

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 35698
)
 WILLIAM A. POGGIONE) **BOARD DECISION**
) (Precedential)
 From rejection during probationary)
 period from the position of Staff) **NO. 95-12**
 Services Analyst with the)
 Department of General Services)
 at Sacramento) July 11, 1995

Appearances: Bruce Monfross¹, Representative, California State Employees' Association representing appellant, William A. Poggione; Kathleen A. Yates, Senior Staff Counsel, Department of General Services representing respondent, Department of General Services.

Before Lorrie Ward, President; Floss Bos, Vice President; Richard Carpenter, and Alice Stoner, 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 the appeal of William A. Poggione (appellant) from rejection during probationary period from the position of Staff Services Analyst with the Department of General Services at Sacramento (Department).

The appellant was rejected during probation effective June 20, 1994 based upon recurring problems with his attendance record, failure to follow instructions and learn the requirements of his position, and discourtesy on one occasion to a fellow employee. After a hearing on the merits, the ALJ ruled in a Proposed Decision

¹ Steve Bassoff, also of California State Employees' Association, made an appearance at oral argument on behalf of Bruce Monfross.

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that there was substantial evidence to support the reasons for appellant's rejection during probation. The ALJ further held, however, that appellant was not entitled to mandatory reinstatement to the prior position he held at the Department as a Restoration Work Specialist because that position was not considered by law to be a "former position" to which the appellant had mandatory reinstatement rights under Government Code section 19140.5². Since appellant's position as a Restoration Work Specialist was his first permanent position in state civil service, the result of the rejection action was that appellant was terminated from state service.

The Board rejected the ALJ's Proposed Decision, asking the parties to specifically address the issue of whether the appellant had mandatory reinstatement rights to the position of Restoration Work Specialist. After a review of the record in this case, including the transcript, exhibits, and the written and oral arguments of the parties, the Board concludes that while substantial evidence supports the reasons for appellant's rejection during probation, appellant had a mandatory right to reinstate to the position of Restoration Work Specialist so long as he is medically able to perform the essential functions of that position.

² All references to statutes herein are to the Government Code unless otherwise indicated.

FACTUAL BACKGROUND

Appellant was first employed on an intermittent basis in January of 1988 as a laborer and carpenter within the Department's Office of State Architect. In January 1991, he was appointed full-time to the position of Restoration Work Specialist at the Department.

On March 18, 1993, appellant submitted a note to the Department from his physician, Dr. Paul D. Forrest, indicating that because of medical problems appellant was experiencing with his back, appellant was permanently restricted in his job duties from lifting more than 40 pounds. Based upon this note, appellant requested that he be reasonably accommodated in his position.

The Department determined, however, that the physician's medical restrictions were too confining to accommodate appellant in the position of Restoration Work Specialist and, therefore, it decided to explore alternatives, including less physically demanding jobs within the Department. Thereafter, appellant approached persons within the Department and indicated his interest in the position of Staff Services Analyst. After reviewing the specifications for that position and appellant's credentials, the Department offered to reasonably accommodate appellant by allowing him to transfer to the position of Staff Services Analyst.

In a letter to appellant from the Department's personnel unit dated May 10, 1993, appellant was told he had four choices:

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1) accept the transfer to the Staff Services Analyst position; 2) medical separation; 3) medical leave of absence; or 4) voluntary resignation.³ The Department further informed appellant that if he elected either a medical separation or medical leave of absence, he would have mandatory reinstatement rights to the position of Restoration Work Specialist when he was again medically capable of performing the duties of that position. Appellant was not informed that if he chose to transfer to the position of Staff Services Analyst, and was later rejected during probation, the department would take the position that he would not have mandatory reinstatement rights. Appellant chose to accept the transfer to the position of Staff Services Analyst. Appellant's physician approved of the transfer and appellant began work in his new position on or about June 14, 1993.

As a Staff Services Analyst with the Department, appellant served as a project analyst for work undertaken by the Office of the State Architect. This position required him to monitor the costs and time expenditures for various projects undertaken by the office. From the beginning, appellant experienced difficulties performing the duties of his position.

Appellant's first Report of Performance for Probationary Employee was dated October 13, 1993. This report indicated that

³ Appellant was not offered disability retirement because he did not have the requisite length of state service for qualification.

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improvement was necessary in appellant's work habits and relationships with people. It also noted that appellant's record of attendance needed improvement. The report, however, gave appellant an overall assessment rating of "standard."

