

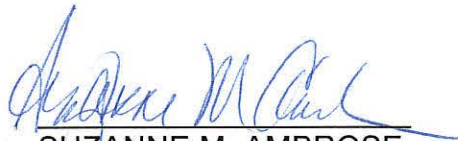
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STATE PERSONNEL BOARD

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* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Board Resolution and Order at its meeting on December 12, 2019, as reflected in the record of the meeting and the Board minutes.


SUZANNE M. AMBROSE
Executive Officer

SALLY KARVON
v.
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION

Appeal from Non-Punitive Termination

Case No. 19-1060

Proposed Decision

STATEMENT OF THE CASE

This matter came on for a hearing on Appellant's Motion to Dismiss before State Personnel Board (SPB) Administrative Law Judge (ALJ) Amy Friedman, on September 12, 2019, in Sacramento, California. The matter was submitted at the conclusion of the hearing on September 12, 2019.

Appellant Sally Karvon (Appellant) was represented by Theresa Witherspoon, Assistant Chief Counsel, Service Employees International Union, Local 1000.

Respondent California Department of Corrections and Rehabilitation (Respondent or CDCR) was represented by Sarah Hartmann, Attorney III, California Correctional Health Care Services (CCHCS), CDCR.

PROCEDURAL HISTORY

Respondent served a Notice of Termination Without Fault (Notice) on Appellant, non-punitively terminating Appellant from her position as a Licensed Vocational Nurse, CDCR, effective on May 24, 2019. The Notice cited Government Code section 19585 as the authority for the non-punitive termination. Cause for the action was recited as follows:

This non-punitive termination is being taken against you for your failure to meet a requirement for continuing employment. All CDCR, CCHCS employees are required by law to be skin tested or evaluated for Tuberculosis (TB) and must be free of infectious TB prior to employment and on at least an annual basis or more often if directed (Penal Code Section 6007). Any employee who does not meet the requirement can be promptly and legally terminated from CDCR, CCHCS.

The Notice alleged Appellant failed to complete annual tuberculosis testing for 2019, and asserted therefore Appellant is “not legally permitted to remain in [her] classification of Licensed Vocational Nurse, CDCR, CCHCS.” The Notice concluded that Appellant had failed to maintain a condition of her employment, and under Penal Code section 6007, CDCR was required to terminate her employment.

Appellant filed a Motion to Dismiss. Appellant argued that the Notice was invalid because Government Code section 19585 allows for non-punitive termination only for failure to meet a requirement prescribed in the official classification specification, and annual tuberculosis testing is not a requirement in the specification for the classification of Licensed Vocational Nurse, CDCR. Appellant also argued that non-punitive termination can only be premised on the acquisition or retention of licenses and professional qualifications (Gov. Code, § 19585, subd. (d)), and may not be applied to medical standards (*ibid.*). Additionally, Appellant urged that Penal Code section 6007 cannot form an independent basis for dismissing Appellant, because it is not part of the civil service law overseen by the SPB pursuant to its authority under article VII, section 3 of the California Constitution.

Respondent opposed the motion. Respondent argued that it properly non-punitively terminated Appellant because Penal Code section 6007 makes annual tuberculosis a condition of continued employment. Respondent also asserted Appellant was prohibited by law from having contact with inmates, and the ability to contact inmates is a necessary requirement for continuing to perform all of the job duties designated in the specifications for Appellant’s classification. In support of its position, Respondent cited *J.S.*, SPB case number 07-1861PA, a non-precedential decision wherein the SPB

upheld the non-punitive termination of a Correctional Officer who failed to complete annual tuberculosis testing. In *J.S.*, the SPB found that an employee who does not comply with the testing requirement must necessarily be precluded from contact with inmates, because continued inmate contact would undermine the Legislature's purpose of preventing the spread of tuberculosis in California's prisons. Because the ability to have contact with inmates was necessary for eligibility for continuing employment under the specifications for the classification of Correctional Officer, the SPB concluded that non-punitive termination was proper. The SPB also concluded that the non-punitive termination did not impermissibly impose a medical standard, because the basis for termination was failure to comply with Penal Code section 6007, not medical reasons. Respondent requested official notice of *J.S.*

