BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **J[redacted] H[redacted]** **T[redacted] H[redacted]** For back pay and benefits after reinstatement to the position of Correctional Officer at the Richard A. McGee Correctional Training Center, Department of Corrections at Galt	)	SPB Case Nos. 34675 and 34702 **BOARD DECISION** (Precedential) **NO. 96-07** May 7-8, 1996

Appearances: Janice Shaw, Hearing Representative, California Correctional Peace Officers Association, on behalf of appellants, J[redacted] H[redacted] and T[redacted] H[redacted]; Michael E. Gash, Labor Relations Counsel, Department of Personnel Administration, on behalf of respondent, Richard A. McGee Correctional Training Center.

Before: Lorrie Ward, President; Floss Bos, Vice President; Ron Alvarado, Richard Carpenter and Alice Stoner, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) after the Board rejected the Administrative Law Judge's (ALJ) Proposed Decision denying back pay to appellants, J[redacted] H[redacted] and T[redacted] H[redacted]. In its original decision in this case, the Board found that there was no substantial evidence in the record to support appellants' rejection during probation and ordered that they be reinstated to their positions. The Board's decision did not address the issue of back pay.

After the parties were unable to agree on whether back pay was owed for the time period between February 18, 1994, when appellants were improperly rejected, and December 6, 1994, when the Board

ordered them reinstated, the parties requested a hearing. The ALJ conducted a hearing on the issue of back pay and prepared a Proposed Decision denying appellants back pay. On August 8, 1995, the Board rejected the ALJ's Proposed Decision and asked the parties to brief the issue of back pay.

After a review of the transcripts and the oral and written arguments of the parties, the Board determines for the reasons set forth below that back pay and benefits should be paid to appellants for the period February 18, 1994 to December 6, 1994.

REVIEW OF ORIGINAL DECISION

On January 1, 1994, J[redacted] H[redacted] and T[redacted] H[redacted] were each appointed to the position of Correctional Officer at the Richard A. McGee Correctional Training Center, Department of Corrections at Galt. While stationed at the Training Center, appellants were required to qualify on a number of different weapons.

On January 21, 1994, during a routine weapons qualification, H[redacted] and H[redacted] occupied positions next to each other on the firing line, H[redacted] on the left and H[redacted] on the right. A rangemaster observing H[redacted]'s attempt to hit the target noticed that H[redacted] shot to her left or at the berm in front of the target. When H[redacted]'s target was scored, however, she registered a score of 25 of 25. H[redacted], who was firing at the same time, was not observed while she was shooting but scored only 14 hits out of

a possible 25 and failed to qualify during this particular qualification round.

Sergeant Hinkle, the Company Commander, was standing nearby and began to laugh. He assumed that H[redacted] hit H[redacted]'s target. He told appellants that H[redacted] had slid by and that, without H[redacted]'s help, H[redacted] would not have qualified. H[redacted] and H[redacted] were later observed laughing about H[redacted] qualifying because H[redacted] shot at the wrong target.

Based on this incident, H[redacted] and H[redacted] were rejected from probation effective February 18, 1994. The notice of rejection concluded that H[redacted] and H[redacted] had cheated during the January 21, 1996 range qualifications. H[redacted] and H[redacted] filed timely appeals.

In his Proposed Decision, the ALJ found that there was no substantial evidence to support the rejections. In addition however, the ALJ found that appellants had not completed training at the Academy and were not certified as peace officers pursuant to the requirements of the Peace Officer Standards and Training Commission (POST). Consequently, the ALJ believed it would be inappropriate to place appellants in permanent positions as Correctional Officers in that Penal Code § 832 prohibits an individual who is not POST certified from carrying out the duties of a peace officer. The ALJ determined that the proper remedy was to modify the rejections and reinstate appellants as Correctional Officers on a probationary basis commencing December 6, 1994. The

Board adopted the ALJ's decision as its own. Neither party appealed the Board's decision.

