unlawful for any person –

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ...possess ... or to receive

¹¹ Penal Code § 1001.55(a).

any firearm or ammunition which has been shipped or transported in interstate commerce.¹²

However, 18 U.S.C. section 921 also specifically provides that:

A person shall not be considered to have been convicted of such an offense [misdemeanor crime of domestic violence] for purposes of this chapter (18 U.S.C. § 921 *et seq.*) if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.¹³

As set forth above, by virtue of his participation in the “Deferred Entry of Judgment Program,” appellant had not been convicted of a misdemeanor crime of domestic violence. Moreover, even were the Board to determine that he had been so “convicted,” his conviction had been set aside at the time of his termination. Section 921(a)(33)(B)(ii) makes clear that convictions which have been set aside will not constitute “convictions” for purposes of the Federal Firearms Act. Appellant was not, therefore, precluded from possessing a firearm under the terms of that Act.

Since as of March 27, 1999, appellant had not been convicted of a misdemeanor violation of Penal Code section 243(e)(1), he was not precluded from possessing a firearm under the provisions of either Penal Code section 12021 or 18 U.S.C. section 921 *et seq.* He was, therefore, able to meet that requirement for continuing employment as a correctional officer at the time of his dismissal. Consequently,

¹² 18 U.S.C. § 922(g)(9).

¹³ 18 U.S.C. § 921(a)(33)(B)(ii).

appellant was improperly dismissed from his position and must be reinstated.¹⁴ The only question that now remains is whether appellant is entitled to an award of back pay and benefits as a result of his improper termination.

Back Pay

The non-punitive termination statute at issue here, Government Code section 19585, provides, in pertinent part:

An appointing power may terminate ... an employee who fails to meet the requirement for continuing employment that is prescribed by the board ... in the specification for the classification to which the employee is appointed. [¶] The employee shall receive at least five days' written notice of termination ... and shall have the right to appeal the action to the board. [¶] When the requirements for continuing employment have been regained, terminated ... employees may be reinstated pursuant to Section 19140.¹⁵ [¶] Any action under this section shall be considered nondisciplinary for the purposes of the State Civil Service Act and board rules.¹⁶

This section is unlike the provisions of Government Code section 19584, which provides that:

Whenever the board revokes or modifies an *adverse action* and orders that the employee be returned to his or her position, it shall direct the payment of salary and all interest accrued thereto, and the reinstatement of all benefits that otherwise would have occurred.¹⁷

¹⁴ Since we find that appellant's plea of nolo contendere did not constitute a "conviction" for purposes of Section 12021 or 18 U.S.C. sections 921 or 922, we need not address the issue of the effect of appellant's withdrawal of his plea on April 2, 1999.

¹⁵ Government Code § 19140 provides for permissive, not mandatory, reinstatement rights under such circumstances.

¹⁶ Government Code § 19585(b), (f), (g), (h).

¹⁷ Government Code § 19484 (emphasis added). See also Government Code § 19253.5(g), providing for an award of back pay for employees improperly terminated for medical reasons.

While it is readily apparent from the statutes that the Legislature expressly granted the Board authority to fully compensate employees who have been wrongfully dismissed via disciplinary action, the Legislature did not expressly grant such authority to the Board in those cases where it revokes a non-disciplinary termination under Government Code section 19585. Of paramount importance then is the question of whether the Board possesses the implied authority to grant such an award.

The Department argues that the Legislature's failure to expressly authorize such an award pursuant to Section 19585 precludes the Board from exercising its discretion to grant such relief. For the reasons set forth below, we disagree. Instead, the Board finds that the interpretation of Section 19585 urged by the Department conflicts with the Board's Constitutional mandate¹⁸ to oversee the state civil service system by conducting hearings and rendering decisions which are "just and proper,"¹⁹ and which comport with applicable principles of due process.

Fundamental principles of due process mandate that appellant be awarded back pay and benefits for the period of time he was wrongfully terminated. Appellant clearly had a constitutionally protected property interest in his continued employment as a correctional officer.²⁰ He was wrongfully deprived of that property interest for the period of time that he was wrongfully terminated. The deprivation suffered by appellant is really no different than that suffered by employees who are wrongfully disciplined²¹ or

¹⁸ Cal. Const. Art VII, § 3(a).

¹⁹ Government Code § 19582(a).

²⁰ Skelly v. State Personnel Board (1976) 15 Cal.3d 194, 206.

²¹ Government Code §§ 19583, 19584.

wrongfully medically terminated.²² Consequently, appellant is entitled to compensation so as to make him whole for that period of time that his property right was wrongfully abrogated.²³

The Board rejects the Department's contention that the passage of Senate Bill 1073,²⁴ demonstrates that the Board did not possess the requisite authority to award back pay when it revoked a termination brought pursuant to Section 19585, until January 1, 2000. Instead, the Board finds that the provisions of that bill merely clarified and codified existing law. The Board has always been implicitly authorized to award back pay and benefits to an employee when it revokes the non-punitive termination taken against him or her prior to January 1, 2000.²⁵ The change in the statute was sought to provide clear notice to parties who practice before the board that the Board has this authority. As of January 1, 2000, the Board is expressly authorized to award back pay and benefits to employees who are wrongfully non-punitively terminated.

CONCLUSION

Appellant's plea of nolo contendere to a violation of Penal Code section 243(e)(1) did not constitute a conviction. While such a plea may often-times constitute a conviction under California law, it is clear that when the plea is entered in conjunction with a plea agreement that permits the defendant to participate in a pre-trial diversion program pursuant to Penal Code section 1001.50 *et seq.*, no conviction occurs unless

²² Government Code § 19253.5(g).

²³ Barber v. State Personnel Board (1976) 18 Cal.3d 395, 402.

²⁴ Chaptered September 2, 1999, Chapter 310, Statutes of 1999.

²⁵ The superior court recognized this implicit authority in Julie Foreman v. State Personnel Board, et al., Sacramento County Superior Court, Case No. 97CS02730.

and until the defendant fails to complete the diversion program successfully and the court subsequently enters judgment in the case based on the prior plea. Since as of the date of his termination on March 27, 1999, appellant had not been convicted of any crime, the Department erred in terminating him pursuant to the provisions of Government Code section 19585. As such, the Board will order appellant's reinstatement to his position as a Correctional Officer.

In addition, when the Board revokes a termination taken pursuant to Section 19585, it possesses the requisite authority to order an award of back pay and benefits to the employee wrongfully terminated. Since appellant was wrongfully terminated from his position, he is entitled to such an award.

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 non-punitive termination of M [REDACTED] S [REDACTED] from the position of Correctional Officer with the Correctional Training Facility, Department of Corrections at Soledad is revoked;
2. The Department of Corrections shall reinstate M [REDACTED] I S [REDACTED] to his position as a Correctional Officer with the Correctional Training Facility at Soledad, effective March 27, 1999;
3. The Department Of Corrections shall pay to M [REDACTED] S [REDACTED] all back pay and benefits that would have accrued to him had he not been terminated.

4. This matter is hereby 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 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

[S █████ -dec]