

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)
)
 MARK CHAMBERLAIN)
)
 For back pay from constructive leave of)
 absence under Government Code)
 section 19574.5 from the position of)
 Psychiatric Technician (permanent-)
 intermittent) with Metropolitan State)
 Hospital, Department of Mental Health at)
 Norwalk)
)
 _____)

SPB Case No. 01-0740B

BOARD DECISION
(Precedential)

NO.: 02-03

February 7-8, 2002

APPEARANCES: Jay Salter, Consultant, California Association of Psychiatric Technicians, on behalf of appellant, Mark Chamberlain; Larry Maldonado, Human Resources Director, Metropolitan State Hospital, Department of Mental Health, on behalf of respondent, Department of Mental Health.

BEFORE: William Elkins, Vice President; Florence Bos 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 whether appellant, as a permanent-intermittent employee, was entitled to any back pay. By this decision, the Board determines that, under the facts of this case, appellant established that he was placed on involuntary administrative leave pursuant to Government Code section 19574.5 and that, but for that leave, he would have worked a sufficiently definite number of hours so as to be entitled to an award of back pay.

BACKGROUND

Factual Summary

Appellant has been employed with the state since 1981. On May 16, 1997, appellant was appointed to the position of Psychiatric Technician, full-time, with the Department of Mental Health (DMH). On January 1, 1998, appellant's status changed to that of permanent-intermittent Psychiatric Technician with DMH. According to appellant, he always worked a minimum of 127 hours per month at MSH, working in whatever treatment units MSH administrators called on him to work. Thus, according to appellant, "the only thing 'intermittent' about [his] status as an MSH employee was the location of the job sites he was assigned to work, not whether he would be assigned to work 127 hours in any given month."¹

The parties entered the following stipulation into the record:

The parties stipulate that Respondent ordered Appellant off work April 28, 2000 pending an investigation into the Notice of Adverse Action which involved allegations of patient abuse which was not ultimately cause for the Notice of Adverse Action formal reprimand.

The parties further stipulated that appellant was not scheduled for work from April 29, 2000 through November 5, 2000, because of that investigation. Appellant returned to work beginning November 6, 2000, and later received a notice of adverse action of official reprimand effective March 19, 2001. The parties stipulated that the allegations of patient abuse for which appellant had been investigated were not ultimately cause for that notice of adverse action.

¹ The Department does not dispute this assertion, which was set forth in appellant's written argument to the Board.

The parties entered into a stipulation for settlement of the adverse action at the hearing.² The parties further stipulated that, “if it is found that appellant is due back pay, during the comparable time period appellant earned as a permanent intermittent employee 127 hours per month plus benefits.”

Procedural Summary

The Board rejected the ALJ's Proposed Decision at its July 24, 2001 meeting to consider whether appellant is entitled to back pay for the period during which he was placed on involuntary administrative leave from his permanent-intermittent position.

DISCUSSION

Involuntary Leave of Absence

Government Code section 19574.5 provides a means by which a state employer may, under certain conditions, remove an employee immediately from the workplace in order to investigate allegations of serious misconduct, without having to comply with the procedural and notice requirements normally applicable prior to taking disciplinary action. Thus, section 19574.5 provides:

Pending investigation by the appointing power of accusations against an employee involving misappropriation of public funds or property, drug addiction, mistreatment of persons in a state institution, immorality, or acts which would constitute a felony or a misdemeanor involving moral turpitude, the appointing power may order the employee on leave of absence for not to exceed 15 days. The leave may be terminated by the appointing power by giving 48 hours' notice in writing to the employee.

² The stipulation for settlement was approved by the Board on July 11, 2001.

If adverse action is not taken on or before the date such a leave is terminated, the leave shall be with pay.

If adverse action is taken on or before the date such leave is terminated, the adverse action may be taken retroactive to any date on or after the date the employee went on leave. Notwithstanding the provisions of Section 19574, the adverse action, under such circumstances, shall be valid if written notice is served upon the employee and filed with the board not later than 15 calendar days after the employee is notified of the adverse action.

In order to invoke section 19574.5, an employer must show not only that the disciplined employee was accused of engaging in one of the five types of listed misconduct, but also that the alleged misconduct constituted “such a job-related extraordinary circumstance that immediate removal is required.”³ Thus, the statute is designed to prevent further potential harm by removing the employee for a brief period of time while the employer investigates allegations of serious misconduct under circumstances where immediate removal is required. To protect the employee’s due process interest in public employment, however, the statute requires that the leave be with pay unless written notice of adverse action is served within 15 days.

