BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **CONNIE J. ARMSTEAD** From constructive medical termination or suspension in the position of Office Assistant (Typing) with the Department of California Highway Patrol at San Diego	)	SPB Case No. 00-4241 **BOARD DECISION** (Precedential) **No. 03-02** May 6, 2003

APPEARANCES: Fernando Acosta, Attorney, California State Employees Association, on behalf of appellant, Connie J. Armstead; Martin Hagan, Deputy Attorney General, on behalf of respondent, California Highway Patrol.

BEFORE: William Elkins, President; Ron Alvarado, Vice President; and Maeley Tom, Member.

DECISION

This appeal is before the State Personnel Board (SPB or Board) after the Board rejected the proposed decision of the Administrative Law Judge (ALJ) to review whether the California Highway Patrol (CHP) constructively medically terminated or suspended Connie J. Armstead (appellant). Before notifying appellant under Government Code § 19253.5(i) of its intention to apply for disability retirement on her behalf, CHP placed her on paid administrative leave while it sent her for a fitness for duty examination and considered its options in response to the results of that examination. In this Decision, the Board finds that appellant has failed to show that CHP's actions resulted in an illegal constructive medical termination or suspension. Appellant's appeal is, therefore, dismissed.

BACKGROUND

Factual History[1]

(Employment History)

Appellant was appointed as an Office Assistant (Typing) on April 19, 1993. Effective May 1, 1996, appellant received a four working day suspension. (SPB Case No. 96-0274.)

At its meeting on February 4 - 5, 1997, the Board found that CHP had subjected appellant to an illegal constructive medical termination when it ordered her on a three-month unpaid leave of absence without first providing her with the notice and opportunity to be heard required by Government Code § 19253.5, subdivision (f). (Connie Armstead (1997) SPB Dec. No. 97-01.)

Effective December 27, 1996, the Department medically terminated appellant pursuant to Government Code § 19253.5, subdivision (d). At its meeting on August 5 - 6, 1997, the Board revoked that medical termination, finding that CHP had not proved, by a preponderance of the evidence, that, due to medical reasons, appellant was unable to perform the work of her position, or any other position, at CHP. (Connie J. Armstead (1997) SPB Case Nos. 97-1977 and 97-1873.)

[1] No witnesses testified during the evidentiary hearing before the Board's Administrative Law Judge. Instead, upon the agreement of the parties, certain documents were marked as exhibits and admitted into evidence, including the Board's decisions in Connie J. Armstead (1997) SPB Dec. No. 97-01, SPB Case No. 96-2979, and Connie J. Armstead (1997) SPB Case Nos. 97-1977 and 97-1873. In addition, the Board takes official notice of the Proposed Decision by the Board of Administration, California Public Employees' Retirement System, CalPERS Case No. 5192, OAH No. L2002020478, signed January 9, 2003 and filed January 10, 2003 (CalPERS Decision). The information set forth in this Factual Background section is taken from the exhibits and CalPERS Decision.

(Relevant Facts)

On November 1, 2000, upon appellant's return from a voluntary medical leave of absence, CHP placed appellant on administrative time-off with pay pending a fitness for duty examination. In response, appellant wrote a letter to CHP dated November 1, 2000, which stated that she was "ready, willing and able to return to work to perform [her] duties effective November 1, 2000."

On November 7, 2000, appellant attended a fitness for duty examination and was found to be "permanently unfit for duty" at CHP.

On or about December 15, 2000, CHP sent a letter to appellant entitled "Fitness for Duty" (Options Letter) that advised her of the findings of the fitness for duty examination, offered her three options (transfer to another state agency, resign from CHP, or apply for disability retirement), and notified her that if she did not act upon one of these three options in 15 days, CHP would apply for disability retirement on her behalf.

