

which appellant was eventually reinstated. Thus, the Board concludes that appellant should be awarded backpay at the salary established for a Tax Technician I.

As to the issue of mitigation, the Board concludes that, while appellant did not look for other employment after she was terminated, the Department failed to present evidence as to whether comparable work was available. Accordingly, the Department did not prove that it was entitled to any offset of the backpay award.

BACKGROUND

Factual Summary

Deanna Davies (appellant) was hired on October 16, 1989 as an Office Assistant (General) in the Local Revenue & Business Taxes Unit of the State Board of Equalization (BOE). In her capacity as an Office Assistant (General), she was expected to rotate through various positions in the office including that of file clerk, microfilm retriever and sorter. According to a doctor's report, BOE was aware when it hired appellant that she suffered from low-back pain.

On May 30, 1990, appellant further aggravated her lower back at work while pulling buckets of files, causing her to miss several months of work. Appellant returned to work, but subsequently had problems again with her back in 1992 as a result of having to perform repetitive filing. In June of 1993, appellant slipped and fell in the bathroom at work and was again absent for a short time. On May 6, 1994 appellant was injured at work when trying to escape down the stairs of the building during an evacuation. Later that same year, in December 1994, appellant sustained pain to her left shoulder from sorting microfilm at work. In July of 1995, she sustained further low-

back and other pain when she slipped and fell getting into a car and also sustained injury from repeatedly having to perform filing duties at work.

All of these injuries were the subject of various workers' compensation claims, for which appellant was paid a total of \$14,514.00 (less \$5,600 permanent disability advances received by appellant) on or about February 3, 1997, in settlement of her claims. Prior to receiving this settlement money, appellant was required to undergo several Agreed Medical Examinations performed by Dr. Peter J. Mandell.

In Dr. Mandell's report from the first Agreed Medical Examination dated March 29, 1995, Dr. Mandell determined that while appellant should continue with analgesic medicine for her pain, as well as physical therapy and/or chiropractic care, he saw no reason that appellant should not to continue to work in her position as an Office Assistant, so long as she did not perform heavy lifting, repetitive bending or stooping.

In Dr. Mandell's report from the second Agreed Medical Examination dated May 3, 1996, he determined that appellant's pain was frequent, "slight to moderate", and that she should continue to be prohibited from heavy lifting, repetitive bending and stooping.¹ He further determined that she should not do any filing (appellant was not performing filing duties at that time) and that her disability condition was rated as 24.75% and was permanent and stationary. Appellant continued to work thereafter in her position as an Office Assistant.

In July 1996, Dr. Mandell reviewed the job analysis for the three office assistant positions in the Local Revenue & Business Taxes Unit; file clerk, microfilm retriever and

¹ Heavy lifting was defined in these reports as lifting objects weighing 25 pounds or more.

sorter. In Dr. Mandell's written evaluation dated July 28, 1996, he determined that appellant could perform the file clerk position, so long as she did not repeatedly perform filing duties (he stated that appellant represented that this position did not entail repetitive filing, but did include sorting activities) as well as the sorter position, but that she could not perform the microfilm retriever position or any other position requiring repetitive filing.

In the meantime, appellant experienced another flare-up of her condition in August of 1996 and saw her treating physician for medical treatment. Subsequently, on September 17, 1996, Dr. Mandell issued a supplemental report stating that he believed that the sorting activities in her present position also seemed to be causing appellant some pain, and that she should not be doing any job that required repetitive sorting activities.

On October 6, 1996, appellant was involved in a car accident. She saw a doctor after the accident and had been off work for approximately one week when she received a letter from the Office Manager at BOE telling her not to return to work until further notice, as she felt that appellant could not adequately perform her job duties.² At the time of the accident, appellant was performing in the sorter position.

