

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 26876
)
 BRUCE HARRINGTON) **BOARD DECISION**
) (Precedential)
 From dismissal from the position of)
 Psychiatric Technician at the Patton) **NO. 91-01**
 State Hospital, Department of Mental)
 Health at Patton) September 3-4, 1991

Appearances: Loren E. McMaster, representing Appellant Bruce
 Harrington; Karen J. Kilpatrick, representing Respondent,
 Department of Mental Health, Patton State Hospital

Before Chavez, President; Burgener, Stoner, Ward and Carpenter,
 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 Bruce Harrington (Appellant or Harrington), a psychiatric technician who had been dismissed from his position at the Patton State Hospital, Department of Mental Health at Patton (Department). In sustaining the dismissal, the ALJ rejected Appellant's argument that the Department's failure to comply with the substance abuse testing provisions set forth at Title 2 of the California Code of Regulations, section 599.960, et seq.¹ mandated dismissal of the

¹All section references are to Title 2 of the California Code of Regulations unless otherwise indicated.

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charges against Appellant.²

The Board determined to decide the case itself, based upon the record and additional arguments to be submitted in writing. After review of the entire record, including the transcripts and briefs submitted by the parties, the Board overturns the dismissal for the reasons set forth below.

FACTUAL SUMMARY

Adoption of the Substance Abuse Regulations

In October 1988, the Department of Personnel Administration (DPA) enacted a comprehensive set of regulations designed "to help ensure that the State workplace is free from the effects of drug and alcohol abuse." (2 Cal. Code of Regulations, section 599.960 et seq.) The regulations set forth in detail the procedures that State agencies are required to follow should they desire to utilize substance testing to attain the goal of a drugs and alcohol free workplace. They describe the circumstances under which an employee may be tested, describe the standards to be observed in the collecting, handling, and testing of the sample, and set forth the procedures to be observed once substance abuse

²The ALJ agreed with Appellant's contention that a Skelly violation had occurred. Since we find the dismissal inappropriate, we need not address Appellant's contention that his Skelly rights were violated.

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test results are received by the appointing power from the laboratory that has performed the tests.

At issue here is the Department's noncompliance with the requirement that substance abuse test results be received and reviewed by a Medical Review Officer.³ During the sample collection process, the employee is to be provided the opportunity to provide information about factors other than illegal drug use, such as the taking of legally prescribed medications, that could cause a false positive result. At the employee's option, this information may be submitted in a sealed envelope to be opened only by a Medical Review Officer if the test result is positive. (Section 599.964) The Medical Review Officer, who is to be a licensed physician designated by the appointing power, is charged with the obligation to:

- (a) Review the results and determine if the standards and procedures required by this Article have been followed.
- (b) For positive results interview the affected employee to determine if factors other than illegal drug use may have caused the result.
- (c) Consider any assertions by the affected employee of irregularities in the sample collection and testing process.
- (d) Based on the above, provide a written explanation of the test results to the appointing power or his/her

³Appellant has not alleged any failure on the part of the Department to comply with any of the other substance abuse testing regulations.

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designee. The employee shall also receive a copy of this explanation. (Section 599.965)

The Substance Abuse Testing of Appellant

Since his appointment on March 16, 1987, Appellant has worked as a Psychiatric Technician, a Pre-Licensed Psychiatric Technician, and a Psychiatric Technician Trainee.

On July 24, 1989, Appellant was served with a Notice of Adverse Action of dismissal. On August 3, 1989, in return for the Department's rescinding his dismissal from State service, Appellant signed a "Contract for Continued Employment" (Contract).

The introductory paragraph of the Contract provides that:

Due to your use of drugs/alcohol and the resulting unproductive performance and/or potential for creating unsafe conditions at work, it is necessary, as a condition to your continuing employment, for you to agree to the following...:

The Contract provided that the Appellant maintain physical sobriety while on duty, and required that he be free of the use, influence, after effects, or possession of alcohol, drugs, or other intoxicants while on duty or on stand-by, or when reporting for duty. To ensure that Appellant remained drug and alcohol free, the Contract required that Appellant submit to drug/alcohol testing at the discretion of the Department for up to one year. The Contract further provided that Appellant's failure to comply with any of the

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conditions of the contract could or would result in adverse action, up to and including dismissal.⁴

Pursuant to the terms of the Contract, on September 4, 1989, the Department required the Appellant to submit a urine sample for substance testing. When Appellant gave the sample, he stated in writing that he had taken the medications Actifed, Motrin, and Robitussin.