On or about January 3, 2001, CHP notified appellant that, because she had not selected one of the options offered to her in the Options Letter, CHP intended to file, in accordance with Government Code § 19253.5, an application for Disability Retirement on her behalf and gave her until January 18, 2001 to respond (Notice Letter).[2]

[2] Effective June 19, 2001, the Board amended Board Rule 52.3 to require that an appointing power must comply with all the Skelly notice requirements when it notifies an employee that it intends to apply for disability retirement on the employee's behalf pursuant to Government Code §19253.5(i)(1). On January 24, 2002, the Department of Personnel Administration (DPA) issued Personnel Management Liaison Memo (PML) 2002-005, which describes the process departments should follow when issuing notices under Government Code § 19253.5(i)(1). That PML can be found on DPA's website at http://www.dpa.ca.gov/textdocs/freepmls/PML2002005.TXT.

On or about February 6, 2001, CHP applied to the California Public Employees Retirement System (PERS) for disability retirement on behalf of appellant.

On or about October 4, 2001, PERS granted CHP's application for disability retirement on appellant's behalf.

On or about November 2, 2001, appellant appealed to PERS from PERS's determination granting CHP's disability retirement application on her behalf. On or about January 9, 2003, PERS denied appellant's appeal to set aside her involuntary disability retirement.

Procedural History

Appellant filed an appeal with SPB from constructive medical termination or suspension, asserting that CHP had violated the law by: (1) failing to provide her with timely notice and an opportunity to respond before she was notified that she would not be permitted to return to work for asserted medical reasons from November 1, 2000 through January 3, 2001; and (2) ordering her not to report to work from November 1, 2000 to February 6, 2001.

The ALJ issued a proposed decision. The Board rejected that proposed decision and determined to decide the case itself.

The Board has reviewed the record in this matter, including the transcripts, exhibits and written arguments, and has heard the oral arguments of the parties, and now issues the following decision.

ISSUE

The following issue is before the Board for review:

Did CHP constructively medically terminate or suspend appellant when it placed her on paid administrative leave before it gave her notice and an opportunity to be heard in accordance with Government Code § 19253.5(i)(1)?

DISCUSSION

Medical Actions under Government Code § 19253.5

Government Code § 19253.5 sets forth the rules and procedures appointing powers must follow when taking medical actions against state civil service employees.

Pursuant to Government Code § 19253.5, subdivision (i), if an appointing power determines 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 must file an application for disability retirement on the employee's behalf.[3] The appointing power must give the employee 15 days written notice of its intention to file such an application and a reasonable opportunity to respond. The appointing power must also comply with the

[3] Government Code § 19253.5(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. The appointing power shall give the employee 15 days written notice of its intention to file such an application and a reasonable opportunity to respond to the appointing power prior to the appointing power's filing of the application. However, the appointing power's decision to file the application is final and is not appealable to the State Personnel Board.

provisions of Board Rule 52.3, the Skelly rule.[4] If the appointing power provides the requisite notice and opportunity to respond, the appointing power's decision to file the disability retirement application is final and is not appealable to SPB.

Constructive Medical Action

Appellant asserts that CHP subjected her to an illegal constructive medical termination or suspension when it ordered her off work on November 1, 2000, while she attended a fitness for duty examination and CHP decided how to proceed with respect to the results of that examination, without first providing to her notice and an opportunity to be heard under Government Code § 19253.5(i)(1).

Government Code § 19253.5, subdivision (a) permits an appointing power to send an employee to a fitness for duty examination in order to evaluate the capacity of

[4] Board Rule 52.3, Title 2, Code of California Regulations § 52.3, provides, in relevant part:

> (a) At least five working days before the effective date of a proposed adverse action, rejection during the probationary period, or non-punitive termination, demotion, or transfer under Government Code section 19585, the appointing power, as defined in Government Code Section 18524, or an authorized representative of the appointing power shall give the employee written notice of the proposed action. At least 15 calendar days before the effective date of a medical termination, demotion, or transfer under Government Code section 19253.5 or an application for disability retirement filed pursuant to Government Code section 19253.5(i)(1), the appointing power or an authorized representative of the appointing power shall give the employee written notice of the proposed action. The notice shall include:
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> (1) the reasons for such action,
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> (2) a copy of the charges for adverse action,
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> (3) a copy of all materials upon which the action is based,
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> (4) notice of the employee's right to be represented in proceedings under this section, and
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> (5) notice of the employee's right to respond to the person specified in subsection (b).

the employee to perform the work of his or her position.[5] There is no language in Government Code § 19253.5 that explains the type of notice, if any, that an appointing power must provide to an employee before sending the employee for a fitness for duty examination. Appellant contends that, because there is no express language in Government Code § 19253.5(a) that permits an appointing power to place an employee off work pending a fitness for duty examination, CHP had no right to order appellant off work on November 1, 2000, before giving her notice and an opportunity to be heard under Government Code § 19253.5(i)(1).