By the time the second Report of Performance for Probationary Employee was issued to appellant on February 13, 1994, appellant's overall performance rating had dropped to "improvement needed." This report indicated that appellant had problems in the areas of skill, work habits, relationships with people and learning ability. The report urged appellant to pay closer attention during training and to ask questions when he did not understand something. The report also noted that appellant's attendance record still required improvement.

The third Report of Performance for Probationary Employee dated June 13, 1994 indicated that improvement was needed in almost all areas of evaluation. The report noted that despite months of training and time to learn the position, appellant still did not have the requisite skill and knowledge to perform his job duties accurately. It further noted that appellant's supervisor, Marlene Angeli, recommended that appellant be denied permanent status in the position.

At the hearing before the ALJ, appellant's administrative

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supervisor during his probationary period⁴, Marlene Angeli, testified that despite being assigned competent persons to train him and being given adequate time to learn the position, appellant demonstrated throughout his probationary period that he was unable to accurately and promptly perform the duties of a Staff Services Analyst. In support of Ms. Angeli's testimony, the Department submitted into evidence several examples of appellant's substantive and grammatical errors in work authorization forms, which errors were made even after appellant had been in the position for almost a year. According to Ms. Angeli, appellant's mistakes caused administrative problems for the Department. The supervisor who was assigned to oversee appellant's work projects during May and June of 1994, Theodore Park, concurred with Ms. Angeli's testimony that the nature and frequency of appellant's errors during the last few months of his probationary period were unacceptable given the several months he had to learn the duties of the position.

The Department contended that not only did appellant have performance problems, he was also inexcusably tardy for work on numerous occasions during his probationary period. The Department introduced into evidence several corrective memorandums written by

⁴ The record revealed that Ms. Angeli was appellant's supervisor from the beginning of appellant's probationary period until May of 1994, when supervisorial duties became split between Ms. Angeli and Mr. Theodore Park, Ms. Angeli being responsible for appellant's administrative supervision and Mr. Park being responsible solely for supervising appellant's work product.

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Ms. Angeli to appellant during January and February of 1994 documenting appellant's tardiness on numerous occasions. Despite having received these memorandums, the record reveals that appellant was tardy thereafter on at least seven separate occasions.

Finally, the Department cited as reason for appellant's rejection an incident involving appellant's discourtesy to a fellow employee. On or about December 21, 1993, the Department received an incident report that appellant had been belligerent and profane to a maintenance worker. The ALJ found this maintenance worker's testimony to be credible when he testified that appellant used four letter words towards him and another coworker to demonstrate his anger about people putting sand in ashtrays.

At the hearing before the ALJ, appellant took the position that his failure to perform the duties of his position to the Department's satisfaction was attributable to his lack of proper training. He testified that he had several different persons to whom he was supposed to go with questions at different times, making it difficult for him to learn his job duties effectively and consistently. He further contended that training was provided only sporadically as Department staff was too busy to pay attention and ensure he had adequate training. Appellant further testified that Ms. Angeli herself should have spent time training him, rather than rely on her subordinates to train him properly.

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As to the allegations of tardiness, appellant did not attempt to counter the allegations, but rather, testified that his tardies were attributable to insomnia, which he alleged was approximately 50 percent caused by his back troubles. Appellant did not offer any medical or other evidence concerning this defense.

Finally, as to the charge of discourtesy, appellant offered no testimony or evidence concerning the alleged incident.

After appellant's rejection during probation on June 20, 1994⁵, appellant timely sought mandatory reinstatement to the position of Restoration Work Specialist, but the Department denied reinstatement on the grounds that position was not a "former position" to which appellant had mandatory reinstatement rights under the law. Appellant testified that while the condition of his back presently precludes him from returning to that position, his back problem is correctable through surgery.

On appeal to the Board, appellant contends that the reasons given for the rejection during probation are not supported by the evidence. He further argues that even if the rejection was lawful, he was entitled to mandatory reinstatement to his prior position as a Restoration Work Specialist pursuant to section 19140.5.

⁵ The Department extended appellant's probationary period to June 20, 1994 and served its notice of rejection on June 13, 1994.

DISCUSSION

The Rejection During Probation

A probationer may be rejected by the appointing power during the probationary period for reasons relating to a probationer's qualifications, the good of the service, or his or her failure to demonstrate merit, efficiency, fitness, and moral responsibility.

Section 19173. The Board has jurisdiction to investigate, with or without a hearing, appeals from rejections during probation and after an investigation may affirm or modify the action of the appointing power or restore the probationer back to the employment list for certification to any position within the class, except for the agency from which he or she was rejected. Section 19175(a) (b) and (c). Alternatively, the Board may restore a rejected probationer to the position from which they were rejected, but this shall be done only if the Board determines, after hearing, that there is no substantial evidence to support the reason or reasons for rejection or that the rejection was made in fraud or bad faith. Section 19175(d). Furthermore, at any such hearing, the rejected probationer has the burden of proof; subject to rebuttal by him or her, it shall be presumed that the rejection was free from fraud and bad faith and that the statement of reasons therefore in the notice of rejection is true. Id.

