

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)
) SPB Case No. 27771
)
) **S** **M**)
) **BOARD DECISION**
) (Precedential)
)
) From dismissal from the position)
) of Correctional Officer)
) (Intermittent) at Richard J.) **NO. 91-05**
) Donovan Correctional Training)
) Facility, Department of) December 3, 1991
) Corrections at San Diego)

Appearances: California Correctional Peace Officers Association by Ina A. Arnold, Senior Hearing Representative, representing appellant **S** **M**; Daniel E. Lungren, Attorney General of the State of California by Larry Raskin and Melvin R. Segal, Deputy Attorneys General, representing respondent, Department of Corrections.

Before Burgener, Stoner, Carpenter and Ward, 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) in an appeal by **S** **M** (Appellant or **M**) a permanent intermittent correctional officer who had been terminated from her position at the Richard J. Donovan Correctional Training Facility, Department of Corrections (Department) at San Diego. Relying on Government Code section 19257.5, the ALJ "voided" the appointment of **M** to the correctional officer position on the grounds that had the Department been aware when it appointed her to the position that it would have to pay her overtime, it would not have appointed her.

The Board determined to decide the case itself, based upon the record and additional arguments to be submitted both in writing and

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orally. After review of the entire record, including the transcripts and briefs submitted by the parties, and after having listened to oral arguments presented on September 3, 1991, the Board rejects the proposed decision of the ALJ and reinstates the appellant for the reasons that follow.

FACTUAL SUMMARY

On September 29, 1986, M [REDACTED] was appointed to the position of full-time correctional officer. Beginning on August 1, 1987, appellant worked, in addition to her correctional officer position, the part-time position of institution firefighter. At the time M [REDACTED] was appointed a full time correctional officer, there were no full-time fire fighting positions available: all firefighters were part-time or stand-by and did not have to be peace officers.

On July 7, 1989, the Department began to hire firefighters on a full-time basis. On August 1, 1989, appellant accepted an appointment as full-time firefighter. The same day, appellant entered into an agreement with the Department under which the Department also agreed to appoint her to the position of permanent intermittent correctional officer. When appellant accepted the intermittent correctional officer position, she and the Department agreed that she would be paid at straight time.

The Department subsequently discovered that the Fair Labor

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Standards Act (FLSA)¹ legally obligated it to pay appellant overtime for the hours she worked in the correctional officer position.² On April 2, 1990, the Department sent appellant a letter revoking her status as a permanent intermittent correctional officer. The letter stated, in pertinent part:

This revocation is based on the number (of) PIE [permanent intermittent employees] currently on the list and the anticipated number of PIEs in the future.

Additionally, in this way I can afford them more hours to abide by my commitment to the PIE program and allow them the ability to better provide for their subsistence.

The Department never filed anything with the SPB requesting that the appointment of M █████ to the permanent intermittent correctional officer position be voided. M █████ appealed her termination.

ISSUE

The primary issue for determination in this case is whether the appointment of M █████ to the permanent intermittent

¹The FLSA is contained at 29 U.S.C. sections 201 et seq.

²As a firefighter, appellant worked nine days a month for 24 hours a day. She also averaged 22 hours a month as an intermittent correctional officer prior to her termination. The FLSA provides that firefighters are required to be compensated at the overtime rate for work over 216 hours. The FLSA further provides that an employee occupying multiple positions, who works in excess of forty (40) hours in a work week, regardless of the fact that the extra hours are for an additional position, is entitled to overtime for all hours over forty.

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correctional officer position is voidable pursuant to Government Code section 19257.5.

DISCUSSION

Government Code section 19257.5 provides:

When the appointment of any employee has been made and accepted in good faith, but where such appointment would not have been made but for some mistake of law or fact, which if known to the parties would have rendered the appointment unlawful when made, the Board may declare the appointment void from the beginning if such action is taken within one year after the appointment.

(emphasis added)

The parties do not dispute that the appointment in question was made and accepted in good faith. The Department contends, however, that the appointment was made under mistake of law since neither party was aware, at the time of the appointment, that the FLSA required that the appellant would have to be paid time and a half to be legally compensated for the overtime position. Had the parties been apprised of the FLSA overtime provisions when they entered into the agreement that M █████ would be paid straight time for her work in the correctional officer position, the Department argues, the appointment would have been unlawful when made.³

We need not decide the issue of whether or not the appointment of M █████ was unlawful within the meaning of Government Code section 19257.5, since we find that we are procedurally barred from

³The Department is not contending that the appointment of M █████ to the position in question violated any civil service statutes or rules.

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voiding the appointment at this point in time. The proper procedures for voiding an unlawful appointment set forth in Title 2 of the California Code of Regulations, section 266. Section 266 provides, in part:

When the executive officer determines that an appointment is unlawful, the executive officer shall determine the good faith of the appointing power and the employee under Rule 8 and shall take corrective action up to and including voiding the appointment, provided that:

(a) No corrective action shall be taken on any appointment which has been in effect for one year or longer if both the appointing power and the employee acted in good faith... (emphasis added)

In this case, the Department did not follow the proper procedures for voiding an appointment. The Department's April 2, 1990 letter to M [REDACTED] ostensibly revoking her status as a permanent intermittent correctional officer was insufficient to accomplish its intended purpose of voiding the appointment. Rather than taking unilateral action to void the appointment, the Department should have filed a request to void the appointment with the executive officer of the Board; this it admittedly did not do. Thus, despite the fact that the Department's letter to M [REDACTED] was sent within one year of her appointment, the appointment remained in effect for more than one year, not having been declared void by the Board. The Board has no authority to declare an appointment void unless it does so within one year after the appointment has been made. Consequently, in the instant case, even

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assuming arguendo that the appointment could be consider unlawful within the meaning of Government Code section 19257.5, the Board has no authority at this point in time to declare it void. (Government Code section 19257.5).

CONCLUSION

For the reasons set forth above, the Department's attempt to revoke appellant's appointment is set aside and appellant is reinstated to her position as a permanent intermittent correctional officer with back pay and benefits as appropriate.

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 attempted revocation of the appointment of S [REDACTED] M [REDACTED] to the position of permanent intermittent correctional officer is hereby set aside;

2. The Department of Corrections shall reinstate said appellant to the position of permanent intermittent correctional officer;

3. The Department shall pay appellant all back pay and benefits, if any, that would have accrued to her had she not been wrongfully terminated;

4. This matter is hereby referred to the 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

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and benefits, if any, due appellant.

5. This decision is certified for publication as a precedential decision (Government Code section 19582.5).

STATE PERSONNEL BOARD*

Alice Stoner, Vice- President
Clair Burgener, Member
Lorrie Ward, Member
Richard Carpenter, Member

*President Richard Chavez did not participate in this decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on December 3, 1991.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board