H[redacted] returned to the Correctional Training Center in December and completed her training. H[redacted] did not return to work. In December of 1994, H[redacted] was five months pregnant and chose to delay her re-entry to the Correctional Training Center until after the birth of her child.

Based on the ALJ's finding that there was no substantial evidence to support their rejections during probation, appellants requested back pay, benefits, and interest for the period from February 18, 1994, the day the rejections were effective, to December 5, 1994, the day the Board ordered appellants reinstated. The parties were unable to agree on the issue of back pay. This appeal ensued.

ISSUES

1. Are appellants eligible for back pay and benefits?

2 To what position shall appellants be restored?

3. To what benefits and interest are appellants entitled?

4. To what extent should appellants' back pay award be reduced due to mitigation or appellants' failure to be ready, able and willing to work?

DISCUSSION

ARE APPELLANTS ELIGIBLE FOR BACK PAY?

The Department argues that Government Code § 19175 prohibits the award of back pay to appellants.

Government Code section 19175 provides in pertinent part that:

> The board . . .may investigate with or without a hearing the reasons for rejection. After investigation, the board may do any of the following:
>
> (a) Affirm the action of the appointing power.
> (b) Modify the action of the appointing power.
> (c) Restore the name of the rejected probationer to the employment list for certification . . .
> (d) Restore him or her to the position from which he or she was 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. . . .

Government Code § 19180 provides in pertinent part:

> If the board restores a rejected probationer to his position it shall direct the payment of salary to the employee for such period of time as the rejection was improperly in effect. . .

The Department argues that back pay cannot be awarded to appellants because the ALJ modified the action of the appointing power pursuant to Government Code § 19175 (b) and did not restore appellants to their positions pursuant to section 19175 (d). We disagree.

The clear intent of the statute is that, when there is no substantial evidence to support the reason or reasons for rejection, the Board must redress the impropriety of the Department's decision to reject the probationer by restoring the probationer to his or her position. In the present case, the ALJ found, and the Board agreed, there was no substantial evidence to support the reason for appellants' rejections on probation.

Consequently, it was our intention to restore appellants to their positions.

This determination is supported by our analysis of the meaning of "modify" under Government Code § 19175, subdivision (d). Before 1985, the Government Code included only three options the Board could exercise when faced with an appeal of a rejection from probation. These options were: to affirm, to restore the probationer's name to an employment list, or to restore the probationer to his or her position. In 1985, an additional option was added: the Board could now *modify* the action of the appointing power. The meaning of the term "modify" is not further described. We can, however, construe the statute.

Subdivision (b), the modification option, is positioned on a continuum somewhere between subdivision (a), where the Board affirms the Department's action, and subdivision (d), where the Board restores the probationer to his or her position based on a finding either that the Department has acted in bad faith or, as here, that there is no substantial evidence to support the reasons for rejection. Thus, the Board may modify an action, in a case where there may be substantial evidence in the record to support the reasons for rejection but the Board, nonetheless, determines that rejection is not appropriate. For example, the Board might modify a rejection during probation to an Official Reprimand upon a showing that minor discipline is warranted but that rejection is too harsh under the circumstances.

Applying the above interpretation of the statutory language to the present case, modification is not appropriate. There is no showing that these probationers failed to meet any standards. They were rejected based solely on one incident of alleged misconduct -- cheating at the firing range. The ALJ found that there was no substantial evidence to support this reason for rejection. Thus, there is no basis in law for modifying the appellants' rejections during probation and appellants must be restored to their positions.

TO WHAT POSITIONS SHALL APPELLANTS BE RESTORED?

While at the Correctional Training Center, and during their probationary period, appellants H[redacted] and H[redacted] held the classification of Correctional Officer. Appellants can be made whole by restoring them to the position they would have been in had they not been improperly rejected, with due consideration for the fact that successful graduation from the academy is a necessary prerequisite for completion of the academy. We cannot speculate that had appellants not been wrongfully rejected they would have graduated from the academy. Thus, we restore appellants to probationary status in the Correctional Officer classification at the academy. We award back pay to compensate them for the time they were wrongfully rejected.