After a review of the record, we conclude that appellant has failed to meet his burden of proving that there is no substantial

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evidence to support the reasons for rejection or that the rejection was made in fraud or bad faith. Therefore, we decline to restore him to the position of Staff Services Analyst.

On the contrary, the record before us supports the Department's contention that appellant did not adequately perform the duties of the position of Staff Services Analyst within the Office of the State Architect. Appellant made several errors in his work which were deemed unacceptable by his superiors, even after he had spent almost a year learning the duties of the position. We are unconvinced that appellant has proven that his unacceptable work performance was attributable to any deficiencies in the Department's training.

More importantly, however, the record is clear that appellant's work habits were unacceptable. Even after several warnings concerning the importance of prompt attendance and calling in immediately to report one's absence due to illness, appellant was still tardy on several occasions. As stated in Frances P. Gonzales (1993) SPB Dec. No. 93-13 at page 4, "[a]n employee's failure to meet the employer's legitimate expectation regarding attendance results in inherent harm to the public service," certainly justifying appellant's rejection during probation in this case.

Finally, although one instance of discourteous language to a fellow employee may not be sufficient alone to justify appellant's

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rejection, when considered together with appellant's work performance and attendance record, we conclude that there is sufficient evidence to support the reasons for appellant's rejection. Accordingly, the rejection during probationary period is sustained.

Request For Mandatory Reinstatement

Having determined that the rejection was lawful, we address the question of whether the appellant had mandatory reinstatement rights to his prior position as a Restoration Work Specialist.

Section 19140.5 provides:

This section applies only to a permanent employee, or an employee who previously had permanent status and who, since receiving such permanent status, has had no break in the continuity of state service due to a permanent separation.

An employee who isrejected during probation...shall be reinstated to his or her former position provided all of the following conditions occur:

- (1) The employee accepted the appointment without a break in the continuity of state service;
- (2) The reinstatement is requested in the manner provided by board rule within 10 working days after the effective date of the termination. (Emphasis added.)

The purpose behind the right to mandatory reinstatement is to protect the employee who has already achieved permanent status in the civil service from being terminated from state service based on the employee's inability to perform adequately in a new job after transfer or promotion. The fact that the new position is not a good match for an employee who has had success in a prior position does not justify separation from all of state service, especially

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where the rejection during probation is due to performance problems.⁶

In this case, the Department contends it is not obligated to reinstate appellant to the position of Restoration Work Specialist as that is not a "former position" as those words are used in section 19140.5. Section 18522 defines "former position" as either of the following:

(a) A position in the classification to which an employee was last appointed as a probationer, permanent employee, or career executive, under the same appointing power where that position was held, and within a designated geographical organizational, or functional subdivision of that state agency as determined by the board. [or]

(b) With the concurrence of both the appointing power and the employee, a position in a different classification to which the same appointing power could have assigned such an employee in accordance with this part. However, the former position shall not include positions from which the employee has been...terminated, demoted, or transferred in accordance with Section 19253.5... (emphasis added.)

Section 19253.5, the "medical termination" statute, is a law which appointing powers may invoke if they have reason to believe a person cannot perform the duties of their position for medical reasons. This statute allows the appointing power, in accordance with board rule, to require an employee to submit to a medical

⁶ When an employee with reinstatement rights engages in serious misconduct during the probationary period, the department should consider discipline rather than rejection. Here, the rejection was based primarily on an appellant's inability to perform the job, a job substantially different than that held by appellant previously. While the tardiness and incident of discourtesy could have formed the basis of a disciplinary action, the Department chose rejection instead.

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examination to evaluate the physical or mental condition of the employee, or alternatively, to rely upon medical reports submitted by the employee and notify the employee that they are being medically demoted, transferred or terminated pursuant to this code section. Under section 19253.5, an employee has the right to appeal any demotion, transfer or termination.

The Department claims that appellant has no mandatory rights of reinstatement because under the language of section 18522, the position of Restoration Work Specialist is specifically excluded as a "former position." It is the Department's contention that since appellant's transfer was done purely for medical reasons, for all intents and purposes the transfer transpired pursuant to section 19253.5.

