BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **M█████ █ B█████** For determination of back salary, benefits, and interest after reinstatement to the position of Correctional Administrator with the Department of Corrections at Sacramento	))))))))))	SPB Case No. 96-2675 **BOARD DECISION** (Precedential) **NO. 99-05** April 6, 1999

APPEARANCES: M. Bradley Wishek and Michael Rothschild, Rothschild, Wishek & Sands, attorneys, on behalf of appellant, M█████ █ B█████; Paul D. Warenski, Schachter, Kristoff, Orenstein & Berkowitz, attorneys, on behalf of respondent, Department of Corrections.

BEFORE: Florence Bos, President; Richard Carpenter, Vice President; Ron Alvarado and Lorrie Ward, Members.

DECISION

This case is before the State Personnel Board (Board) after it rejected the Proposed Decision of the administrative law judge (ALJ) that determined the amount of back pay due to M█████ █ B█████ (appellant) following the Board's decision to revoke appellant's dismissal from the position of Correctional Administrator with the Department of Corrections (Department). On June 4, 1996, the Board issued its decision revoking appellant's dismissal and ordering the Department to reinstate appellant and pay him all back salary and benefits that would have accrued had appellant not been dismissed. In this decision, the Board determines that appellant is entitled to full back pay and benefits at the rate applicable to the position of Correctional Administrator for the period February 7, 1993 through September 12, 1996, less the amount he actually earned during that period.

BACKGROUND

Factual Summary

The Legal Proceedings

The Department dismissed appellant from his position as Correctional Administrator effective August 5, 1992, based on several allegations of favoritism toward inmates.[1] On January 27, 1993, the California Attorney General, Department of Justice, filed a felony complaint against appellant based upon substantially the same alleged misconduct, and appellant was arrested on three felony charges on February 1, 1993. Each of the three counts carried a penalty of imprisonment of two to four years upon conviction. Criminal proceedings ensued over the admissibility of evidence obtained by wiretap. Ultimately, on January 17, 1994, the California Court of Appeal for the Third Appellate District held that the wiretap evidence was obtained in violation of the federal wiretapping law and ordered suppression of the unlawfully obtained evidence and any evidence derived from the unlawful wiretap.[2] The felony charges were dismissed on February 27, 1995.

Subsequently, on June 4, 1996, the Board issued its precedential decision B█████ I. In that decision, the Board granted appellant's motion to suppress the same evidence that had been ordered suppressed in the criminal proceeding, revoked the

[1] See M██████ B████l (1996) SPB Dec. No. 96-08 ("B████ I"). Immediately prior to his dismissal, appellant had been working as the Chief Deputy Warden of Deuel Vocational Institute (DVI), a career executive assignment (CEA). The Department terminated appellant's CEA on June 1, 1992 and reinstated him to the position of Correctional Administrator before dismissing him from that position.

[2] B█████ v. Superior Court (1994) 21 Cal.App.4th 1811, 1825.

dismissal and ordered the Department to pay appellant all back salary and benefits that would have accrued to him had he not been dismissed. On January 28, 1997, the Sacramento County Superior Court denied the Department's petition for writ of mandate challenging the Board's decision, and entered judgment on February 13, 1997. The Department subsequently appealed the judgment but dismissed the appeal.

Appellant's Job Search

Appellant did not seek any employment during the period August 5, 1992, the date of his dismissal, until January 1996. According to appellant, he was unable to effectively seek work while the criminal proceedings were pending and, even after they were dismissed in February 1995, he was still optimistic about prevailing before the Board and returning to work at the Department. In January 1996 appellant began seeking employment and obtained a part-time position at a golf course on March 24, 1996. Appellant earned $4,008.93 at the golf course in 1996. On September 13, 1996, the Department reinstated appellant to his position as Correctional Administrator with full salary and benefits.[3] The parties stipulated that the Department has paid appellant for the period August 5, 1992 through February 6, 1993, with interest at the rate of 7%.

