

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)
)
 VAROOZH TOROSSIAN)
)
 From Non-punitive Termination from the)
 position of Transportation Engineer (civil))
 with the Department of Transportation at)
 Glendale)
)
 _____)

SPB Case No. 02-1147

BOARD DECISION
(Precedential)
NO. 03-04

August 5, 2003

MODIFICATION

Pursuant to a resolution adopted by the Board on June 7, 2005, the Board's
Order at paragraph 1 on page 10 is modified to read:

The non-punitive termination taken against Varoozh Torossian is
modified to a non-punitive unpaid leave of absence from April 12,
2002 through May 22, 2002, the date PECG notified Caltrans of the
renewal;

[A Petition for Writ of Mandate has been filed in superior court concerning this case]

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	SPB Case No. 02-1147
)	
VAROOZH TOROSSIAN)	BOARD DECISION
)	(Precedential)
From Nonpunitive Termination from the)	
position of Transportation Engineer (civil))	
with the Department of Transportation at)	NO. 03-04
Glendale)	
_____)	August 5, 2003

APPEARANCES: Stephen D. Beck, Staff Consultant, Professional Engineers in California Government, on behalf of appellant, Varoozh Torossian; Jeanell M. Bradley, Staff Services Manager I, on behalf of the Department of Transportation

BEFORE: William Elkins, President; Ron Alvarado, Vice President; Maeley Tom and Sean Harrigan, Members.

DECISION

This case is before the State Personnel Board (Board) after the Board granted the Petition for Rehearing filed by Varoozh Torossian (appellant) in his appeal from non-punitive termination from his position with the California Department of Transportation (Caltrans). In this decision, the Board concludes that given appellant's good faith, timely and proper application for renewal of his Employment Authorization Card (EAC), and given the unanticipated change in the processing times by the Immigration and Naturalization Service (INS) of EACs, causing the renewal of appellant's EAC to be delayed beyond the expiration of his prior employment authorization, the department should have put him on an unpaid leave of absence pending approval of his renewal application. The Board, therefore, modifies the non-punitive termination to a non-

punitive unpaid leave of absence and awards backpay from the date the Professional Engineers in California Government (PECG), appellant's representative, notified Caltrans of the renewal of the EAC.

FACTUAL SUMMARY

Appellant entered state service as a Transportation Engineer (Civil) on August 1, 2001. Appellant has no history of adverse action.

Appellant is a dual citizen of Canada and Iran. He retained an immigration attorney to assist him in applying to the INS for an immigrant visa ("green card"). As part of the "green card" process, the INS issued appellant an EAC that was scheduled to expire April 3, 2002. Appellant's immigration attorney advised him not to apply for renewal of his EAC until just a few months before it expired, because the INS would not process it any earlier.

On February 14¹, appellant mailed his renewal application for his EAC to the INS. The application was returned to appellant by the INS because the fees were changing effective February 19. Appellant resubmitted his application and fees. On March 14, the INS notified appellant's attorney that processing his EAC would take 80 days.

On March 26, Caltrans Personnel Analyst Stephanie Jones (Jones) informed appellant that his EAC would expire April 3. Jones informed him that he must submit an extension of his EAC, or a new work visa/authorization, on or before April 3, to avoid being terminated.²

¹ All date references are to 2002.

² Jones sent this notice pursuant to a newly established Caltrans procedure intended to give its employees notice of the impending expiration of their EACs. There was no evidence that Caltrans was required to give such notice.

On March 29, the INS informed appellant that there was a four month backlog in processing EAC renewal applications.

On April 4, the Department served appellant with a Notice of Non-punitive Termination (Notice). The Notice, by its terms, was to become effective April 11.

Appellant attempted to expedite the renewal of his EAC. He made personal visits to INS offices in Los Angeles and Laguna Niguel two days in a row to try to expedite his application or get a temporary extension prior to issuance of the Notice, and then visited the Laguna Niguel office again after he received the Notice. He also wrote letters to the INS requesting that the approval of his application be expedited so that it would take effect before the effective date of his termination. He visited his Congressman, consulted with his immigration attorney, and contacted his PEGG union representative.

Appellant's Congressman was able to get a commitment from the INS for expedited processing of appellant's EAC renewal. Appellant was issued a new EAC, effective May 10. On May 22, PEGG notified the Department of the renewal.

Appellant's Caltrans supervisors testified they would like to reinstate him.

ISSUES

The following issues are before the Board for determination:

1. Was the appellant properly non-punitively terminated?
2. What is the effect, if any, of Government Code section 19585(e) on appellant's non-punitive termination?