The sample was submitted to the Watson Medical Laboratory in San Bernardino for testing. Mervin D. Russell (Russell), a medical toxicologist at the laboratory, first performed the EMIT test which detected amphetamines in Appellant's urine. Russell testified that the use of Actifed, Motrin and Robitussin could cause the EMIT test to render a false positive result. Russell also performed a TPIA test on the sample. The TPIA test also detected amphetamines. Russell testified that the TPIA test is not 100 percent effective and that, although the chance of false positives is very small, the legal medications taken by Appellant could cause a false positive result.

The Department admits that it did not comply with the

⁴The substance abuse regulations provide that an employee in a "sensitive position" may be substance tested when there is reasonable suspicion to believe the employee violated the proscription against drug and alcohol abuse as set forth in section 599.960(b). In addition, if an employee admits to a violation of 599.960(b), the employee may be required to submit to periodic testing as a condition of remaining in or returning to State employment. (Section 599.960(c))

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substance abuse regulations, despite the fact that Appellant contended that he had taken legal medications that he believed could cause a false positive result. Appellant's substance abuse test results were not released nor reviewed by a Medical Review Officer. Appellant was terminated based upon the results of the drug test for having "reported for duty with measurable amounts of Amphetamines in...[his] system" in violation of the Contract requirement that he "...maintain physical sobriety...". At the Skelly hearing, Appellant provided the Executive Director of the Department, who served as the Skelly hearing officer, with a list of the legal medications that he had taken and that he believed had caused the drug test to yield a false positive result. The Executive Director testified he was not aware of the requirement that test results be reviewed by the Medical Review Officer.

ISSUE

Whether, in substance abuse testing the Appellant, the Department was required to comply with the substance abuse testing procedures set forth in Title 2, California Code of Regulations, section 599.960, et seq., a particularly section 599.965 which requires that test results be reviewed by a Medical Review Officer?

DISCUSSION

Even though the substance abuse test in question took place eleven (11) months after the effective date of the regulations, the Department admittedly did not comply with any of the procedures set forth in section 599.965. The Department advances several arguments as to why it was not required to adhere to the procedures set forth in the regulations. First, the Department contends that compliance with the regulations is voluntary. The Department bases this argument solely on the plain language in the regulation which provides:

Section 599.960. General Policy.

(a) It is the purpose of this article to help ensure that the State workplace is free from the effects of drug and alcohol abuse. These provisions shall be in addition to and shall not be construed as a required prerequisite to or as replacing, limiting or setting standards for any other types of provisions available under law to serve this purpose, including employee assistance, adverse action and medical examination.

The Department does not articulate any rationale for its interpretation of the above-quoted language and we do not find any support in the quoted language, or anywhere in the regulations, for the Department's position that compliance with the regulations is

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discretionary rather than mandatory. We find that the only thing discretionary about the regulations in question is that the employing agency has the discretion to determine whether it wants to utilize substance abuse testing at all. The language in question simply makes clear that substance abuse testing is not preemptive of other approaches to the substance abuse problem. It assures the employing agency that it need not use substance abuse testing to achieve the goal of "a State workplace...free from the effects of drug and alcohol abuse," but may continue to address substance abuse problems through the use of employee assistance programs, adverse actions and medical examinations. Should a department decide to use substance abuse testing, however, compliance with the procedures set forth in the regulations is absolutely mandatory.

