

R [REDACTED] P [REDACTED]
v.
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION

Appeal from Non-Punitive Termination

SPB Dec. No. 23-01
Case No. 22-0784

BOARD DECISION

BEFORE: Kathy Baldree, President; Gail Willis, Ana Matosantos, and Kimiko Burton, Members.¹

This case is before the State Personnel Board (SPB or Board) after it rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the appeal by R [REDACTED] P [REDACTED] (Appellant), Case Number 22-0784. Respondent, California Department of Corrections and Rehabilitation (CDCR or Respondent) served Appellant with a Notice of Non-Punitive Termination (NNPT) dismissing him from his position as a Correctional Officer (CO) under Government Code section 19585.² Respondent alleged Appellant no longer met the requirements for continuing employment based on his inability to carry a firearm after a Criminal Protective Order – Domestic Violence was issued against him.

Appellant appealed the NNPT, arguing the termination was impermissible under two theories, both grounded in section 19585, subdivision (a). First, he argued because he was out on medical leave he was not required to meet the continuing requirements of employment until he was physically able to return to work. Second, he argued the non-punitive termination was improper because he had previously applied for disability retirement, which was pending at the time of the termination.

¹ Vice President Shawnda Westly was not in attendance at the oral argument and therefore is not a participant in this decision.

² All further statutory references are to the Government Code, unless noted otherwise.

In this Decision, the Board concludes that section 19585 permits Respondent to non-punitively terminate Appellant because the termination was based on his inability to carry a firearm unrelated to any medical reason or Appellant's application for disability retirement and herein sustains the non-punitive termination.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent hired Appellant on March 24, 2014, as a CO assigned to Salinas Valley State Prison. On November 7, 2017, an inmate attacked Appellant. He sustained an injury to his back among other non-specified injuries. Since the attack, Appellant has not returned to work.

During his medical leave, Appellant was criminally charged with domestic violence. He appeared in San Luis Obispo Superior Court for an arraignment proceeding on September 20, 2021. Following the hearing, the court issued a Criminal Protective Order – Domestic Violence, which, among other things, prohibited Appellant from owning or possessing any firearms. The Protective Order included the following warning:

Any person subject to a protective order is prohibited from owning, possessing, purchasing, or attempting to purchase, receiving, or attempting to receive, or otherwise obtaining a firearm . . . Under federal law, the issuance of a protective order after hearing will generally prohibit the restrained person from owning, accepting, transporting, or possessing firearms or ammunition. A violation of this prohibition is a separate federal crime.

The Criminal Protective Order would remain in effect for three years from the date of issuance.

Sometime in April 2022, Appellant applied for disability retirement with the California Public Employees' Retirement System (CalPERS). CalPERS returned Appellant's application as incomplete. Appellant resubmitted his application again in August 2022 and October 2022. According to Appellant, his application was still pending at the time of his appeal.

Respondent non-punitively terminated Appellant on June 24, 2022, due to the court order restricting his ability to possess a firearm. A requirement of the CO classification is that "[a]ny person prohibited by State or Federal law from possessing, using or having in his/her custody or control any firearm, firearm device, or other weapon or device authorized for use by the California Department of Corrections is not eligible to compete for, be appointed to, or continue employment in this classification."³ Appellant timely appealed the non-punitive termination to the SPB.

Appellant filed a motion to dismiss arguing the non-punitive termination was impermissible as he is not required to maintain the continuing requirements of the job while he was on medical leave. In addition, Appellant further argued that section 19585 subdivision (a) precluded Respondent from non-punitively terminating him because he applied for disability retirement.

On November 21, 2022, Presiding Administrative Law Judge (PALJ) Mark Kruger denied the motion to dismiss on the grounds that the cause for action against Appellant in the NNPT was unrelated to a medical condition or Appellant's application for disability

³ Class specifications for Correctional Officers as posted on CalHR's website. < <https://www.calhr.ca.gov/state-hr-professionals/pages/9662.aspx>> Visited on April 27, 2023, last updated December 12, 2018.

retirement. Thus, section 19585, subdivision (a), did not preclude the NNPT action against Appellant.