DISCUSSION

Government Code section 19585, the non-punitive action statute, may be relied upon by employers in lieu of adverse action or rejection during probation when the only cause for taking action against an employee is his or her failure to meet a requirement for continuing employment.³

Subdivision (b) of the statute allows the appointing power to grant the employee a leave of absence in lieu of termination, demotion or transfer.

Subdivision (c) provides:

The federal Immigration Reform and Control Act of 1986 requires termination of an employee for failure to meet the employment eligibility requirements of that act, and if this is the only cause for action against that employee, the termination shall be carried out pursuant to this section...(emphasis added).

Subdivision (d) provides:

For the purposes of this section, requirements for continuing employment shall be limited to the acquisition or retention of specified licenses, certificates, registrations, or other professional qualifications, education, or eligibility for continuing employment or advancement to the fully qualified level within a particular class series...(emphasis added).

Subdivision (e) provides:

For the purposes of this section, an employee who has filed a proper and timely application for renewal of a required license, registration, or certificate shall be considered as having maintained the license, registration, or certificate unless it is subsequently denied, revoked, or suspended...

Appellant stipulated that his work authorization expired on April 3, 2002.

Caltrans relied on subdivision (c) in terminating appellant. Caltrans alleged that as of

³ Govt. Code section 19585 (a).

the effective date of his termination, April 11, 2002, appellant failed to meet the employment eligibility requirements of the federal Immigration Reform and Control Act. (IRCA).

Appellant argues, however, that subdivision (e) of the statute applies and that his February 14, 2002 application for renewal of his EAC was “proper and timely” and should therefore be considered sufficient to stave off his termination between the time of the application and its ultimate renewal.

Both the language of the statute itself and the legislative history support appellant’s argument that his timely and proper application for renewal of his EAC should have been adequate to allow him to retain his permanent civil service status in his position. In terms of the language of the statute, subdivision (c) provides that if failure to meet the requirements of the IRCA is the only ground for termination, the termination shall be carried out “pursuant to this section.” (emphasis added). Subdivision (e) of the section provides that a timely and proper application for renewal of a required license, registration, or certificate shall be considered as maintaining it, unless it is subsequently denied. The EAC falls within a practical definition of “certificate.”⁴ Finally, subdivision (b) of the section provides that a leave of absence is a viable alternative to termination. Thus, the language of the statute supports appellant’s argument that his application for renewal of his EAC, combined with an unpaid leave of absence during the unanticipated delay of the renewal, should have been sufficient to protect him from termination.

⁴ American Heritage Dictionary (2d college ed. 1985) p.255, defines “certificate” as: a document containing a certified statement, esp. as to the truth of something.”

The legislative history further supports appellant's contentions. The purpose of adding subdivision (c) to Government Code section 19585 was to provide a nondisciplinary means of terminating employees who had employment eligibility problems stemming from the Federal law. The non-punitive process was statutorily defined to apply to an employee's failure to a "requirement for continuing employment that is prescribed by the board on or after January 1, 1986, in the specification for the classification to which the employee is appointed."⁵ The requirements for continuing employment are statutorily defined as including, inter alia, "retention of certificates" as well as "eligibility for continuing employment" and, according to the statute, are to be "prescribed by the board on or after January 1, 1986, in the specification for the classification to which the employee is appointed.

Since IRCA requirements are not set forth in the specifications for classifications, it was unclear, prior to the amendment of section 19585 adding of subdivision (c), whether the non-punitive action process could be used when the only cause for action against an employee was failure to meet IRCA requirements. Rather than attempt to fix the ambiguity by adding the IRCA requirements to the over 4000 class specifications in existence at the time, the Board opted for a legislative solution. Thus, Section 19585 was amended to add subdivision (c), which provides that the failure to meet IRCA employment eligibility requirements is grounds for a non-punitive termination from state civil service.

In this case, appellant made every effort to obtain the necessary work authorization renewal and the certificate evidencing the same. He filed his application

⁵ Govt. Code section 19585, subdivision (b).

in what had been, prior to September 11, 2001, sufficient time for processing the renewal. He followed up on his renewal with telephone calls, written inquiries, and even a number of in-person visits to multiple INS offices. Despite his sincere efforts to complete the renewal process before expiration of his work authorization, his work authorization expired and he was non-punitively terminated based solely upon application of the provisions of subdivision (c).

Notwithstanding the above, we understand the Department's concern that it could be accused of violating federal law in allowing appellant to work without a current work authorization. The federal law is clear and provides:

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.⁶

Upon expiration of his work authorization, appellant became "unauthorized" as to his employment with the State, the Department was understandably concerned about its liability had it continued him on the payroll. We believe, however, that Section 19585 provides the solution to the Department's dilemma. Subdivision (e) states:

Notwithstanding the foregoing, as prescribed by Article 11 (commencing with Section 19991) of Chapter 1 of Part 2.6, the appointing power may grant the employee a leave of absence in lieu of one of the actions specified above...⁷

⁶ 8 USC 1324a(a)(2).