In C[redacted] M[redacted], the Board found that a state employer subjected an employee to an illegal constructive medical termination or suspension when it refused, for asserted medical reasons, to allow her to return to work, but had not served her with a formal notice of medical action under Government Code § 19253.5, and the employee asserted that she was ready, willing, and able to work and had a legal right to work.[6]

In J[redacted] [redacted]. B[redacted], the Board held that, in order for an employee to prove that he or she has been subjected to a constructive medical termination, the employee must show that: (1) s/he asserted to his/her appointing power that s/he was ready, willing and able to work under circumstances that indicated that s/he, in all good faith, wished to return to work and perform the essential functions of her/his job with or without a reasonable accommodation; (2) the appointing power refused to allow him/her to work in his/her

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[5] Government Code § 19253.5(a) provides:

> (a) In accordance with board rule, the appointing power may require an employee to submit to a medical examination by a physician or physicians designated by the appointing power to evaluate the capacity of the employee to perform the work of his or her position.

See, Yin v. State of California (9th Cir. 1996) 95 F.3d 864.

[6] (1993) SPB Dec. No. 93-08.

position for asserted medical reasons, but did not comply with the procedural due process requirements set forth in Government Code § 19253.5 and Board Rule 52.3; and (3) s/he has a vested interest in his/her position that has never been legally terminated either through resignation or other appropriate means in compliance with Skelly's due process requirements.[7]

Appellant asserts that all three of these elements of a constructive medical termination or suspension apply in this case: (1) on November 1, 2000, when she was ordered on involuntary leave, she asserted to CHP that she was ready, willing and able to work; (2) CHP refused to allow her to return to work for asserted medical reasons without first complying with the procedural requirements of Government Code § 19253.5 and Board Rule 52.3; and (3) she had a vested right in her position that had not been legally terminated. There is, however, a significant difference between appellant's case and all the other constructive medical actions that the Board has reviewed to date. In all the other constructive medical action cases, the employee was on non-pay status during the relevant period. In this case, appellant was placed on paid leave, pending the completion of her fitness for duty examination and a determination by CHP as to how it wished to proceed.[8] Appellant contends that, even though she was paid her salary, she was nonetheless constructively medically terminated because she was not given the notice and

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[7] (2002) SPB Dec. No. 02-02, pp. 15-16. The respondent in [redacted] has filed a petition for writ of mandate in court.

[8] Compare, [redacted] (2001) SPB Dec. No. 01-02. (The Board found that a state employer had violated an employee's due process rights by failing to provide him notice and an opportunity to be heard before cutting off his administrative time off payments. The Board in that decision disapproved its decision in [redacted] (1999) SPB Dec. No. 99-07 to the extent it was inconsistent with the Board's decision in [redacted]. In [redacted], the Board allowed an appointing power to place an employee on non-pay status pending a determination by PERS on a disability retirement application filed on the employee's behalf. The provisions of Government Code § 19253.5, subdivision (i)(2), adopted after the relevant acts in [redacted] occurred, have made the holding in that case moot.)

the opportunity to be heard that Government Code § 19253.5(i)(1) mandates. We disagree.