Under the pay structure governing appellants' classifications, a Correctional Officer remains in Range A until he or she has completed academy training. Neither appellant had completed

academy training at the time of thier rejection; thus, both appellants will be paid back pay at the rate of Range A.[1]

The projected net salary for H[redacted] between February 19, 1994 and December 5, 1994 at Range A was $13,720.22. Her projected gross salary for that period was $18,399.62. H[redacted]'s projected net salary at Range A for the same period was $12,599.04 and her gross salary was $18,399.62.

TO WHAT BENEFITS AND INTEREST PAYMENTS ARE APPELLANTS ENTITLED?

Government Code § 19180 provides in pertinent part:

> If the board restores a rejected probationer to his position it shall direct the payment of salary to the employee for such period of time as the rejection was improperly in effect.

Because the purpose of a back pay remedy is to place an employee in the position he or she would have been in but for the employer's improper act, we construe the term "salary" to include both salary and benefits. This construction is supported by the legislative history of an analogous statute, Government Code § 19584. Prior to January 1, 1986, Government Code § 19584 was identical to section 19180. However, in 1985, Assembly Bill (AB) 2009 (Chapter 1195, Statutes of 1985) was passed which amended section 19584 to provide in pertinent part:

> Whenever the board revokes or modifies an adverse action and orders that the employee be returned to his or her

[1]At the time of the hearing oral argument before the Board, appellant H[redacted] had completed her academy training and become POST certified. Appellant H[redacted] had not yet returned to state service.

> 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 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.

The bill analysis of AB 2009 by the State Personnel Board described the new provisions as follows:

> [The new provisions] [a]uthorize the Board to award interest payments and lost benefits to employees when adverse actions are revoked or modified. The award of benefits generally occurs under the existing law and AB 2009 would clarify this issue. The award of interest to employees will represent a new cost to the State. (State Personnel Board, Analysis of Assem.Bill 2009 (1985 Reg. Sess.) Jan. 8, 1985.)

The purpose of AB 2009 in defining benefits was to clarify existing law as interpreted by SPB and to permit the Board to award interest. Thus, prior to enactment of AB 2009, the Board construed the term "salary" to include benefits. There is no reason to adopt a different interpretation now.

We find that Government Code § 19180 allows the Board to award both salary and benefits, and that the benefits that may be awarded under section 19180 are the same as the benefits that may be awarded under section 19584.

AMOUNT OF BENEFITS

During February 19, 1994 through December 5, 1994 both appellants would have accumulated 32 hours of holiday pay. In

addition, each would have accumulated 88 hours of sick leave, 88hours of vacation leave, and 80 hours of excess hours worked.

Flex Elect

While a Cadet at the Correctional Training Center, appellant H[redacted] was enrolled in the state's "Flex Elect" cash option program in lieu of medical benefits. H[redacted] was able to exercise this option since her husband was a state employee and participated in a health insurance program. H[redacted] is to be awarded the amount she would have been received in Flex Elect benefits during the period February 19, 1994 to December 5, 1994.[2]

[2]Even if the Board did not construe the term "salary" as used in section 19180 to include benefits, appellants would be eligible for health benefits pursuant to Government Code § 22814 which provides:

> "An employee enrolled in a health benefits plan who is removed or suspended without pay and later reinstated or restored to duty on the ground that such removal or suspension was unjustified, unwarranted or illegal shall not be deprived of coverage or benefits for the interim, but any contributions otherwise payable by the employer which were actually paid by him shall be restored to the same extent and effect as though such removal or suspension had not taken place, and any other equitable adjustments necessary and proper under the circumstances shall be made in premiums, subscription charges, contributions and claims."