The Department's expert witness, vocational evaluation consultant Gary D. Nibblelink, testified that, had appellant made a reasonable effort to seek work, he could have been employed within 60 to 120 days after he was dismissed on August 5, 1992. Nibblelink identified 18 entry-level jobs and projected openings in them that appellant

[3] The Department has placed appellant on paid administrative leave.

could have competed for in the open market in the San Joaquin and Sacramento–Yolo County areas.[4] Nibblelink based his opinion upon his review of appellant's background, work history, age, education and experience.[5] Essentially, Nibblelink asserted that appellant could have sought and obtained entry-level work in these types of positions, given his prior work experience working as an electrician and manager and holding administrative positions. The projected openings in these 18 jobs from 1990 through 1998 ranged from unknown (Distribution Warehouse Manager) to 40 (Procurement Clerk, Purchasing Agent, and Facilities Planner in San Joaquin County) to 1370 (Stock Control Clerk and Central Supply Worker in Sacramento-Yolo County). The entry-level monthly salary for the 18 positions ranged from $953 (Security Guard in San Joaquin County) to $3,364 (Procurement Services Manager in Sacramento-Yolo County).[6] The median monthly income for the 18 jobs was $2,331. Nibblelink did not consider appellant's salary as a Correctional Administrator in identifying these positions.[7] According to Nibblelink, the fact that appellant was facing criminal charges did not affect his ability to look for a job.

---

[4] The 18 jobs identified by Nibblelink were: Central Supply Worker, Stock Control Clerk, Procurement Clerk, Security Guard, Building Maintenance Repairer, Maintenance Supervisor, Expediter, Production Supervisor, Maintenance Electrician, Electrician Supervisor, Electrician, Property Manager, Food Service Manager, Distribution Warehouse Manager, Procurement Services Manager, Contract Specialist/Contract Administrator, Purchasing Agent, and Facilities Planner.

[5] Appellant had worked for the state since 1972, and held positions as a Clerk Typist, Electrician, Electrician Supervisor, Chief of Plant Operations, Business Manager, Program Administrator, Correctional Administrator and Chief Deputy Warden. Since 1976, all of his work was with the Department.

[6] The highest identified monthly salary was $3,575 for Production Supervisor in San Joaquin County.

[7] In February 1993, appellant's Correctional Administrator salary was $5910 per month. In January 1994, the salary was $6202. In January 1995, the salary was $6392. That was the monthly salary appellant received when he was reinstated to full paid administrative leave and benefits on September 13, 1996.

Appellant's expert witness, vocational evaluation consultant Gregory Sells, opined that appellant could not reasonably have been expected to look for and obtain work while the criminal charges against him were pending. In his opinion, since appellant faced death or serious injury if he, as a former prison administrator, were incarcerated for felony convictions, he had to focus on his criminal trial and appeal. In addition, he would have likely received, at best, a neutral reference from the Department during this time period, was not in an emotional position to look for work, and faced a difficult labor market. Sells confirmed that the pending felony charges against appellant posed a major impediment to obtaining a job: Sells contacted three private security firms and all of them told him that they would not hire someone with pending felony charges. Sells further testified that, although appellant's skills and background would have qualified him for some of the 18 jobs identified by Nibblelink, those jobs were not substantially similar to appellant's high-level positions with the Department because the salaries and responsibilities were not comparable.

Beginning in January 1996, appellant began seeking work. Appellant applied for positions with a security guard firm, a parcel service, a winery, a financial services company, a food service distributor, a life insurance company, two golf courses, and a position as a community services officer for a city. According to Sells, appellant took reasonable steps to secure employment at that time, given that he was not a professional job seeker. The job market was difficult, with a 14% unemployment rate in Stanislaus County, double the statewide unemployment rate of 7.2%.

The fact that appellant had previously faced felony charges and was still involved in proceedings before the Board adversely affected his ability to obtain employment in 1996. In his application for a security guard position with Guardsmark, Inc., appellant was asked to disclose whether he had ever been arrested or convicted of a crime. In response, appellant listed the three felony violations he had been charged with and stated all three charges were dismissed. A representative of Guardsmark interviewed appellant for two hours and told appellant that he would have to check with the corporate office to receive approval to employ appellant because of the arrests. When appellant called back a few weeks later, the representative told appellant that the corporate office had said he would be an "embarrassment" to them.