Although the Department did not expressly invoke section 19574.5, its actions demonstrate that it did so implicitly. The parties stipulated that the Department ordered appellant off work on April 28th, 2000 pending an investigation of allegations of patient abuse, which falls squarely within one of the five enumerated types of misconduct (mistreatment of a person in a state institution) for which the statute may be invoked. The parties also stipulated that the reason appellant was placed off work was because of that investigation. Therefore, we find that, by its actions, the Department effectively

³ Warren v. State Personnel Board (1979) 94 Cal.App.3d 95, 110; R■■■■ R■■■ (1999) SPB Dec. No. 99-10.

invoked section 19574.5 by placing appellant on an involuntary leave of absence for the sole purpose of investigating allegations of misconduct covered by the statute.⁴ The Department did not terminate the leave within 15 days, nor did it serve appellant at any time with a notice of adverse action concerning the alleged misconduct. The Department was not entitled to summarily remove appellant from the workplace for purposes specified in section 19574.5 without complying with the protections set forth in that statute.

We have considered the Department's argument that, because of appellant's status as a permanent-intermittent employee, it was free to simply not call appellant in to work pending the investigation. We disagree. As defined by statute, "an 'intermittent' position or appointment is a position or appointment in which the employee is to work periodically or for a fluctuating portion of the full-time work schedule."⁵ While employees working in intermittent positions have no vested right to any particular schedule or even to be called in to work, they are otherwise entitled to the same protections applicable to other permanent civil service employees and retain permanent status unless separated from service in accordance with applicable rules.⁶

⁴ We need not, and do not, determine whether, in fact, the necessary extraordinary circumstances existed that would have permitted the Department to place appellant on administrative leave pursuant to section 19574.5.

⁵ Gov. Code, § 18552.

⁶ C██████ D██████ (1994) SPB Dec. No. 94-15, at pp. 6-7.

Entitlement to Back Pay

The Board addressed the right of a permanent-intermittent employee to recover back pay after an improper termination in C. [REDACTED] D. [REDACTED]⁷ and S. [REDACTED] M. [REDACTED]⁸. D. [REDACTED] involved an employee who held two positions simultaneously for the same appointing power: during the week he worked full time as a Parole Agent for the Department of the Youth Authority and, on the weekends, he worked an average of an additional 40 hours per month as a Youth Counselor. After the department determined that allowing him to work in both positions would require the payment of overtime wages pursuant to the federal Fair Labor Standards Act (FLSA),⁹ it decided to stop calling him into work as a Youth Counselor. The Board rejected appellant's claim that the department's actions amounted to "constructive termination" of his appointment, holding that, since the department had no obligation to work a permanent intermittent employee any specified number of hours, the "mere failure to work appellant does not constitute a constructive termination." The Board held, nonetheless, that the department was not free to invoke the "automatic resignation" provisions of SPB Rule 448¹⁰ to separate him from state service one and one-half years later, since his absence was not unauthorized

⁷ (1994) SPB Dec. No. 94-15.

⁸ (1991) SPB Dec. No. 91-05.

⁹ 29 U.S.C. § 201, et seq.

¹⁰ 2 Cal. Code Reg. § 448. That rule provides: "(a) An intermittent employee whose continuity of employment in a position is interrupted by a nonwork period that extends longer than one year may be considered to have automatically resigned from the position without fault as of one year from the last day the employee was on pay status subject to the restrictions in subsection (b).

(b) separations are restricted to:

(1) nonwork periods not covered by a paid leave, a formal leave of absence without pay or other temporary separation and,

(2) those circumstances which create a presumption that the employee has abandoned his or her position."

but simply a function of the department's decision not to schedule him for work. The Board determined, however, that no back pay could be awarded, since it had no control over whether the department scheduled a permanent intermittent employee to work.

M involved similar facts. In that case, the Department of Corrections failed to follow the proper procedure for voiding M appointment as a permanent intermittent correctional officer after it determined that it would incur liability under the FLSA due to M simultaneous employment as a full-time firefighter for the same department. On remand, the Board declined to award back pay on the ground that, as a permanent intermittent employee, M had no vested entitlement to a particular work schedule or an established number of work hours.¹¹

The case before us is different. As discussed above, the parties stipulated that the only reason appellant was not called in to work was in order for the Department to conduct an investigation into alleged misconduct that is expressly within the scope of Government Code section 19574.5. He was not, as the Department asserts, simply not called in to work, as in D. Instead, the Department took the affirmative step of placing him off duty and sending him home pending its investigation into allegations of misconduct. Given these facts, we conclude that appellant's employment as a permanent intermittent employee was sufficiently definite and predictable so as to justify an award of back pay and benefits.

