

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 23872
)
 RICHARD WARE) **BOARD DECISION**
) (Precedential)
)
For interest on back pay as a) **NO. 95-08**
Supervising Cook I at the Mule)
Creek State Prison, Department)
of Corrections at Ione) March 7, 1995

Appearances: Steven B. Bassoff, Attorney, California State Employees Association representing appellant, Richard Ware; Daniel E. Lungren, Attorney General, by Vincent J. Scally, Deputy Attorney General for Respondent, Department of Corrections.

Before: Lorrie Ward, President; Floss Bos, Vice President; Richard Carpenter, Alice Stoner and Alfred R. Villalobos, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ). The only issue in the case is the interest rate to be applied to appellant's back pay award.

The ALJ who conducted the back pay hearing determined that seven percent was the appropriate rate. The Board agrees that seven percent is the proper rate but not for the reasons set forth by the ALJ in his Proposed Decision.

PROCEDURAL HISTORY

On April 12, 1989, the State Personnel Board issued a decision sustaining the appellant's dismissal on grounds that his

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conduct constituted sexual harassment sufficient to warrant dismissal.

On or about July 12, 1989, appellant filed a Petition for Peremptory Writ of Administrative Mandamus in the Superior Court for the County of Sacramento in Richard Ware v. California State Personnel Board, et al., Case No. 362042, to compel the State Personnel Board to set aside its decision of April 12, 1989.

On April 5, 1990, the superior court entered its judgment granting appellant's petition and commanding the State Personnel Board to set aside its decision of April 12, 1989, and to redetermine the penalty in this matter.

On or about May 14, 1990, the Department of Corrections appealed the decision of the superior court to the Court of Appeal for the Third Appellate District.

On May 28, 1992, the Court of Appeal issued its decision affirming the decision of the superior court to issue a peremptory writ of mandate directing the SPB to set aside its decision and redetermine the penalty to be imposed in this matter.

On November 3, 1992, the SPB issued a decision modifying appellant's dismissal to a one year suspension without pay effective March 15, 1988. The matter was also referred to an Administrative Law Judge for a determination of back pay in the event the parties were unable to come to an agreement on salary and benefits due appellant.

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On June 30, 1993, the appellant requested a back pay hearing. A hearing was scheduled for September 21, 1993. The hearing was canceled upon the parties' agreement to handle the back pay issue by way of written submissions. The parties filed briefs on or before November 19, 1993.

On March 24, 1994, the ALJ assigned to this matter forwarded to the parties a copy of I [REDACTED] M [REDACTED] (1994) SPB Dec. No. 94-08, a precedential Board decision which provided that the proper rate of interest to be applied to back pay awards rendered after March 8, 1994 was seven percent. The ALJ requested that the parties submit a stipulation of fact upon which a decision might be rendered. The parties agreed.

The stipulated finding of fact and written argument were all received by the ALJ on July 8, 1994, after an extension agreed to by the parties.

ISSUES

The only issue before the Board is the rate of interest to be applied to the amount of back pay already paid to appellant.¹

¹On May 18, 1994, the appellant filed a written Motion to Dismiss the Adverse Action based on his claim that the SPB had lost jurisdiction to decide the case. The appellant's motion is denied. This matter was decided by the State Personnel Board on January 3, 1992, pursuant to a court remand to redetermine the matter. Pursuant to said remand, the State Personnel Board was vested with jurisdiction in this matter. The decision of the State Personnel Board in this case is final and the sole matter to be decided is the back pay issue.

FACTS

Appellant's one year suspension ended on March 15, 1989. Appellant returned to work on September 3, 1992. The Department paid the appellant back pay for the period of time between March 15, 1989 through September 3, 1992. The back pay amounted to some \$50,130.00 in wages. Pursuant to Government Code § 19584, which provides for the payment of interest on back pay awards, the Department paid appellant interest on the back pay award. The Department calculated the rate of interest at seven percent.

The parties stipulated that, if the rate of interest applicable to back pay in this case is calculated at ten percent, the respondent owes appellant \$4,500.00 in remaining interest payments. If the rate of interest is calculated at seven percent, the appellant has been paid in full.