Appellant replied to Respondent's Opposition. Appellant primarily attacked Respondent's reliance on *J.S.*, providing information concerning subsequent writ proceedings wherein *J.S.* was vacated by order of the Superior Court of Sacramento County and remanded to the SPB. The superior court found that Penal Code section 6007's requirement that CDCR employees demonstrate that they are free from tuberculosis in an infectious stage as a condition of continued employment was "unquestionably a medical standard." The SPB filed a Return with the superior court, stating that the decision in SPB case number 07-1861PA was set aside and referred to the Chief ALJ for further proceedings consistent with the superior court's order. The SPB later filed an additional Return with the superior court, stating that a revised decision had been adopted. In that revised decision, case number SPB 07-1861PAC, SPB ALJ Jason Krestoff ordered the non-punitive termination revoked. ALJ Krestoff found that because

Penal Code section 6007 requires employees who test positive for tuberculosis to have a medical evaluation to determine the need for follow-up care, it imposed a medical standard for continuing employment, and therefore not a proper basis for non-punitive termination under Government Code section 19585.

In the Reply, Appellant also discussed a Sacramento County Superior Court order in *CDCR v. SPB (Michael Bell)*, a writ proceeding wherein CDCR challenged the SPB decision revoking Bell's non-punitive termination as a Correctional Officer due to failure to complete annual tuberculosis testing. The superior court found CDCR could not use Government Code section 19585 to non-punitively terminate the Correctional Officer, because securing a tuberculosis certificate is not listed in the specifications for that classification.

Appellant requested official notice of the pleadings and orders in the *J.S.* and *Bell* cases. Appellant additionally argued that Respondent cannot now recast the issue as contact with inmates, because the Notice did not purport to terminate Appellant for that reason. Appellant asserted Appellant's due process rights would be violated if her termination was upheld for a reason not asserted in the Notice.

Respondent filed a response to Appellant's Reply. Counsel for Respondent explained that she was unaware of the subsequent proceedings in *J.S.* and withdrew Respondent's request for official notice of the revoked decision.

Oral argument was conducted on September 12, 2019. At the hearing, Appellant's counsel reiterated the arguments from her pleadings, urged a ruling consistent with the non-precedential SPB decisions cited, and also noted that Appellant's classification is particular to employment with CDCR and the SPB has not modified the

specification to include tuberculosis testing. Respondent argued that permitting non-punitive termination for failure to complete annual tuberculosis testing is necessary to give effect to the Legislature's intent in making that testing a "condition of continued employment," and to harmonize Penal Code section 6007 and Government Code section 19585. Respondent also urged that the tuberculosis testing is not an impermissible medical standard, because the relevant condition of employment is only completing testing, not testing negative for tuberculosis. Respondent did not oppose Appellant's request for official notice, which was granted. Official notice was also taken of the SPB specifications for the classification of Licensed Vocational Nurse, California Department of Corrections and Rehabilitation.

PRINCIPLES OF LAW AND ANALYSIS

Under Government Code section 19585, a permanent employee can be terminated in lieu of adverse action for failure to meet a requirement for continuing employment. (Gov. Code, § 19585.) Specifically, "[a]n appointing power may terminate, demote, or transfer an employee who fails to meet the requirement for continuing employment that is prescribed by the board . . . in the specification for the classification to which the employee is appointed." (*Id.* at § 19585, subd. (b).) The SPB's discretion to designate requirements for continuing employment is limited to "the 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." (*Id.* at § 19585, subd. (d).) The SPB is required to create procedures for ensuring that affected employees are aware of the requirements. (*Ibid.*)