¹¹ S, M ("M II") (1993) SPB Case No. 27771. Decisions of the Board that have not been designated as precedential may be cited as persuasive, but not binding, authority. (G, C (1992) SPB Dec. No. 92-11, p. 5.) Darryl R. Seals (1996) SPB Case No. 39144, a nonprecedential decision relied on by the Department, is also inapposite, in that the permanent intermittent employee in that case was not placed off work for reasons expressly covered by Government Code section 19574.5.

The Department was not free to simply send appellant home while it investigated the allegations of misconduct against him. It had two options. If it believed the facts warranted that appellant be removed from the workplace immediately, it could have invoked Government Code section 19574.5 and placed appellant on involuntary leave without pay for up to 15 days, at which time it could have served a notice of adverse action, which could have been retroactive to the date the leave commenced, or paid appellant for the time of the leave if the investigation turned out not to warrant adverse action. Alternatively, if the alleged misconduct did not rise to the level that would justify immediate termination under section 19574.5, the Department could have placed appellant on administrative leave with pay while it investigated the matter. The Department was not free, however, to leave appellant in limbo while it proceeded with its investigation for 6 months before allowing him to return to work.

Unlike in D [REDACTED] and M [REDACTED], this is not a case of the Department simply exercising its option not to call a permanent intermittent employee in to work. Instead, the Department took the affirmative step of placing appellant off work while it performed an investigation into alleged misconduct. It is clear that, but for the investigation, the Department would have continued to employ appellant and, in fact, resumed employing him once its investigation was completed. Under these circumstances, appellant is entitled to be compensated for his involuntary leave of absence, given the stipulation that he worked a sufficiently definite and predictable schedule to enable an objective determination of the amount he would have worked.

Calculation of Back Pay

The parties stipulated that, if appellant were entitled to back pay, “during the comparable period appellant earned as a permanent intermittent employee 127 hours per month plus benefits.” Section 19574.5 does not specifically address the method by which back pay is to be calculated under that statute. Government Code section 19584, applicable when the Board revokes or modifies an adverse action, provides for the payment of all back pay, interest and benefits that otherwise would have normally accrued. The Board finds these standards equally applicable to leaves of absence under section 19574.5.

The Board has previously awarded back pay to permanent intermittent employees where the evidence established that they would have continued to work a regular schedule but for the appointing power’s improper actions.¹² In light of the parties’ stipulation, we find that, while appellant had no vested right to work a particular number of hours, he would have worked 127 hours per month plus benefits during the period of his involuntary leave of absence but for that absence. Therefore, appellant is entitled to receive back pay at the rate of 127 hours per month plus benefits and interest for the period April 29 through November 5, 2000, consistent with the standards set forth in Government Code section 19584.

¹² See, e.g., Diana R. Bustamante (1996) SPB Case NO. 34214 (constructive medical termination); Lonnie Ray Johnson, Jr. and Artie J. Ferguson (1993) SPB Case Nos. 31141 and 31256 (improper layoff); Anthony Anderson (1987) SPB Case No. 21509 (improper dismissal). Although not binding, these decisions may be relied upon as persuasive authority. (, supra.)

CONCLUSION

An employee with permanent intermittent status has no vested right to work a particular schedule or number of hours, and an appointing power may lawfully refrain from calling such an employee in to work. An appointing power may not, however, use an employee's permanent intermittent status as a means of denying the employee statutory protections available to all state civil service employees. Where, as here, an appointing power removes an employee from the workplace for the sole purpose of investigating alleged misconduct covered by Government Code section 19574.5, it must comply with the requirements of that statute.

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 appeal of Mark Chamberlain from back pay from constructive leave of absence under Government Code section 19574.5 is hereby granted.
2. Consistent with the standards set forth in Government Code section 19584, the Department shall pay to Mark Chamberlain all back salary, interest and benefits, if any, that would have accrued to him had he worked 127 hours per month for the period April 29, 2000 through November 5, 2000 instead of having been placed on an involuntary leave of absence.
3. 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, interest and benefits due appellant using the standards set forth in Government Code section 19584.

4. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD¹³

William Elkins, Vice President
Florence Bos, Member
Sean Harrigan, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on February 7-8, 2002.

Walter Vaughn
Executive Officer
State Personnel Board

[Chamberlain-dec]

¹³ President Ron Alvarado was not present at oral argument and did not participate in this decision.