The case proceeded to an evidentiary hearing before ALJ Lori Green. Appellant renewed his motion to dismiss that was previously denied by PALJ Kruger. ALJ Green did not find good cause to disturb PALJ Kruger's decision and denied Appellant's request. ALJ Green further determined the evidence was sufficient to sustain the non-punitive termination and issued a Proposed Decision to that effect on December 8, 2022.

At its January 12, 2023, meeting, the Board rejected the Proposed Decision and elected to hear the matter itself. Subsequently, the parties submitted written arguments and at the Board's April 13, 2023, meeting, provided oral arguments.

DISCUSSION

Section 19585 provides options for an appointing power when it faces a situation where its employee fails to meet a requirement for continued employment in their classification. Specifically, "[t]his section shall apply to permanent and probationary employees and may be used in lieu of adverse action and rejection during probation when the only cause for action against an employee is his or her failure to meet a requirement for continuing employment, as provided in this section. This section shall not apply to cases subject to the provisions of termination or demotion for medical reasons or retirement for disability." (Gov. Code, § 19585, subd. (a).)

Appellant does not dispute the classification specification requires correctional officers to be able to possess or use a firearm and the court order effectively prevents

him from meeting that requirement. Appellant, however, contends section 19585, subdivision (a) does not extend to situations where the employee is on leave and has applied for disability retirement without any expectation of returning to duty. Appellant principally relies on *Julie L. Foreman* (1998) SPB Dec. No. 98-04 (*Foreman*) to support his argument. The employee in *Foreman* was a Psychiatric Technician who sustained an on-the-job injury and went on industrial disability leave. The department non-punitively terminated her because she failed to successfully renew her Psychiatric Technician license, a requirement for her continued employment. The evidence established that the employee knew of her obligation to complete the continuing education but was unable to do so due to her injuries. The employee also inquired about light-duty assignments but was advised that none were available.

The Board did not sustain the non-punitive termination notwithstanding the employee's failure to maintain her license. The Board reasoned that the employee was on leave due to a work-related injury and was advised she would not be allowed to work until her injury resolves. The genesis of her inability to work was not the licensing condition of employment; rather, it was because of the work-related injury. Government Code section 19582 is not intended to be used by departments to dismiss employees who are unable to work due to their work-related injuries. Instead, it is intended to provide departments an alternative to the traditional disciplinary action in dealing with employees who fail to maintain a license or other conditions of employment unrelated to their disability or work-related injury. (*Id.* at p. 7.)

Appellant asserts that, as with the employee in *Foreman*, Appellant was also “off of work on an approved leave for a work-related injury” (*Foreman* p. 2) and is unable to return to his full duties because of his injuries. Appellant further asserts he is not “performing or expected to perform the duties of his [] position.” (Appellant’s brief p. 4 [quoting *Foreman* p. 6].) Thus, he need not maintain the minimum requirements of a CO. Since going on medical leave, Appellant has not performed any of his duties nor was he expected to meet the CO minimum qualifications. For example, he was not required to maintain his range qualification, also a requirement for continued employment. This was a yearly evaluation wherein Appellant would have to perform with a weapon for a qualifying score. His work-related injury, and not the firearm restriction, was the direct cause of his inability to perform his duties.

Appellant also cites to *G.P.* (1997) SPB Dec. No. 97-07 (*G.P.*) as further authority why non-punitive termination is improper in this instance. In *G.P.*, a correctional lieutenant attempted suicide and was placed on a 72-hour psychiatric hold resulting in a firearms prohibition. The lieutenant subsequently filed for worker’s compensation benefits and disability retirement. His employer, the Department of Corrections at Chowchilla (Department) non-punitively terminated him based on the firearm restriction. The Board determined the non-punitive termination under section 19585 was improper because the firearm restriction was directly attributable to the employee’s disability. (*Id.* at pp. 6-7.) Appellant contends he is similarly situated as the employee in *G.P.* since he filed for disability retirement. Appellant further asserts his situation presents an even more compelling basis for denying the non-punitive

termination than *G.P.* since Appellant had been off work for a significant duration before he received the firearm restriction.