⁷ Govt. Code section 19991.1(a) provides:

(a) Subject to department rule an appointing power may grant a leave of absence without pay, to any employee under his or her jurisdiction for a period not exceeding one year. An extension to an unpaid leave of absence may be granted by the appointing power upon the prior approval of the department. A leave so granted assures to the employee the right to return under the provisions of Section 19143...

The equities of this case call out for application of this subdivision. The Department should have placed appellant on a non-punitive unpaid leave of absence pending completion of the renewal process that he had begun several weeks before the expiration of his work authorization.

So long as appellant was not being paid during the period that his work authorization had expired, the Department would not have been in violation of federal law. Federal case law supports this determination. In Collins Foods Intern., Inc. v. U.S. I.N.S.⁸, a federal court held that Collins Foods International had not violated the statutory prohibition against "hiring for employment" an alien not authorized to work, even though it had extended a job offer to an individual without first verifying his work authorization. The court relied on a federal regulation that defines "hiring" as "the actual commencement of employment of an employee for wages or other remuneration,"⁹ as well as another regulation that provides that employers are required to examine an employee's documentation and complete necessary forms "within three business days" of the hire.¹⁰ Thus, in a sense, the employee in Collins who had been hired, but not paid, pending the verification of his work authorization, was in a position similar to that of an employee on an unpaid leave of absence. Therefore, the Department could have put appellant on an unpaid leave of absence pending completion of the work authorization renewal process without being in violation of the federal immigration laws.

⁸ 948 F.2d 549, 551.

⁹ 8 C.F.R. 274a.1(c).

¹⁰ 8 C.F.R. 274a.2(b)(ii)

The Department argues that this case should be decided consistently with the Board's precedential decision in George Lannes.¹¹ In that case, the Board found the Department had the discretion to terminate an employee who had his driver's license suspended because of a drunk driving charge, even though it could have accommodated him in a position that did not require driving. In Lannes, the loss of the work requirement was the result of volitional conduct. In the instant case, appellant lost the requirement through no fault of his own, had timely filed a renewal application, and was unable to obtain the renewal because of an unanticipated change in processing times.

We agree with appellant, that this case is more akin to that of Julie L. Foreman.¹² Foreman lost her nursing license because, through no fault of her own, and because of a work-related injury, she was unable to take the classes necessary to renew the license. The Board refused to allow the appointing power to non-punitively terminate Foreman, who was on a leave of absence at the time. As we said in that case, we cannot believe, that in enacting Section 19585, the legislature intended that employees lose their permanent civil service rights, including the right to mandatory reinstatement, solely for reasons that are beyond their control.

CONCLUSION

The Board is bound to issue a decision that is "just and proper."¹³ Given appellant's good faith efforts to timely renew his employment authorization, the

¹¹ (1992) SPB Dec. No. 92-10

¹² (1998) SPB Dec. No. 98-04

¹³ Govt. Code section 19582

unanticipated delay in the granting of the renewal, the option in the statute for Caltrans to put appellant on a leave of absence pending the INS' action on his application, and the fact that the authorization was ultimately renewed, we modify the non-punitive termination to a non-punitive unpaid leave of absence between the time of the non-punitive termination and the date that PEGC notified Caltrans of the renewal of appellant's EAC. Given that appellant was not legally authorized to work until the renewal took effect, backpay is authorized only from the date PEGC notified Caltrans of the renewal to the date of this decision.

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 non-punitive termination taken against Varoozh Torossian is modified to a non-punitive unpaid leave of absence from April 4, 2002 through May 22, 2002, the date PEGC notified Caltrans of the renewal;
2. That Varoozh Torossian be reinstated to his position of Transportation Engineer (Civil) with the Department of Transportation at Glendale;
3. That Varoozh Torossian be paid back pay, pursuant to Government Code section 19585 (l) from and after the date PEGC notified Caltrans of the renewal of appellant's EAC;
4. This matter is hereby referred to the Chief Administrative Law Judge and shall be set for further hearing on written request of either party in the event the parties are unable to agree as to the salary, benefits and interest due appellant.

5. Pursuant to Government Code § 19582.5, this decision is certified for publication as a precedential decision.

STATE PERSONNEL BOARD

William Elkins, President
Ron Alvarado, Vice President
Sean Harrigan, Member
Maeley Tom, Member
* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on August 5, 2003.

Walter Vaughn
Executive Officer
State Personnel Board

[Torossian.dec]