In or about January 1997, appellant was told by BOE that, pursuant to Government Code section 19253.5, she was required to attend a fitness for duty examination with a physician appointed by BOE. On February 3, 1997, appellant attended this examination with Dr. Arthur M. Auerbach. Dr. Auerbach performed the

² It appears from the record that BOE kept appellant on paid leave until the effective date of the medical termination.

examination, reviewing appellant's history, as well as the Agreed Medical Examination reports, and the job descriptions for the three positions of Office Assistant (General) in the Local Revenue & Business Taxes Unit; file clerk, microfilm retriever, and sorter. Dr. Auerbach found that duties involving repetitive sorting or filing were not appropriate activities for appellant given her medical condition, and concluded that appellant was not fit to perform the duties of any of these positions.

Pursuant to Dr. Auerbach's findings, BOE served appellant with a notice of medical termination effective April 11, 1997, alleging that appellant was unable to perform the duties of her classification. A hearing on the appeal from medical termination was set for May 14, 1997 before a Board Administrative Law Judge (ALJ). At this hearing, the parties entered into settlement discussions. Eventually, the appellant and the BOE entered into a stipulated settlement agreement, adopted by the Board on May 21, 1997. This agreement provided that appellant would be given 60 days to obtain a release from her physician that stated that she could perform the essential duties of a then-available position within transfer range of Office Assistant (General). The agreement further provided, however, that the medical release contain restrictions consistent with or greater than the restrictions previously imposed by Dr. Mandell in the Agreed Medical Examination reports.³ BOE agreed to keep a number of positions vacant for 60 days and to submit descriptions of the vacant positions to the appellant to forward to her treating physician for evaluation.

³ These restrictions included lifting no more than 25 pounds, no repetitive bending at the waist and no stooping.

Pursuant to the settlement agreement, BOE forwarded to appellant the duty statements for the classifications of Tax Technician I, Office Assistant General (Local Revenue & Business Taxes Unit), Office Assistant General (Mail Messenger), Office Assistant General (Mail Processor), Office Assistant – Typing (Support) and Office Assistant – Typing (Permanent Intermittent). Pursuant to the parties' agreement, appellant was examined by her treating physician, Dr. Michael Uhrig, on June 2, 1997. After examining appellant, reviewing her medical history, and reviewing the duty statements for the classifications of Office Assistant (General) and Tax Technician I, Dr. Uhrig gave appellant a visitation verification form that stated that she was cleared to go back to work either as an Office Assistant (General) or Tax Technician I, with the understanding she could only lift more than 25 pounds on occasion.⁴

BOE rejected the form from Dr. Uhrig, stating that it did not conform to the terms of the settlement agreement as the agreement required that the medical release contain the specific limitations imposed by Dr. Mandell. Appellant again contacted Dr. Uhrig and, without further examining appellant, Dr. Uhrig sent the BOE a letter on July 8, 1997, explaining that appellant was cleared to work either as a Tax Technician I or an Office Assistant in the Local Revenue & Business Taxes Unit, provided that she lift weights of 26-40 pounds only occasionally. This release was also rejected by BOE as not containing all of the restrictions previously imposed by Dr. Mandell. Appellant then asked Dr. Uhrig to rewrite his medical clearance to conform to the medical restrictions imposed upon her by Dr. Mandell.

⁴ It is unclear from the record whether appellant gave Dr. Uhrig the other duty statements she received from BOE.

Finally, on July 23, 1997, Dr. Uhrick wrote a letter to BOE stating that he was clearing appellant to work either as an Office Assistant (General) or Tax Technician I in the Local Revenue & Business Taxes Unit, but that she was restricted from lifting more than 25 pounds, could not repetitively bend at the waist, and could not stoop. This time, BOE rejected the medical clearance as untimely because it was submitted after the 60-day period set forth in the parties' stipulated settlement agreement.

The parties subsequently came back before the Board, each claiming that the other party had failed to comply with the terms of the May 21, 1997 stipulated settlement agreement. A hearing was held on November 25, 1997 before the ALJ to determine whether either or both parties had breached the terms of the agreement. The ALJ determined on January 9, 1998 that both parties had breached the settlement agreement and ordered that the appeal from medical termination be placed back on the active hearing calendar.