An appointing power has a duty to take reasonable steps to ensure that its workplace is safe for all its employees.[9] If an appointing power has a reasonable, good faith belief that an employee's medical or psychological state is such that the employee may pose a risk to the health or safety of him or herself or others, the appointing power may place that employee on a paid leave pending a fitness for duty examination and a determination as to how the appointing power should proceed in response to the results of that examination.[10]

The evidence shows that appellant has a history of troubling behavior in the workplace. The evidence also shows that CHP acted expeditiously to send appellant for a fitness for duty examination and to determine what it should do in response to the results of that examination: It placed her on a paid leave on November 1, 2000. The fitness for duty examination was conducted on November 7, 2000. The fitness for duty doctor issued his report on November 11, 2000, which opined that appellant was permanently unfit for duty with CHP. On December 15, 2000, CHP sent appellant the Options Letter and gave her 15 days to respond. On January 3, 2001, it notified her that it was going to apply for disability retirement on her behalf and gave her 15 days to respond. On February 6, 2001, CHP applied to PERS for disability retirement on appellant's behalf. The entire period of appellant's paid leave was less than 15 weeks.

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[9] See, Chevron U.S.A. Inc. v. Echazabal (2002) 536 U.S. 73.

[10] See, A[redacted]_[redacted] (2000) SPB Dec. No. 00-01, p. 22. (The Board stated an appointing power that doubted whether an employee, who had been released by his doctor to return to work, was fit for duty, separately or as part of the interactive process, could have put the employee back on the payroll and, pursuant to Government Code § 19253.5(a), sent him for a fitness for duty examination.)

Given appellant's troubling behavior in the workplace, we find that CHP's placing appellant on a short paid leave while it sent her for a fitness for duty examination and made a determination as to how it should proceed in light of the results of that examination was appropriate and did not constitute a constructive medical termination or suspension.

Interactive Process

Appellant also asserts that CHP acted improperly by failing to provide her a sufficient opportunity to engage in the interactive process before placing her on paid leave and sending her for a fitness for duty examination.

In D[redacted] H[redacted],[11] the Board held that an appointing power must engage in a flexible interactive process before serving a medical demotion or transfer upon an employee pursuant to Government Code § 19253.5(c). In that decision, the Board explained how appointing powers should proceed to ensure that employees, who have medical or psychological impairments that impact their ability to perform the essential functions of their positions, are granted all the rights to which they may be entitled under the State Civil Service Act, the California Fair Employment and Housing Act (FEHA),[12] and the federal Americans with Disabilities Act (ADA).[13]

As the Board explained, an appointing power should first review whether the employee is a qualified individual with a disability who may be able to perform the essential functions of his or her existing position with a reasonable accommodation. If

[11] (2001) SPB Dec. No. 01-01. The respondent in H[redacted] has filed a petition for writ of mandate in court.

[12] Government Code § 19200 et seq.

[13] 42 U.S.C. § 12101 et seq. The appointing power must also be aware of whatever rights the employee may have under the California Family Rights Act, Government Code § 12945.1 et seq., the federal Family and Medical Leave Act (FMLA), 5 U.S.C. § 6381 et seq., the workers' compensation laws and the public employees retirement laws.

the appointing power determines that there are no reasonable accommodations available that would permit the employee to perform the essential functions of his or her existing position, then the appointing power must look to whether there may be any vacant positions in the department in which the employee can perform and to which the employee may be transferred or demoted. If such a position exists, the appointing may utilize the provisions of Government Code § 19253.5(c) to transfer or demote the employee. If the appointing power determines that the employee cannot be reasonably accommodated either in his or her existing position or in any vacant positions to which he or she could be reassigned, then the appointing power may utilize either the provisions of Government Code § 19253.5, subdivision (d) to medically terminate the employee if the employee is not eligible for disability retirement, or Government Code § 19253.5, subdivision (i) to apply for disability retirement on the employee's behalf if the employee is vested in PERS.

To determine the best way to proceed, the appointing power should engage in a flexible interactive process with the employee, which includes: (1) analyzing the employee's job and determining its purpose and essential functions; (2) consulting with the employee to ascertain her job-related limitations and how those limitations could be overcome with a reasonable accommodation; (3) in consultation with the employee, identifying potential accommodations and assessing the effectiveness that those accommodations would have in enabling the employee to perform the essential functions of his or her position; and (4) taking into consideration the employee's

preference, selecting and implementing an accommodation that is most appropriate for both the appointing power and the employee.[14]