The Department also submitted a psychiatric evaluation dated November 11, 1996, that was prepared for the State Compensation Insurance Fund. That evaluation concluded that appellant was totally disabled from April 9, 1992 through June 15, 1992, and that he continued to have a partial temporary mental disability thereafter, aggravated by his involuntary termination on August 5, 1992. The report states: "there are no psychiatric restrictions from his working in his usual/customary job description." The report further stated that appellant had been ready to return to work for a long time, and that, had he not been terminated or allowed to return immediately following his dismissal, he would have been fit psychiatrically.

Procedural Summary

Following a hearing on back pay, the Chief ALJ determined that appellant should have mitigated his damages by seeking employment prior to March 1996. The Chief

ALJ therefore offset the award of back pay by an amount the Department contended appellant would have earned had he sought work prior to that time. The Board rejected the Chief ALJ's Proposed Decision at its meeting on September 1-2, 1998, to consider the amount of back pay due to appellant.

ISSUES

1. Was appellant ready, willing and able to perform the duties of his position at all times during the backpay period?
2. Should the Board deduct any amount for compensation that appellant earned, or might reasonably have earned, during the backpay period?[8]

DISCUSSION

Ready, Willing and Able

August 5, 1992 – February 27, 1995

According to appellant, he did not seek work while the criminal charges against him were pending because he needed to devote substantial time to assisting his attorneys and working toward getting the charges dismissed. In addition, he asserted that he was too emotionally distraught over the threat of a criminal conviction and

---

[8] At the hearing before the ALJ, appellant asserted that he should receive interest at the rate of 10% for any back salary awarded for the period prior to March 8, 1994, the date the Board issued its Precedential Decision in L█████ M█████ (1994) SPB Dec. No. 94-08. The ALJ disagreed and recommended an award of interest at the rate of 7% for the entire back pay period. Although given the opportunity to do so, appellant has not raised the issue of the appropriate interest rate before the Board, and the Board adopts the ALJ's determination that 7% is the appropriate interest rate for the entire back pay period.

incarceration, given his former position as a high-level prison administrator, to look for work during that time. The Department contends that these admissions establish that appellant was not ready, willing and able to work at all during the period between August 5, 1992 and February 27, 1995, and that, therefore, no back pay may be awarded for this period.[9]

The Board disagrees. Government Code section 19584 provides:

> 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 normally accrued. "Salary" shall include salary, as defined in section 18000, salary adjustments and shift differential, and other special salary compensations, if sufficiently predictable. Benefits shall include, but not be limited to, retirement, medical, dental, and seniority benefits pursuant to memoranda of understanding for that classification of employee to the employee for such period of time as the Board finds the adverse action was improperly in effect.
>
> Salary shall not be authorized or paid for any portion of a period of adverse action that the employee was not ready, able and willing to perform the duties <u>of his or her position</u>, whether such adverse action is valid or not or the causes on which it is based state facts sufficient to constitute cause for discipline.
>
> From any such salary due their shall be deducted compensation that the employee earned, or might reasonably have earned, during any period commencing more than six months after the initial date of the suspension. (Emphasis added.)

Government Code section 19584 thus mandates an award of back salary and benefits when an adverse action is revoked and anticipates that salary is to be withheld

[9] The period between August 5, 1992 and February 6, 1993 is not at issue in this proceeding, as the parties agree that appellant has received compensation for that period.

only under two circumstances: 1) for those periods during which the appellant was not ready, willing and able to perform the duties of his or her position; and/or 2) where the appellant earned or might reasonably have earned compensation in mitigation of his or her damages. The Board has followed the well-established rule in civil actions that the employer bears the burden of proving any offset to an award of back pay following a wrongful termination.[10] The Board concludes, therefore, that the Department bears the burden of establishing that appellant was not ready, willing and able to perform the duties of his position during the relevant period.