The Department also argued at the hearing that it had been instructed not to implement the drug testing program until all of the elements of the program were in place including the execution of contracts with laboratories for testing, the designation of collection sites, and the hiring of medical review officers. Based on a memorandum from DPA dated March 1, 1990, the ALJ found that the contracts for medical review officer services did not become operational until March 1990. The memorandum provided, in part, as follows:

To assist in the implementation of the substance

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testing program for current employees in sensitive positions, the Department of Personnel Administration (DPA) has established central resources for urine sample collection, laboratory analysis, and medical review. We expect that most agencies will find them to be the easiest way to meet the technical and procedural standards in the substance abuse rules. Departments meeting the requirements specified below are now authorized to use this system for reasonable suspicion testing of employees serving in positions for which the sensitive designation process has been completed.

We reject the argument that employing agencies were not obligated to follow the DPA regulations until March 1990 and that, therefore, the Department did not have to follow the procedures set forth in those regulations when it tested Appellant in late 1989. First, even assuming the Department had been instructed not to implement the substance abuse testing program set forth in the regulations, as testified to by the Department's personnel officer, then it should not have been doing substance testing at all. The Department was not free to implement only those elements of the program that it chose to implement while ignoring those aspects of the program it found inconvenient or distasteful.

Second, if the Department chose to utilize substance abuse testing, the Department could have complied with the regulations as of October 1988, their effective date, even before DPA had taken steps to facilitate the procedures specified in the regulations. As noted in the above-quoted memorandum, the central resources established by DPA may have provided "the easiest way to meet

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technical and procedural standards in the substance abuse rules," but they certainly did not provide the only way. With respect to the Medical Review Officer requirements, section 599.965 provides that: "Each appointing power shall designate one or more Medical Review Officers, who shall be licensed physicians...." (Section 599.965). Thus, if the Department wanted to utilize substance testing, it could have designated one of its licensed physicians to be the Medical Review Officer and complied with the mandates of the regulations.

CONCLUSION

The Department's failure to comply with the law as set forth in the DPA's substance abuse testing regulations is material, since Appellant had taken three legal medications that could have caused his substance abuse test to yield a false positive reading for amphetamines. The apparent purpose of the requirement that a Medical Review Officer review positive test results and interview the employee who has tested positive is to assure the integrity of the process and the accuracy of the results. The Department's failure to abide by this requirement not only rendered the test results themselves suspect, but also denied appellant his right to have questionable test results reviewed by a trained Medical Review Officer before those results were forwarded to and accepted as

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accurate by his appointing power.

Since the sole cause for Appellant's dismissal was his failure to "maintain physical sobriety," and since the only evidence of that failure was procured in violation of the safeguards set forth in the substance testing regulations and may therefore be unreliable, we have no choice but to overturn the dismissal and order Appellant reinstated with back pay and benefits as provided by law.⁵

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code sections 19582 and 19584, it is hereby ORDERED that:

1. The above-referenced adverse action of dismissal taken against Bruce Harrington is revoked.

⁵This Board has, in the past, declined to sustain discipline based solely upon the results of substance abuse tests in cases where the order to submit to the test was illegal (In the Matter of the Appeal by Reginald Cobb (1991) SPB Case No. 25827) or where the tests were not "consistently run in a reliable fashion to produce trustworthy results." (In the Matter of the Appeal by Jerome Warfield (1989) SPB Case No. 24502). Although these cases are not precedential, they have persuasive value. The courts have applied the exclusionary rule to exclude improperly obtained evidence from disciplinary proceedings where the objective of deterrence would be served. See Dyson v. State Personnel Bd. (1989) 213 Cal.App.3d 711. In this case, exclusion of substance abuse test results from consideration not only deters noncompliance with DPA's substance abuse testing regulations, but also assures that discipline will not be imposed based on a possibly false positive test result.

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2. The Department of Mental Health and its representatives shall reinstate Appellant Bruce Harrington to his position of Psychiatric Technician and pay to him all back pay and benefits that would have accrued to him had he not been wrongfully terminated.

3. 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 and benefits due Appellant (Government Code section 19584).

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

STATE PERSONNEL BOARD*

Clair Burgener, Member
Alice Stoner, 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 in Case No. 26876 at its meeting on September 3 and 4, 1991.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board