A hearing on the merits of the medical termination was held on April 8, 1998. On October 7, and 8, 1998, the Board adopted the proposed decision of the ALJ, finding that, while there was a preponderance of evidence that appellant could not perform the essential duties of her job because of her medical condition, BOE failed to prove that appellant could not perform any other available job within the department and failed to determine if appellant could be reasonably accommodated. BOE did not file a petition for rehearing or a petition for writ of mandate challenging the decision, but asked that appellant submit a medical clearance before she would be allowed to return to work.

Appellant submitted an Independent Medical Evaluation from Dr. Alan Tempkin dated March 5, 1999. Dr. Tempkin concluded in his evaluation that appellant could

perform the essential duties of either the Office Assistant (General) or Tax Technician I classifications. BOE reinstated appellant as of March 8, 1999 in the position of Tax Technician I.

PROCEDURAL SUMMARY

A backpay hearing was held at appellant's request on March 11, 1999 before a new ALJ. Subsequent to this hearing, the ALJ issued a proposed decision concluding that appellant was not owed any backpay because: 1) BOE could not have reasonably been expected to return appellant to work prior to receiving medical clearance from Dr. Tempkin on March 5, 1999, and 2) appellant failed to mitigate her damages by seeking alternative employment while she was off work. The Board adopted this decision at its meeting of July 20, 1999.

Subsequently, at its meeting of November 2, 1999, the Board granted appellant's petition for rehearing, and asked the parties to discuss the following issues:

ISSUES

- (1) Was appellant ready, willing and able to work at any time between April 11, 1997 and March 8, 1999, entitling her to an award of backpay?
- (2) If so, should the backpay award be offset by appellant's failure to mitigate her damages by looking for alternative employment?

DISCUSSION

Determination of Ready, Able and Willing

Government Code section 19253.5 sets forth the right of an appointing power to require an employee to submit to a medical examination to determine his or her ability to perform his or her job, as well as the right to terminate, demote or transfer an employee who is medically unable to perform the duties of his or her position.⁵ Section 19253.5, subdivision (g) further provides that whenever the Board revokes or modifies a medical demotion, transfer, or termination, it shall direct the payment of salary to the employee calculated on the same basis and using the same standards as provided in Government Code section 19584. Section 19584 provides, in pertinent part:

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 [Government Code] Section 18000, salary adjustments, and shift differential, and other special salary compensations, if sufficiently predictable. Benefits shall include, but shall not be limited to, retirement, medical, dental, and seniority benefits pursuant to memoranda of understanding for that classification of employee to the employee for that 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 of his or her position, whether the adverse action is valid or not or the causes on which it is based state facts sufficient to constitute cause for discipline. (Emphasis added.)

⁵ Unless otherwise stated, all statutory references are to the Government Code.

The Board has previously held that the employer, not the employee, carries the burden of proving whether an employee is “ready, able and willing” to perform the duties of his or her position and, in the absence of proof that he or she was not, an employee is entitled to backpay.⁶

In this case, the Board revoked appellant’s medical termination, stating in its decision that BOE failed to meet its burden of proving appellant’s inability to perform the work of her position or any other available position before medically terminating her, and failed to ascertain if appellant could be reasonably accommodated.⁷ The termination having been revoked, appellant is presumably entitled to backpay unless BOE can prove that appellant was not ready, able and willing to perform her duties during the period she was suspended from work.

The appellant conceded during oral argument that, at the time of her termination and continuing thereafter, she was not physically able to perform the duties of her classification as an Office Assistant (General). Upon first glance, such a concession might end further discussion and result in the denial of a backpay award, as section 19584 provides that the employee be “ready, able and willing to perform the duties of his or her position” during the time the employee is off work. We find, however, that section 19584 cannot be interpreted so narrowly.