DISCUSSION

In his Proposed Decision, the ALJ determined that interest on appellant's back pay should be paid at the rate of seven percent per year. The ALJ based his determination on I [REDACTED] [REDACTED]. M [REDACTED] (1994) SPB Dec. No. 94-08. In M [REDACTED], after reviewing the various statutes which might be construed to provide a basis for determining an appropriate interest rate, the Board held that an interest rate of seven percent should henceforth be applied to back pay awarded by the Board. M [REDACTED] at p. 12. The Board determined, however, that the holding in M [REDACTED] should be

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prospective only. Id. M was decided on March 8, 1994. The Board held that, in keeping with the Board's past practice, when back pay was awarded prior to March 8, 1994, interest was to be paid at the rate of ten percent. Id.

In the present case, the Board reduced appellant's penalty and ordered salary and benefits restored on November 3, 1992, long before M was decided. Even though on November 3, 1992, the amount of back pay to be awarded may have been uncertain, there can be no doubt that back pay was awarded on that day. See Robert Moore (1994) SPB Dec. No. 94-23 at p. 12. Thus, the ALJ erred in finding that M requires that the interest rate be set at seven percent.

For his part, appellant argues that M requires that appellant be paid interest at the rate of ten percent per year. In M, the board found that ten percent was the appropriate rate of interest to be paid on back pay awarded prior to the issuance of M. The Board reiterated its holding in M in Robert Moore (1994) SPB Dec. No. 23 by awarding ten percent interest to Moore because he was awarded back pay prior to the M decision.

Despite the Board's holding in M, the Department argues on two grounds that the Board should award interest at only seven percent. The Department first argues that since court ordered back pay awards are subject to a seven percent interest rate, and

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since the Board set aside appellant's dismissal in response to a court order, appellant's back pay award is vested with the attributes of a court judgment and, therefore, seven percent should apply.

The Department is mistaken. In M [REDACTED], the Board found that:

[A] court may be bound to apply the constitutional rate of interest to a backpay award after an enforcement order is obtained or after judgment is rendered on a petition for writ of mandate, [but] the Board itself is not bound by the interest rates set forth in the California Constitution in assessing interest on its own awards.

Thus, the Board has already rejected the idea that it is somehow bound to apply whatever interest rate a court would have applied had the back pay been ordered by a court instead of the Board. The back pay award in this case was rendered by the Board, and does not constitute a judgment or court order.

Alternatively, the Department argues that appellant is estopped from claiming that the rate of ten percent should be applied to his back pay award because, on November 19, 1993, the appellant filed a Reply Brief with the ALJ in which he stated he "had no dispute with the department's calculation that it owes appellant \$50,130.07 in back salary and \$10,542.10 in interest." The "department's calculation" referred to in appellant's brief is set out in an attachment to the Department's Brief Regarding Back Pay dated October 12, 1993. The attachment clearly indicates that the Department calculated the \$10,542.10 figure

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using a seven percent interest rate. The Department argues that since appellant had already agreed to a seven percent interest rate at the time M was decided, we should not apply M to appellant's case.

An attorney's concession is ...'not merely evidence of a fact; it is a conclusive concession of the truth of a matter which has the effect of removing it from the issues.'(citations omitted).

Smith v. Walter E. Heller & Co. (1978) 82 Cal. App. 3d 259, 269.

In this case, appellant's reply brief indicates that, as of November 1993, while the parties disagreed about whether appellant had been paid all the back pay due him, there was no disagreement over the interest rate to be applied to the back pay award.

We find that appellant's agreement that interest should be paid at seven percent removed the interest rate from issue and estops him from arguing that ten percent is the appropriate rate of interest to be paid on his back pay 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. Appellant shall not be paid any additional interest payment on his back pay award.

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

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THE STATE PERSONNEL BOARD*

Lorrie Ward, President
Floss Bos, Vice President
Richard Carpenter, Member
Alice Stoner, Member

*Member Alfred R. Villalobos was not present when this case was considered and therefore did not participate in the decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on March 7, 1995.

WALTER VAUGHN

Walter Vaughn, Acting Executive Officer
State Personnel Board