BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 31193
	)	
MICHAEL K. YOKUM	)	**BOARD DECISION**
	)	(Precedential)
From non-punitive termination	)	
from the position of Warehouse	)	**NO. 93-25**
Worker with the Department of	)	
General Services at Sacramento	)	August 3, 1993

Appearances: M. Catherine Jones, Attorney, Van Bourg, Weinberg, Roger & Rosenfeld, representing Michael K. Yokum, appellant; Deborah Kerns, Staff Counsel, Department of General Services, representing Department of General Services, respondent.

Before Carpenter, President; Stoner, Vice President; and Ward, Member.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board granted a Petition for Rehearing filed by Michael K. Yokum (appellant), a Warehouse Worker with the Department of General Services (Department), who had been terminated without fault by the Department for failure to maintain a driver's license.

Appellant's Petition for Rehearing was filed after the Board adopted the Proposed Decision of an Administrative Law Judge (ALJ) sustaining appellant's non-punitive termination. The Board granted appellant's Petition for Rehearing to consider the propriety of appellant's non-punitive termination in light of appellant's status as an alcoholic and the Americans with Disabilities Act.

After reviewing the record in this case, including the transcript of the hearing and exhibits, and after consideration of

the written briefs and oral arguments presented to the Board, we sustain the Department's non-punitive termination of the appellant.

FACTUAL BACKGROUND

The facts in this case are simple and without relative dispute. Appellant was employed with the Department beginning in 1985. In 1987, appellant was promoted to the position of Warehouse Worker. In January of 1991, he accepted a limited-term position with the Department of Corrections, also as a Warehouse Worker. Approximately a year later, appellant's California driver's license was revoked for three years by the Department of Motor Vehicles pursuant to Vehicle Code section 13352(a)(5). The license revocation was the result of a conviction for driving under the influence of alcohol.

Because appellant's limited-term position at the Department of Corrections required a driver's license, appellant was terminated from his limited-term position and thereafter returned to his position as a Warehouse Worker for the Department of General Services.

Shortly after appellant's return to the Department of General Services, non-punitive termination proceedings were initiated against appellant under Government Code section 19585(b) on the grounds that appellant failed to maintain his Class III driver's license as required by the job specification for the class of Warehouse Worker.

In his Proposed Decision, the ALJ found that section 19585(b) gave the Department the statutory right to terminate appellant. Furthermore, the ALJ concluded that while the Board's Precedential Decision William Aceves (1992) SPB Dec. No. 92-04 stated that one's alcoholism and subsequent rehabilitation efforts could be considered in a disciplinary action, there was no precedent for doing so for a non-punitive termination. The Board originally adopted the ALJ's Proposed Decision.

In appellant's Petition for Rehearing, appellant argues that his status as an alcoholic requires that the Department provide him with reasonable accommodation under the Americans with Disabilities Act (ADA) by allowing him to remain in his position without being required to drive. Appellant contends that such accommodation would be relatively simple as his position requires only that he drive a few times a year, and that in those instances, there were many co-workers eager to accept his occasional driving assignments. The record of the hearing reflects that appellant's supervisor admitted this to be true.

ISSUE

What is the impact of the Americans with Disability Act on the Department's options under the non-punitive terminations statute?

DISCUSSION

Government Code section 19585(b) allows an appointing power to terminate, demote, or transfer an employee who fails to meet the

requirements for continued employment in the specification for the class to which the employee is appointed. Subdivision (d) of section 19585 defines the requirements for continued employment to a class to include, among other things, the retention of specified licenses.

The classification of Warehouse Worker requires among its minimum qualifications the possession of a current class III California driver's license. Appellant failed to meet a requirement for continued employment in the position of Warehouse Worker when his driver's license was revoked.

In the Precedential Decision of George Lannes, (1992) SPB Dec. No. 92-10, the Board was asked to determine whether Mr. Lannes could be terminated pursuant to Government Code section 19585 for failure to maintain his driver's license. (Mr. Lannes' license was similarly suspended for a drunk driving conviction.) In this Precedential Decision we stated:

> Appellant argued at hearing, and the ALJ found, that the Department should have accommodated him by allowing him to continue to work in his former position without driving or by finding him another position within the Department that did not require the possession of a driver's license...
>
> Nevertheless, we must conclude that the Department was clearly within its statutory rights in terminating appellant without fault under Government Code section 19585. The Department has the choice to transfer or demote an employee rather than terminate him or her, but the Department has no statutory obligation to justify its decision to terminate an employer so long as the statutory prerequisites for a non-punitive termination are satisfied. Appellant's rights in this situation are

> limited to seeking permissive reinstatement once his driver's license is restored.

Under normal circumstances, the Board would end its discussion at this point and conclude that the Department was acting within its statutory authority to terminate appellant based on his failure to maintain his driver's license. The appellant, however, argues that his admitted status as an alcoholic requires that the Department reasonably accommodate him under the ADA (42 U.S.C. 12101 et seq.) by allowing him to retain his job without requiring him to drive. While the Board is sympathetic to appellant's request, we do not believe that the ADA requires such a result in this instance.

The ADA, passed by Congress in 1990, provides among other things that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. section 12112(a).

The state of California is a "covered entity" under the ADA [42 U.S.C. section 12111(2)], and thus, is prohibited from terminating a qualified individual with a disability from a position because of the disability.