⁶ M. [REDACTED] v. E. [REDACTED] (1999) SPB Dec. No. 99-05, page 9.

⁷ The Board notes that the obligation of a state employer to ensure there is no other available position an employee is qualified to perform prior to initiating a medical termination under section 19253.5 is separate from the issue of whether an employer is obligated to provide “reasonable accommodation” to a qualified individual with a disability pursuant to the Fair Employment and Housing Act (section 12940 *et seq.*) or the Americans with Disabilities Act (42 U.S.C. section 12000 *et seq.*). Although the issues may often overlap when a qualified individual with a disability has been medically terminated from his or her position pursuant to section 19253.5, the Board’s decision failed to address whether appellant was, in fact, a qualified individual with a disability under the law, entitling him to reasonable accommodation.

Section 19584 was drafted to address revocations of adverse actions, not medical terminations. Thus, when this statute was written, there was no need for the legislature to address the issue of under what circumstances an employee who was wrongfully medically terminated should receive backpay or of how the amount of backpay due should be calculated. Because section 19253.5 specifically refers to section 19584 for determining backpay awards when the Board revokes a medical action, the two statutes must necessarily be read and interpreted together.

Section 19253.5 prohibits an appointing authority from medically terminating an employee **unless and until** the appointing authority has attempted to find the employee another available position to which the employee can be transferred or demoted and that the employee is able to perform, even if the employee can no longer perform in his or her present position. It would be illogical on the one hand to revoke the medical termination on the grounds that the appointing authority failed to place an employee in another position that he or she was able and qualified to perform, but on the other hand, preclude the employee from receiving backpay because of his or her inability to perform the *former* position. A more logical interpretation of section 19584 is that, in the context of medical terminations that are revoked, the term “his or her position” refers not only to the position from which the employee was improperly terminated, but also any position to which the employee could have legitimately been transferred or demoted and that pays a salary closest to that which the employee had been receiving.⁸

⁸ This same conclusion was reached by this Board in 1996 in Diana R. Bustamante (1996) Case No. 34214. Although non-precedential decisions are not binding on the Board in future cases, they may be cited as persuasive argument.

The Department's return-to-work coordinator testified at the hearing that prior to terminating appellant, she considered whether appellant could perform other jobs within BOE, but concluded that she could not perform any other job. To the contrary, the preponderance of evidence in the record demonstrates that, at all relevant times, appellant was capable of performing the duties of Tax Technician I despite her medical restrictions.

The duties of the classification of Tax Technician I, as evidenced by its duty statement, consist primarily of reviewing and analyzing various documents. Nowhere in the duty statements for this classification is there any indication that appellant would have had to perform repetitive filing or sorting duties -- duties that had previously exacerbated her existing injuries. Moreover, none of the listed duties appear to require appellant to repetitively bend at the waist, stoop, or lift over 25 pounds as prohibited by her medical restrictions.⁹

In addition, the classification of Tax Technician I was one of several that BOE offered to appellant while attempting to settle the medical termination. Indeed, appellant's physician, Dr. Uhrik, cleared appellant to perform in this classification, both in his verification visit slip of June 2, and his letters of July 8 and July 23, 1997.

Finally, in March 1999, Dr. Tempkin also released appellant to perform in this same classification, despite the fact that appellant's medical restrictions were no different from what they were two years before when she was medically terminated.

Thus, although appellant may not have been ready, able and willing to continue to work as an Office Assistant (General) according to her own admissions, the evidence overwhelmingly demonstrates that she was, at all relevant times, ready, able and willing to perform the duties of a Tax Technician I, the position she has held since her reinstatement. Since the evidence in the record reveals that this was an available position for which the appellant was qualified all along, appellant should receive backpay at this rate from the date of her termination until the date of her reinstatement.¹⁰

Duty To Mitigate

Section 19584 further provides as follows:

From any such salary due there 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.