While the pendency of the criminal proceedings may have caused appellant not to seek outside employment, the evidence does not establish that he was unable or unwilling to perform the duties of his position as Correctional Administrator with the Department during this time period. Had the Department not dismissed appellant, he may well have been able to use accrued leave time to attend to his legal proceedings and to obtain assistance to manage his emotional condition.[11] In addition, his emotional and mental condition may not have been as severely impaired, as he would have had the financial security of a job. Therefore, the Board concludes that the Department failed to meet its burden of proving that appellant was not ready, willing and able to

[10] See, e.g., California School Employees Association v. Personnel Commission (1993) 30 Cal.App.3d 241, 249; C J (1994) SPB Case No. 31967, at p. 9 (department bears burden of proving amount of mitigation); D B (1996) SPB Case No. 34214, at p. 13 (department bears burden of proving employee was not ready, willing and able to work). Although Board decisions that are not designated as precedential are not binding authority, they may be cited as persuasive authority. (G O (1992) SPB Dec. No. 92-11, at p. 5.)

[11] As indicated in the record, appellant had over 65 days of accrued vacation and over 15 hours of "extra hours" at the time of his termination.

perform the duties of his position as Correctional Administrator, and appellant is not precluded from recovering back pay on that basis.

February 27, 1995-January 1996

Although the criminal proceedings against him were dismissed on February 27, 1995, appellant still did not seek any work until January 1996. Appellant contends that he did not look for outside work because he was optimistic about receiving a favorable decision from the Board. For the reasons set forth above, the Board concludes that the Department has failed to meet its burden of proving that appellant was not ready, willing or able to perform the duties of his position as Correctional Administrator with the Department after the criminal charges were dropped. To the contrary, appellant's persistence in the proceedings before the Board demonstrates his willingness to return to work. The Board notes that much of the delay in the proceedings was caused by the efforts of the Department in petitioning the Board for rehearing and unsuccessfully appealing the Board's decision to both the superior court and the court of appeal. While relevant to the issue of mitigation, discussed below, the fact that appellant failed to seek out other employment is irrelevant to the issue of whether appellant was ready, willing and able to perform the duties of his position.

Duty to Mitigate

The Department argues that appellant's failure to seek work once the criminal proceedings were dropped, and his minimal effort to secure any employment other than a part-time job at a golf course where he enjoyed playing golf amounts to a failure to reasonably mitigate his damages.

The Department bears the burden to affirmatively prove what the employee earned or with reasonable diligence might have earned from other employment.[12]

> In the absence of proof of other earnings, a presumption arises that the employee has been damaged in the "sum which he would have received if he had performed the required duties in full."[13]

In order to offset from a back pay award earnings that an employee might have earned, the employer must establish that the employee unreasonably failed to seek or accept employment that was comparable or substantially similar to that of which the employee has been deprived.[14] An employee who has been wrongfully discharged is not obligated to seek or accept other employment of a different or inferior kind in order to mitigate damages.[15] Thus, the California Supreme Court has stated:

> However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages.[16]

In Parker, the court concluded that actress Shirley McLaine Parker reasonably rejected a substitute offer of employment after 20th Century-Fox breached a contract to employ her in another film. The compensation offered in the substitute film was identical to that of the original contract, as were 31 of the 34 numbered contractual

---

[12] California School Employees Association v. Personnel Commission, supra, 30 Cal.App.3d at p. 249.

[13] Id., citing Hamilton v. Stockton Unified Sch. Dist. (1966) 245 Cal.App.2d 944, 955.

[14] Parker v. Twentieth Century-Fox Film Corp. (1970) 3 Cal.3d 176, 182.

[15] Smetherham v. Laundry Workers' Union (1941) 44 Cal.App.2d 131, 139.