The ADA defines a "qualified individual with a disability" as an individual with a disability who, with or without reasonable

accommodation, can perform the essential functions of the employment position that the individual holds or desires. 42 U.S.C. section 12111(8). Section 12111(8) further explains:

> For purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employee has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

Alcoholism is generally considered to be a "covered disability" under the ADA. Ogletree, Deakins, Nash, Smoak and Stewart, Americans with Disabilities Act: Employee Rights and Employer Obligations (1992) section 3.05[1], p. 3-61. While alcoholism may be considered a "disability" for purposes of the ADA, the ADA specifically provides that a covered entity may hold an employee who is an alcoholic to the same qualification standards for employment that such entity holds its other employees. 42 U.S.C. section 12114(c)(4).

In short, the ADA does not require that the Department retain appellant as a Warehouse Worker despite his status as a disabled alcoholic. First, appellant is not "an otherwise qualified individual with a disability" as provided for in section 12112(a). The retention of a driver's license was at all relevant times listed as a minimum qualification for his position as a Warehouse Worker. Appellant failed to have a driver's license at the time of his termination. Thus, regardless of appellant's status as an alcoholic, he was "not otherwise qualified" to continue in the

position of Warehouse Worker under Government Code section 19585.

Second, as previously stated, the ADA specifically provides that an employer may hold an employee who is an alcoholic to the same qualification standards as it holds other employees. 42 U.S.C. section 12114(c)(4). For example, the Equal Employment Opportunity Commission has stated that an employer may discipline an employee for showing up late to work or not showing up at all, even if the conduct is attributable to a disability such as alcoholism. (A Technical Assistance Manual On The Employment Provisions (Title 1) Of The Americans With Disabilities Act, Equal Employment Opportunity Commission, January 1992, page VIII-5.) Section 12114(c)(4) runs completely opposite of appellant's request; that, as an alcoholic, he is entitled to retain his position when non-alcoholic employees who do not possess current driver's licenses would not be retained.

Because the ADA was only enacted a relatively short time ago, there is sparse case law interpreting its provisions. The ADA, however, parallels the Rehabilitation Act of 1973 in most respects (see our discussion in L[redacted] W[redacted] (1993) SPB Dec. No. 93-18, pp. 11-12.) and thus we look to cases under the Rehabilitation Act to find further support for our conclusion.

In Pandazides v. Virginia Board of Education (E.D. Va 1990) 752 F.Supp. 696, a teacher brought an action under the Rehabilitation Act claiming that she was discriminated against

because of her learning disability when she was terminated from her teaching position for failure to pass the National Teachers Examination (NTE), a requirement for retention of her teaching certificate. The Board of Education defended its dismissal of Ms. Pandazides on the grounds that she was not an "otherwise qualified individual" as she had failed to obtain a minimum qualifying score on the examination. Ms. Pandazides argued that, as a learning disabled woman, the Board of Education should accommodate her in some way, such as by modifying or waiving the examination.

In granting the Board of Education's motion to dismiss the case, the court stated:

> The NTE has been determined to be one of the basic qualifications necessary to receive a teaching certificate in Virginia and thus, to become a teacher within the Prince William County School system. Yet, the plaintiff has not passed that initial licensing exam in order to receive certification. The Rehabilitation Act is not an affirmative action statute and the Virginia Board of Education is not required to fundamentally alter the minimum qualifications required for licensure in Virginia. Pandazides v. Virginia Board of Education at 697. (Emphasis added.)

In the Ninth Circuit case of Lucero v. Hart (9th Cir. 1990) 915 F.2d 1367, a similar action was brought by a discharged County employee, Ms. Lucero. Ms. Lucero, a clerk-typist, was discharged when it was discovered that she had never passed the County's standard typing test, which required a score of 45 words per minute (w.p.m). Ms. Lucero could type only 44 w.p.m., even after the employer attempted to make reasonable accommodations for her

physical and emotional disabilities. The Ninth Circuit affirmed the District Court's judgment granting the employer's motion to dismiss, noting:

> Initially, it should be noted that Lucero was technically not "otherwise qualified" for her job. A clerk in her position must be able to type 45 w.p.m. Lucero could only type 44 w.p.m. If 44 w.p.m. was sufficient, why is that not the minimum requirement? If 44 w.p.m. is close enough, why not 43 w.p.m.; or 40 w.p.m.? While this seems a very technical distinction, the standard was set at 45 w.p.m. for a reason, and it is not the court's job to establish minimum qualification standards for county employees in Sacramento. Lucero v. Hart at pp. 1371-72. (Emphasis added.)

In the instant case, the minimum qualifications for the class of Warehouse Worker includes possession of a valid California driver's license: the Board does not have the authority to make an exception in appellant's case. There is nothing the Department can do to "reasonably accommodate" appellant without granting an exception to the requirements of the job specification for Warehouse Worker. To allow appellant to return to his job as a Warehouse Worker without his driver's license would serve to give appellant an advantage over non-disabled co-workers who lose their driver's license privileges. We do not believe this is what Congress intended when it passed the ADA.

ORDER

1. The non-punitive termination of appellant is sustained.

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

STATE PERSONNEL BOARD*

Richard Carpenter, President
Alice Stoner, Vice-President
Lorrie Ward, Member

*Member Floss Bos was not present and therefore did not participate in this decision. Member Albert R. Villalobos was not a member of this Board when this case was originally heard 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 August 3, 1993.

GLORIA HARMON

Gloria Harmon, Executive Officer
State Personnel Board