While the cited cases have some similarity to the facts in this matter, the similarities do not dictate the same result for a critical reason. The Board in *Foreman* noted the issue was “whether appellant was required to keep her license current even though she was off for a work-related injury and even though the Department had informed her that it had no work for her until she could return to her Psychiatric Technician duties.” (*Foreman*, pp. 5-6.) The Board’s statement and decision, however, was not intended to be a broad holding that non-punitive action is unavailable whenever an employee is on leave due to a work-related injury. The *Foreman* decision was reached based on the evidence showing that Appellant’s failure to secure her license renewal was related to her injuries. The Board held

it was not appellant’s failure to meet her job specifications that deprived the Department of the full range of appellant’s services; it was her work-related injury and the Department’s determination that she could not work in her position because of that injury. The evidence presented at hearing demonstrated that, *but for* her work-related injury, appellant would have continued to work and would have been able to maintain her license. We cannot accept that in enacting Government Code section 19585, the legislature intended that an employee lose her rights to permanent civil service status solely because she fails to keep her license current while off work on an approved industrial disability leave, having had her request to return to work denied.

(*Id.* at p.7, italics in original.)

Likewise, in *G.P.*, the employee attempted suicide resulting in an involuntary psychiatric hold, which was the reason for his inability to carry a firearm for five years.

(G.P. pp. 2, 4.) The worker's compensation insurance provider determined the employee's suicide attempt was the *direct result of a work-related injury*. He was temporarily totally disabled and applied for disability retirement based on his work-related injury. The department nonetheless non-punitively terminated the employee because of the firearm restriction claiming it was unrelated to his work-related injury. The Board held the employee's legal inability to possess a firearm was inextricably intertwined with the employee's disability and therefore it was impermissible to non-punitively terminate the employee. In reaching this conclusion, the Board relied on the holding in *Patton v. Governing Board* (1978) 77 Cal.App.3d 495, a case in which a bus driver lost his certificate to drive a bus because of a physical disability. Patton's employer argued it terminated Patton because he lost his certificate and not because of his disability. The court found the argument unpersuasive and that terminating him for his inability to maintain the certificate was tantamount to terminating him because of his disability. (*Id.* at 501-502.)

Unlike the employees in *Foreman* and *G.P.*, Appellant's inability to meet the continuing requirement for the Correctional Officer position is not related to nor did it derive from Appellant's injury or disability. The firearm restriction was due to Appellant's involvement in a domestic violence incident.

Appellant nonetheless asserts that section 19585 excludes from non-punitive termination any case in which an employee is off work due to a work-related injury or has applied for disability retirement, regardless of the cause of the employee's inability to meet the requirements for continued employment. Further, he argues the language

of section 19585 does not include a nexus requirement and the Board should not add one.

In determining a statute's meaning, the "fundamental task is to determine the legislative intent and effectuate the law's purpose, giving the statutory language its plain and commonsense meaning." (*Mendoza v. Fonseca McElroy Grinding Co., Inc.* (2021) 11 Cal.5th 1118, 1125, reh'g denied (Sept. 29, 2021).) We review the language of the statute "not in isolation, but in the context of the statutory framework as a whole to discern its scope and to harmonize various parts of the enactment." (*Ibid.*) Legislative intent must be ascertained "based on 'the entire context' of the statutes at issue." (*People v. Murphy* (2011) 52 Cal.4th 81, 91 [quoting *People v. Jenkins* (1980) 28 Cal.3d 494, 502].)