Ironwood Allotment

When both appellants were initially employed in January 1994, the Department offered officers a $2,400.00 allotment for accepting positions at certain prisons. In order to earn the allotment, officers must remain in the position for one year. Both appellants accepted allotment eligible positions at Ironwood State Prison. Appellants argue that this special allotment is a benefit to which they are entitled.

As noted above, one purpose of AB 2009 in amending section 19584 was to clarify the types of benefits that were to be included in a back pay award. Government Code § 19584 provides in pertinent part:

> Benefits shall include, but shall not be limited to, retirement, medical, dental, and seniority benefits pursuant to memorandum of understanding for that classification of employee to the employee for such period of time the board finds the adverse action was improperly in effect.

Although the language of the statute states that benefits shall not be limited to the benefits specifically listed in the statute, in Swepston v. State Personnel Board (1987) 195 Cal. App.3d 92, the court of appeal found that only benefits of the same general nature or class as the other benefits enumerated in section 19584 could be rightly awarded. Id. at 97. In Swepston, the issue was overtime and the court concluded that overtime was not in same general nature or class. Id.

The categories enumerated in Government Code § 19584 are "retirement, medical, dental, and seniority benefits pursuant to memoranda of understanding." A special allotment for remaining at a particular prison is not in the same general nature or class as these benefits and, thus, is not a benefit the Board has discretion to award.[3]

Interest

As noted above, the purpose of AB 2009 was to enable the Board to award interest on back pay and benefits awarded pursuant to 19584. No such amendment was adopted or proposed to allow the Board to award interest on back pay and benefits awarded pursuant to section 19180. Consequently, no interest will be awarded.

TO WHAT EXTENT SHOULD APPELLANTS' BACK PAY AWARD BE REDUCED DUE TO MITIGATION OR APPELLANTS' FAILURE TO BE READY, ABLE AND WILLING TO WORK?

Mitigation

Section 19180 provides in pertinent part:

> From 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.

Both appellants presented unrebutted evidence that they sought

[3]Even if the Ironwood allotment was appropriate, H[redacted] would be ineligible. After her return to work, H[redacted] was assigned to Ironwood but requested a hardship transfer to a no-allotment prison. We reject as speculative H[redacted]'s argument that if she had not been improperly rejected, her circumstances would most likely have been have been completely different and she would not have needed to transfer.

employment but were unable to find work. H[redacted] received $2,975.00 in Unemployment Insurance Compensation payments for the calendar year 1994. In November 1994, H[redacted] was employed in a Circuit City store where she received $1,704.26 in wages while employed as a sales representative. H[redacted] received $2,420.00 in Unemployment Insurance Compensation payments for the calendar year 1994. These amounts will be deducted from appellants' back pay awards. The Department failed to demonstrate that either appellant might reasonably have earned more than the amounts stated above.

Ready, Able and Willing to Work

Government Code § 19180 also provides:

> Salary shall not be authorized or paid for any portion of a period of rejection that the employee was not ready, able, and willing to perform the duties of his position, whether such rejection is valid or not.

The Department contends that H[redacted] should not be paid back pay because she was not ready, able or willing to work. The Department bases this contention on the fact that, after the Board ordered the Department to reinstate H[redacted], she declined to return immediately to the academy because she was 5 months pregnant.

The Department confuses the time period after December 6, 1994 with the time period before December 6, 1994. The back pay period is the time the rejection was improperly in effect: February 18, 1994 through December 6, 1994. The Department proved that appellant was not ready, able and willing to work after December 6,

1994, but did not demonstrate that appellant was not ready, able, and willing to work before December 6, 1996.

ORDER

WHEREFORE IT IS DETERMINED that:

1. Back pay and benefits are awarded to appellants H[redacted] and H[redacted] pursuant to Government Code § 19180 and consistent with the discussion above.

2. This decision 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
Ron Alvarado, Member
Richard Carpenter, Member
Alice Stoner, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on May 7-8, 1996.

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