Appellant, on the other hand, contends that appellant has mandatory reinstatement rights to the former position of Restoration Work Specialist because, among other things, section 18522 is unconstitutional and violates California's Fair Employment and Housing Act. Moreover, appellant argues that the position of Restoration Work Specialist may still be considered a "former position" because appellant was not transferred pursuant to section 19253.5, but was transferred in response to a request for reasonable accommodation.

We need not address appellant's arguments that section 18522 violates the constitutions of California or the United States or

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any other law. We do find, however, that appellant was never transferred from the position of Restoration Work Specialist pursuant to section 19253.5. Thus, we conclude that the position of Restoration Work Specialist is still considered appellant's "former position" under section 18522.

While the Department could have invoked the provisions of section 19253.5, it did not expressly do so. In fact, the letter from the Department to appellant dated June 7, 1993 informing him that his request for reasonable accommodation was approved and informing him of his various options specifically stated, "Please address your written response to this offer of reasonable accommodation to my attention." We believe the record is clear that the transfer was the result of appellant's request for reasonable accommodation and not the result of the Department's decision to invoke the procedures under section 19253.5.

While, at first glance, the distinction between a response to a request for reasonable accommodation and a medical transfer pursuant to section 19253.5 may appear to be a matter of semantics, we believe the distinction is a real one. Had appellant been transferred to the position of Staff Services Analyst pursuant to section 19253.5, he would have been given written notice of the transfer citing such code section, and informed that he had 15 days within which to appeal the action of the appointing power to the State Personnel Board. He would have been placed on constructive

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notice that such a transfer would be subject to the provision of section 18522 which eliminates for medical transfers the mandatory reinstatement rights that generally attach to a rejection during probation of a transferred employee with permanent civil service status.

In addition, we believe that our interpretation of section 18522 in this case conforms with the basic rules of statutory interpretation. One basic rule of statutory interpretation is to interpret a statute according to the "plain meaning" of the language used in the statute, and not to presume that the Legislature intended to say something which it did not say in the statute. Tracy v. Municipal Court (1978) 22 Cal.3d 760, 764. We decline to read into section 18522, which specifically excludes from the definition of former position transfers "in accordance with section 19253.5," a provision which would additionally exclude from the definition of former position, positions accepted by persons who have voluntarily transferred in response to a request for reasonable accommodation. If a department wishes to rely on the provisions of section 19253.5, it must explicitly do so by invoking the statute itself.

This is not to say that the department is precluded from settling a potential medical termination case by securing an explicit agreement from the employee that specifies the transfer is pursuant to section 19253.5 and further specifies which provisions

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of section 19253.5 will or will not apply. Neither is a department precluded from reaching agreement with an employee, as was done in the instant case, to transfer that employee based upon a request for reasonable accommodation. What a department cannot do is to avoid the burden of invoking the provisions of section 19253.5 (i.e. notice appeal rights) while seeking to rely on what it may perceive as the statute's benefits (i.e. no reinstatement rights to former position after rejections).

The second rule of statutory interpretation is to interpret statutes in conformance with reasonableness and common sense. De Young v. City of San Diego (1983) 147 Cal.App.3d 11, 18. In this case, if appellant had simply chosen to transfer from the position of Restoration Work Specialist to Staff Services Analyst for other than medical reasons and was rejected, he would have retained mandatory reinstatement rights to the position of Restoration Work Specialist. We believe that it would make little sense to conclude that the Legislature intended to deny appellant reinstatement rights because he asked to be transferred for medical reasons, as opposed to other reasons. It makes more sense, rather, to surmise that the Legislature chose only to exempt from mandatory reinstatement rights those employees who are forced by their appointing authorities to permanently change their status by the formal procedures set forth in section 19253.5. In such cases, the appointing authority is the one bringing the change of status upon

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the employee, with the employee being given full rights to notice, an opportunity to be heard and an appeal under section 19253.5.

CONCLUSION

Appellant's rejection during probation is sustained. Appellant is deemed to have mandatory reinstatement rights to the position of Restoration Work Specialist when, and if, he is medically able to perform the essential duties of that position.

ORDER

WHEREFORE IT IS DETERMINED that:

1. The rejection during probation taken by the Department of General Services against William A. Poggione effective June 20, 1994 is hereby sustained.

2. William A. Poggione shall have mandatory reinstatement rights to the position of Restoration Work Specialist upon a showing that he is medically able to perform the essential functions of the position.

3. This opinion is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

*THE STATE PERSONNEL BOARD

Lorrie Ward, President
Floss Bos, Vice President
Alice Stoner, Member
Richard Carpenter, Member

* Member Ron Alvarado was not a member of the Board when this case was considered and 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 July 11, 1995.

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C. Lance Barnett, Ph.D.
Executive Officer
State Personnel Board