Section 19585, subdivision (a) provides:

This section shall apply to permanent and probationary employees and may be used in lieu of adverse action and rejection during probation when the only cause for action against an employee is his or her failure to meet a requirement for continuing employment, as provided in this section. *This section shall not apply to cases subject to the provisions of termination or demotion for medical reasons or retirement for disability.*

[Italics added.]

Reading the section 19585, subdivision (a), in its entirety requires that the second sentence of subdivision (a) must be read in conjunction with the first sentence. Respondent's counsel asserts the reference to "cases" in the second sentence is guided by the purpose of the first sentence which spells out the purpose and intent of section 19585.

Section 19585 was enacted in 1985. The bill enacting it, reads, in part, as follows:

State civil service: termination: reinstatement.
Existing law provides that a state civil service employee may be permanently separated from service through resignation or removal for cause, or for medical reasons under specified circumstances.

This bill would authorize an apportioning power, in lieu of adverse action and rejection during probation, to terminate, demote, or transfer a civil service employee, and would authorize the granting of a leave of absence to a civil service employee, who fails to meet a minimum requirement for continuing employment prescribed by the State Personnel Board in the specifications for the employment classification....

(Assem. Bill No. 2056 (1985-1986 Reg. Sess.) The expressed intent was to provide a method of separating employees unrelated to resignation, disciplinary action, or because of “medical reasons under specified circumstances.” Existing law already provided for those methods of permanent separation.

By its plain language, section 19585 permits the employer to take a non-punitive or disciplinary action to remove an employee who fails to meet or maintain a minimum requirement for the classification in which they are employed. The limitation present in the second sentence excluding non-punitive measures to “cases subject to the provisions of termination or demotion for medical reasons or retirement for disability” must be read in conjunction with the preceding body of the subdivision. “The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both

internally and with each other, to the extent possible.” (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.)

Consistent with this Board’s precedential decision in *Foreman* and *G.P.*, the Board finds that the reference to “cases” in the second sentence is an associational reference wherein non-punitive action would not be permitted if the employee’s failure to meet or maintain the requirement is caused by or derivative of the medical reason or reason for retirement for disability. As PALJ Kruger aptly stated,

When read in its entirety, it is clear that the “cases” referred to in the second sentence are not to all cases where an employee happens to be off work due to an injury or disability at the time of the non-punitive action. Rather, the word “case” refers back to the particular “cause for action” the appointing authority asserts for taking the non-punitive action.

Finally, nothing in the statutory language suggests its purpose was to shield those who failed to meet the requirements of continued employment, unrelated to any medical reason, from non-punitive termination.

CONCLUSION

Appellant failed to meet the requirements for continued employment as a Correctional Officer. Respondent appropriately non-punitively terminated him under section 19585.

ORDER

Based on the entire record in this matter, the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the non-punitive termination of R ■■■ P ■■■ from the position of Correctional Officer is SUSTAINED.

* * * * *

I certify that the State Personnel Board made and adopted the foregoing Decision and Order, and I further certify that the attached is a true copy of the Administrative Law Judge's Proposed Decision adopted by the State Personnel Board at its meeting on June 8, 2023.

Suzanne M. Ambrose

SUZANNE M. AMBROSE
Executive Officer

R [REDACTED] P [REDACTED]
v.
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION

Appeal from Non-Punitive Termination

Case No. 22-0784
Proposed Decision

STATEMENT OF THE CASE

This matter came on regularly for hearing before Lori A. Green, Administrative Law Judge, State Personnel Board (SPB or Board) on December 5, 2022, via Webex videoconference.

Appellant, R [REDACTED] P [REDACTED] (Appellant), was present and represented by Dia Moua, Senior Hearing Representative, California Correctional Peace Officers Association (CCPOA).

Respondent, California Department of Corrections and Rehabilitation (Respondent, Department or CDCR), was present and represented by Christopher McGinnis, Attorney I, Office of Legal Affairs, CDCR.