[16] Parker v. Twentieth Century-Fox, supra, 3 Cal.3d at p. 182 (emphasis added, citations omitted).

provisions. Nonetheless, the court held that the substitute offer was not for employment that was comparable or substantially similar. The court found that differences in the type of films (a musical versus a dramatic western), the location of the filming (California versus Australia), and the proposal to eliminate Parker's right to approve the director and screen play of the substitute film all made the substitute employment not substantially similar or comparable to the original employment.[17]

This rule has been applied to wrongful terminations in the public sector. In California School Employees Association v. Personnel Commission,[18] the court held that the rule that a wrongfully discharged employee has a duty to mitigate damages applies "with equal force and dignity" to public employees.[19] The court further cited the established precedent language quoted above that an employee's failure to seek or accept other available employment of a different or inferior kind may not be resorted to in order to mitigate damages. In that case, however, the court rejected the plaintiff's argument that there were no positions available that were comparable or substantially similar to that previously held by a school bus driver whose dismissal was overturned by the court. Instead, the court found that the employer had met its burden of establishing that similar positions in nearby school districts were available, and that the employee failed to mitigate her damages by seeking out that employment. The court further held that minor differences in the pay ("pennies per hour") and benefits between the

---

[17] Id. at p. 183-184.

[18] Supra, 30 Cal.App.3d 241.

[19] Id. at p. 249.

employee's school district and those of the neighboring districts were "not sufficient in the absence of other substantial differences to make the other employment inferior as a matter of law."[20]

Under other circumstances, the failure of a dismissed state employee to seek any employment at all for over two and one-half years might well bar an award of back pay under Government Code section 19584. In this case, however, due to the unique nature of the position from which appellant was improperly terminated, substantially similar or comparable employment was not readily available. Nearly all of the positions identified by the Department's expert were entry-level positions, such as a stock clerk, security guard or electrician, that paid substantially less than appellant would have earned as a Correctional Administrator with the Department. Although the Department identified some potentially higher-level positions, such as maintenance or production supervisor, property manager, contract specialist/contract administrator and procurement services manager, the maximum entry salary for any of these positions was $3364 per month (for Procurement Services Manager in Sacramento-Yolo County). This amount was slightly more than half the $6392 monthly salary he would have received in his position as Correctional Administrator beginning in January 1995. While the Department may be correct that appellant was qualified for and could have obtained such positions had he sought them, they clearly were not substantially similar or

[20] Id. at p. 254.

comparable to his position as the second-in-command at DVI, and he had no legal obligation to seek such employment in order to mitigate his damages.

As recognized by the Chief ALJ, in all likelihood, there is no position in the private sector comparable to that of the high-level correctional administrative positions appellant held, except possibly at a privately operated prison. The Department has provided no evidence that any comparable position was available to appellant. Therefore, the Department has not met its burden of establishing that appellant would have been able to obtain substantially similar employment even if he had sought such employment, and it is not entitled to offset the back pay award based upon the projected earnings appellant might have earned in a substantially different and inferior position.

CONCLUSION

The Department bears the burden of proof on the issues of whether appellant was ready, willing and able to perform the duties of his position as Correctional Administrator and whether appellant failed to reasonably mitigate his damages by seeking out available employment that was substantially similar or comparable to the position from which he was terminated. The Department has failed to meet its burden on either of these issues. Therefore, appellant is entitled to full back pay and benefits at the rate he would have received in his position as Correctional Administrator, offset only by the $4,008.93 he actually earned during the back pay period.

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 Department of Corrections shall pay to M[redacted] [redacted] B[redacted] all back pay and benefits at the rate applicable to the position of Correctional Administrator for the period February 7, 1993 through September 12, 1996, less the sum of $4,008.93.
2. The Department shall also pay appellant interest at the rate of 7% per annum , pursuant to L[redacted] M[redacted] (1994) SPB Dec. No. 94-08.
3. This matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing in the event that the parties are unable to agree on the amount due under this order.
4. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD[21]

Florence Bos, President
Richard Carpenter, Vice President
Ron Alvarado, Member
Lorrie Ward, Member

* * * * *

[21] Member William Elkins 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 April 6, 1999.

Walter Vaughn
Executive Officer
State Personnel Board

[B 2.doc]