Again, the burden of proving offsets to a backpay award rests squarely with the employer.¹¹ In the absence of a showing that the employee had or might reasonably have had other earnings during the backpay period, a presumption arises that the

⁹ While a detailed job analysis for the classification of Tax Technician I provides that occasionally the employee may carry files a short distance which may weigh up to 50 pounds, this does not appear to be an essential duty as evidenced from the duty statement.

¹⁰ Evidence in the record indicates that BOE placed appellant on salary for 11 days in May 1997 in order to allow appellant to see Dr. Uhrig without charge. This amount should be deducted from the calculation of the backpay award.

¹¹ M. B. (1999) SPB Dec. No. 99-05, page 9, citing California School Employees Association v. Personnel Commission (1993) 30 Cal.App.3d 241, 249

employee has been damaged in the amount the employee would have otherwise received had he performed the job duties in full.¹²

¹² California School Employees Association v. Personnel Commission (1993) 30 Cal.App.3d 241, 249, citing Hamilton Stockton Unified School District (1966) 245 Cal.App.2d 944, 955

As set forth in the Board's precedential decision M [REDACTED] B [REDACTED], in order to overcome the presumption that an employee should receive a full award of backpay, an employer must establish that the employee unreasonably failed to seek or accept employment that was comparable or substantially similar to that which the employee has been deprived.¹³ 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 his or her damages.¹⁴

In this case, appellant admitted that she turned down an offer for vocational rehabilitation and that she made no effort to search for another job. She contended, however, that the reason she did not actively search for another job was that she believed her termination was unlawful and that "any day" she would be summoned to return to work. The Board noted in B [REDACTED] that there may be situations where the failure of a dismissed state employee to seek other employment might bar an award of backpay. The Board need not determine whether this was one of those situations, however, as the Department has failed to meet one of the elements of its burden of proof.

Before an offset to a backpay award can be established, an employer must prove not only that the employee did not attempt to seek out alternative employment, but that comparable or substantially similar work was available during the time in question. In Carroll v. Civil Service Commission,¹⁵ a county employee's dismissal was revoked and

¹³ B [REDACTED] at p. 11, citing Parker v. Twentieth Century-Fox Film Corp. (1970) 3 Cal.3d 176, 182

¹⁴ Parker v. Twentieth Century-Fox Film Corp., *supra*, at page 182.

¹⁵ (1973) 31 Cal.App.3d 561

the question arose as to whether the employee was entitled to backpay during the time when he was off work, but was sentenced to serve jail time. In reaching its decision that the employee was entitled to backpay, even during the time he was in jail, the court noted that the county failed to present any evidence showing that similar employment was available to the employee during this time or the amount of money that the employee would have earned from such employment. The court stated:

In the face of this vacuity...we are required to affirm the trial court's implied finding that no such other similar employment opportunities existed during these relevant periods of jail time.¹⁶

Because appellant's occupation was not particularly unusual nor high paying, it probably would not have been difficult to introduce evidence of the availability of comparable office work during the time period in question. In the absence of *any* such evidence, however, the Board cannot simply presume that comparable work existed. Accordingly, BOE has not proven that appellant failed to mitigate her damages and no offset to the backpay award is required.

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 appellant is awarded backpay, benefits and interest at the rate set for the position of Tax Technician I from April 11, 1997 until March 8, 1999, less 11 days' salary as an Office Assistant (General), which was paid to appellant in or about May 1997;

¹⁶ Id. at page 565

2. 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 continue to be unable to agree as to the backpay, benefits and interest due appellant.
3. This decision is certified for publication as a Precedential Decision.
(Government Code § 19582.5).

STATE PERSONNEL BOARD¹⁷

Ron Alvarado, Vice President
Richard Carpenter, Member
William Elkins, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on April 4, 2000.

Walter Vaughn
Executive Officer
State Personnel Board

[Davies.dec]

¹⁷ President Bos and Member Harrigan did not participate in this decision.