Respondent non-punitively terminated Appellant from the classification of Correctional Officer (CO), effective at the close of business, June 24, 2022. In the Notice of Non-Punitive Termination (NNPT), Respondent alleged that Appellant failed to meet a requirement for continued employment when the Superior Court of California, County of San Luis Obispo served Appellant with a Criminal Protective Order – Domestic Violence (Protective Order) which prohibited him from possessing a firearm.

Appellant contends that at the time the Protective Order was issued, he was on medical leave, had not been medically cleared to return to work, and was not required to

meet the requirements for continued employment.¹ Appellant also states that Respondent should have filed an application for disability retirement on his behalf.

ISSUES

The issues to be resolved are:

1. Did Respondent prove by a preponderance of the evidence that, as of the effective date of the non-punitive termination, Appellant failed to meet a continuing requirement of his position as a CO?
2. Was Respondent's non-punitive termination of Appellant valid?

FINDINGS OF FACT

A preponderance of the evidence proves the following facts:

1. On March 24, 2014, Appellant commenced his employment with Respondent as a CO at Salinas Valley State Prison (SVSP).
2. The SPB job specification for CO defines the position as follows:

Under supervision as a sworn essential public safety officer, to provide the public, staff, and inmates protection by enforcing State and Federal laws and administrative regulations while supervising the conduct of inmates or parolees of a State correctional facility or camp, and to do other related work.
3. The job specification also provides that “[a]ny person prohibited by State or Federal law from possessing, using or having in his/her custody or control any firearm, firearm device, or other weapon or device authorized for use by the California Department of Corrections is not eligible to compete for, be appointed to, or continue employment in this classification.”

¹ As discussed in more detail below, Appellant's arguments were previously ruled upon prior to the evidentiary hearing in an Order Denying Appellant's Motion to Dismiss issued by Presiding Administrative Law Judge Mark Kruger (PALJ Kruger) on November 21, 2022.

4. On November 2, 2017, while performing his CO duties at SVSP, Appellant was attacked by Inmate [REDACTED], and subsequently taken to Salinas Valley Memorial Hospital where he received treatment for medical injuries he sustained to his back, groin, and elbow.
5. Since the attack, Appellant has not worked as a CO, has been unable to perform the essential functions of his job, and has been on medical leave because of his back injuries.
6. On September 20, 2021, the Superior Court of San Luis Obispo County issued and served a Protective Order on Appellant pursuant to Penal Code section 136.2. The Protective Order remains in effect for three years from the date of issuance. The Protective Order provides in pertinent part:

The Court orders that [Appellant] must not own, possess, buy or try to buy, receive or try to receive, or otherwise obtain a firearm or ammunition. [Appellant] must surrender to local law enforcement or sell to or store with a licensed gun dealer any firearm owned by [Appellant] or subject to his or her immediate possession or control within 24 hours after service of this order and must file a receipt with the court showing compliance with this order within 48 hours of receiving this order.

The Protective Order also has the following warning:

Any person subject to a protective order is prohibited from owning, possessing, purchasing, or attempting to purchase, receiving, or attempting to receive, or otherwise obtaining a firearm . . . Under federal law, the issuance of a protective order after hearing will generally prohibit the restrained person from owning, accepting, transporting, or possessing firearms or ammunition. A violation of this prohibition is a separate federal crime.

7. In April 2022, Appellant applied for disability retirement with the California Public Employees' Retirement System (CalPERS). Shortly thereafter, but on

an unknown date, CalPERS returned Appellant's application to him because it was incomplete.²

8. On June 16, 2022, Respondent served Appellant the NNPT, with an effective date of June 24, 2022.

APPELLANT'S MOTION TO DISMISS

Prior to the evidentiary hearing, on September 22, 2022, Appellant filed a motion to dismiss the NNPT arguing that at the time he was served with the NNPT, he was off work due to a work-related injury, and it was not anticipated he would return to work. Appellant contended that because he was on a medical leave, he had no duty to maintain the minimum qualifications for his employment. Appellant also argued that because his case was subject to resolution by disability retirement, the non-punitive termination was improper. Appellant asserted that SPB precedential decisions *Julie L. Foreman* (1998) SPB Dec. No. 98-04 and *G.P.* (1997) SPB Dec. No. 97-07 supported his position. Appellant also relied upon Government Code section 19585 subdivision (a) which states:

This section shall apply to permanent and probationary employees and may be used in lieu of adverse action and rejection during probation when the only cause for action against an employee is his or her failure to meet a requirement for continuing employment, as provided in his section. *This section does not apply to cases subject to the provisions of termination or demotion for medical reasons or retirement for disability.* [Emphasis added.]

On October 6, 2022, Respondent opposed Appellant's motion and argued that it non-punitively terminated Appellant because he was served with a Protective Order that prohibited him from carrying a firearm. As a result, Appellant no longer met a requirement

² Appellant resubmitted his disability retirement application to CalPERS in August 2022, and again in October 2022. At the hearing, Appellant testified that his application with CalPERS is "pending."

for continued employment. Respondent further argued that because there was no nexus between the reasons for the NNPT and Appellant's disability, Appellant's case was distinguishable from the Board's decisions in *Foreman* and *G.P.* and was not subject to the exemption in Government Code section 19585, subdivision (a).

On October 14, 2022, Appellant filed a reply arguing that neither Government Code section 19585, nor the Board's precedential decisions, state that a nexus between reasons for the non-punitive termination and the employee's disability must exist for the exemption in Government Code section 19585, subdivision (a) to apply to a case. Appellant further argued that Government Code section 19585 only applies "if the employee is performing or expected to perform the duties of his position."

On November 21, 2022, PALJ Kruger issued an order denying Appellant's motion to dismiss. PALJ Kruger held, in pertinent part:

[I]f Respondent's cause for action against Appellant was premised on an assertion that his disability prevented him from maintaining a requirement of continued employment, his case is then subject to medical demotion/termination or disability retirement, and Government Code section 19585 would not apply . . . [Here] the cause for the non-punitive termination had nothing to do with Appellant's medical condition or disability but was the result of Appellant's own volitional conduct . . .

[I]n *Foreman* and *G.P.*, the Board was concerned that the appellants were being non-punitively terminated because their disabilities prevented them from maintaining the requirements of continued employment. These are critical facts that are not present here

PALJ Kruger further held that the state has an interest in ensuring that its employees maintain the legal requirements for the positions they hold.

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Appellant's argument, if accepted, would prevent appointing authorities from non-punitively terminating employees who either engage in unrelated conduct that causes the loss of a required license, or who simply chose not to maintain those requirements. The state's interest in this regard does not diminish merely because the employee is off work due an injury or disability. Nor is it unreasonable for the state to expect that an employee will maintain the requirements for continued employment for as long as they remain an employee of the state.

At the evidentiary hearing, Appellant asked to renew his motion to dismiss on the grounds that he had new evidence to submit for consideration. The new evidence consisted of Appellant's testimony that since the attack he has suffered from anxiety, depression, and insomnia, and thus, has sustained psychological injuries in addition to medical injuries.

California Code of Civil Procedure, section 1008, subdivision (a) allows a party to move for reconsideration of a prior order based on new or different facts or a change in law. If the motion to reconsider is based on new facts, the moving party must provide a satisfactory explanation for its failure to produce the evidence at an earlier time. (*Torres v. Design Group Facility Solution Inc.*, 45 Cal.App.5th 239, 243 citing *Shiffer v. CBS Corp.* 240 Cal.App.4th, 246, 255.)

Appellant offered no explanation for his failure to raise this "new evidence" in his original motion, evidence that, by his own testimony, he has been aware of and living with since the attack in 2017. Nor did Appellant explain how this new evidence was relevant to the present matter. Therefore, Appellant's request for reconsideration of his motion to dismiss is denied.