Appellant asserts that CHP constructively medically terminated or suspended her because it did not invite her to engage in the interactive process before placing her on paid leave and sending her for a fitness for duty examination. The parties did not submit any evidence as to what written notice, if any, CHP gave to appellant when it ordered her on paid leave and sent her to the fitness for duty examination. Ideally, CHP would have clearly informed appellant in writing on November 1, 2000 that it was placing her on paid leave and sending her for a fitness for duty examination, explained the reasons for its actions, and invited appellant to engage in an interactive process to discuss the best way to proceed. CHP's failure to have done so, however, does not constitute a constructive medical termination. Placing an employee on a paid leave and sending her for a fitness for duty examination does not deprive the employee of any property interest in continued employment so as to invoke procedural due process protections.[15]

Appellant also contends that the Options Letter was inadequate. We agree. While the Options Letter gave appellant 15 days to respond, it erroneously implied that the three options offered to appellant (transfer to another state agency, resign from CHP, or apply for disability retirement) were the only options available to her. Ideally, the Options Letter would have stated that the three offered options were some of the

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[14] See, T[redacted] G[redacted] (2001) SPB Dec. No. 01-3, p. 13.

[15] Compare, Bostean v. Los Angeles Unified School District (1998) 63 Cal.App.4th 95. (The court ruled that a school district deprived an employee of his property interest in continued employment when it placed him on an indefinite involuntary illness leave without pay, invoking procedural due process protection.)

available options, and invited appellant to engage in an interactive process with CHP to explore any other options that might meet the needs of both appellant and the department.[16] But, because the Options Letter did not deprive appellant of any property interest in her continued employment and did offer her an opportunity to respond before CHP took any final action, its inadequacies did not give rise to a constructive medical termination or suspension.

In addition, appellant asserts that the Options Letter was improper because it did not include a copy of the fitness for duty examination report issued by the doctor who evaluated appellant. Government Code § 19253.5(b) permits an appointing power to provide a copy of the fitness for duty examination to the physician designated by the employee.[17] If an appointing power intends to rely upon a fitness for duty examination report as a basis for taking any medical action against the employee, in accordance with Board Rule 52.3(a)(3) and Skelly v. State Personnel Board,[18] the appointing power must provide the employee with a copy of that report when it serves the notice of medical action under Government Code § 19253.5(f) or (i)(1).[19] While it would have been preferable to have included a copy of the fitness for duty report with the Options Letter

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[16] See, S[redacted] S[redacted] (2000) SPB Dec. No. 00-07, p. 8, fn. 7. A Disability Task Force comprised of representatives of numerous state departments and employee unions has developed a model options letter that can be used by appointing powers. It can be found on the Board's website at http://www.spb.ca.gov/spblaw/options.doc.

[17] Government Code § 19253.5(b) provides:

> Fees for the examination and for the services of medical specialists or technicians, if necessary, shall be paid by the state agency. The employee may submit medical or other evidence to the examining physician or to the appointing power. The examining physician shall make a written report of the examination to the appointing power. The appointing power shall provide a copy to the physician designated by the employee.

[18] (1975) 15 Cal.3d 194.

[19] Cf., J[redacted] B[redacted] (2001) SPB Dec. No. 01-02.

in order to encourage a productive interactive process, because the Options Letter did not impose a medical action upon appellant or cut off her pay, CHP's failure to include the fitness for duty examination report with the Options Letter did not constitute a violation of appellant's due process rights.

CONCLUSION

While CHP could have done a better job of notifying appellant of its actions and her options and inviting her to engage with them in an interactive process, because it did not cut off her pay before it gave her notice and an opportunity to respond and filed for disability retirement on her behalf pursuant to Government Code § 19253.5(i), it did not constructively medically terminate or suspend her when it placed her on paid leave pending a fitness for duty examination and a final determination on how it would proceed.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. Connie Armstead's appeal from constructive medical termination or suspension is denied and dismissed.
2. This decision is certified for publication as a Precedential Decision. (Government Code § 19582.5).

STATE PERSONNEL BOARD[20]

William Elkins, President
Ron Alvarado, Vice President
Maeley Tom, Member

[20] Member Sean Harrigan did not participate in this decision.

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on May 6, 2003.

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Walter Vaughn
Executive Officer
State Personnel Board

[Armstead-dec]