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PRINCIPLES OF LAW AND ANALYSIS

An appointing power may non-punitively terminate an employee who fails to meet the continuing requirements of employment under the SPB's specifications for the employee's classification. (Gov. Code, § 19585, subds. (a), (b).) The requirements for continuing employment, and therefore, the permissible grounds for non-punitive termination, are "limited to the acquisition or retention of specified licenses, certificates, registrations, or other professional qualifications, education, or eligibility for continuing employment or advancement to the fully qualified level within a particular class series." (Gov. Code, § 19585, subd. (d).)

In an appeal from non-punitive termination, the appointing power bears the burden of proving by a preponderance of the evidence that the employee failed to acquire or retain the specified license, certificate, registration, or other professional qualifications, education, or eligibility for continuing employment or advancement to the fully qualified level within a particular class series. (*George Lannes* (1992) SPB Dec. No. 92-10.) A preponderance of the evidence is generally defined as evidence that, "when weighed with that opposed to it, has more convincing force and the greater probability of truth." (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 482–483.)

The evidence established that on September 20, 2021, the Superior Court of California, County of San Luis Obispo issued a Protective Order against Appellant preventing him from possessing, buying, receiving, or otherwise obtaining a firearm. The Protective Order does not expire until September 20, 2024. Because Appellant is legally prohibited from carrying a firearm, he cannot meet the requirements for continued employment as a CO.

As for Appellant's argument that Respondent should have filed for disability retirement on his behalf pursuant to Government Code section 19253.5, subdivision (i),³ his argument is rejected because he raised it, for the first time, in his closing argument. New allegations and arguments raised by Appellant in his closing argument cannot be considered because they improperly pertain to matters outside the record. See *Malkasian v. Irwin* (1964) 61 Cal.2d. 738 holding that while counsel in closing argument may indulge in all fair arguments in favor of his client's case, he may not assume facts not evidence or invite speculation of unsupported inferences. (*Malkasian v. Irwin, supra*, 61 Cal.2d. 738, 747.) In addition, Respondent was not provided notice of the need to prepare a defense to any such allegations, nor was it afforded an opportunity to do so.⁴

Because Appellant cannot meet the requirements for continued employment as a CO, Respondent's decision to non-punitively terminate Appellant was appropriate.

CONCLUSIONS OF LAW

1. The official specification for the Correctional Officer classification states that any person prohibited by State or Federal law from possessing, using, or having in his/her custody or control any firearm, firearm device, or other weapon or device authorized for use by the California Department of Corrections and Rehabilitation

³ Government Code section 19253.5, subdivision (i)(1) provides, "If the appointing power, after considering the conclusions of the medical examination provided for by this section or medical reports from the employee's physician and other pertinent information, concludes that the employee is unable to perform the work of his or her present position or any other position in the agency and the employee is eligible and does not waive the right to retire for disability, the appointing power shall file an application for disability retirement on the employee's behalf . . ."

⁴ Parties appearing before the SPB are required to submit a Prehearing and Settlement Conference Statement (Statement) with the Appeals Division 12 calendar days prior to the evidentiary hearing. Among other things, the parties must identify affirmative defenses to any claim. (Cal. Code Regs., tit.2, § 57.1, subd. (f)(3). Appellant did not identify in his Statement that Respondent was required to file for disability retirement on his behalf. He therefore waived the right to raise the matter at hearing.

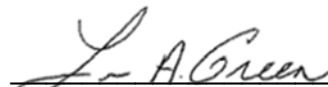
is not eligible to compete for, be appointed to, or continue employee in this classification.

2. On September 20, 2021, Appellant was prohibited from carrying a firearm by the Superior Court of California, County of San Luis Obispo for a period of three years.
3. The non-punitive termination of Appellant from the classification of Correctional Officer is legally appropriate.

ORDER

The California Department of Corrections and Rehabilitation's non-punitive termination of R [REDACTED] P [REDACTED] is **SUSTAINED**.

DATED: December 8, 2022



Lori A. Green
Administrative Law Judge
State Personnel Board