Additionally, the requirements "shall not include medical, physical ability, work, or academy performance standards." (*Ibid.*)

The specification for the classification of Licensed Vocational Nurse, CDCR defines the position as working "in a program providing care to inmates." The typical tasks of the position are "performing nursing procedures as regulated by licensure and certification," including administering medications, performing treatments and procedures, and collecting and documenting vital signs. Some of the typical tasks of the position are specific to the correctional setting, such as "demonstrating awareness of inmate rights and the potential for inmate abuse." The specification also requires possession of a valid, active license from the State of California to practice as a Licensed Vocational Nurse.

Respondent non-punitively terminated Appellant for failure to complete annual tuberculosis testing for 2019. Respondent conceded that tuberculosis testing is not required by Appellant's classification specification. And as detailed above, the grounds for non-punitive termination under Government Code section 19585 are limited to requirements designated "*in the specification for the classification to which the employee is appointed.*" (Gov. Code, § 19585, subd. (b).) Despite that critical flaw, Respondent urges that Government Code section 19585 nevertheless must apply when an employee fails to complete annual tuberculosis testing, to effectuate Penal Code section 6007 and harmonize it with Government Code section 19585. Penal Code section 6007 states, in relevant part, as follows:

(a) No person shall be employed initially by the department¹ unless that person, after an offer of employment, completes an examination, a test, or a medical evaluation and is found to be free of tuberculosis in an infectious or contagious stage prior to assuming work duties.

(b) As a condition of continued employment with the department, those employees who are skin-test negative shall receive an examination or test at least once a year . . . for as long as the employee remains skin-test negative. If an employee has a documented positive skin test, the employee shall have a medical evaluation to determine the need for followup [*sic*] care. An employee with a positive skin test shall follow the department's guidelines for tuberculosis control.

Statutory Interpretation of Government Code section 19585 and Penal Code section 6007

Respondent's argument is based on concepts of statutory interpretation. The primary responsibility when interpreting a statute is to ascertain the Legislature's intent, so as to effectuate the law's purpose. (*Cal. Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698; *County of Los Angeles v. City of Los Angeles* (2013) 214 Cal.App.4th 643, 650.) The first source for determining legislative intent is the words of the statute. (*County of Los Angeles, supra*, 214 Cal.App.4th at p. 650.) Words are read with their ordinary meanings and construed in context, and the "various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (*Ibid.*; *Cal. Correctional Peace Officers' Assn. (CCPOA) v. California* (2010) 189 Cal.App.4th 849, 857.) While constructions leading to absurd results should be avoided (*CCPOA, supra*, 189 Cal.App.4th at p. 857), statutory interpretation does not afford an opportunity to rewrite a statute—"If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not

¹ The "department" refers to CDCR, the Department of the Youth Authority, the Board of Prison Terms, and the Youthful Offender Board. (Pen. Code, § 6006.5, subd. (a).)

appear on the face of the statute or from its legislative history.” (*Cal. Teachers Assn.*, *supra*, 28 Cal.3d at p. 698.)

Respondent argues because Penal Code section 6007 mandates annual tuberculosis testing as “a condition of continued employment,” that testing requirement is a basis for non-punitive termination under Government Code section 19585. The language of section 19585, however, is abundantly clear—the grounds for non-punitive termination are limited to the conditions for employment designated by the SPB in the applicable classification specification. (Gov. Code, § 19585, subd. (b).) Reaching outside section 19585 to find additional grounds for non-punitive termination is also plainly prohibited by the statute’s introductory clause:

This section . . . may be used in lieu of adverse action . . . when the only cause for action against an employee is his or her failure to meet a requirement for continuing employment *as provided in this section*.

(Gov. Code, § 19585, subd. (a).) The Legislature thus did not authorize non-punitive termination based on any requirements other than those “prescribed *by the board . . . in the specification* for the classification.” (*Id.* at § 19585, subd. (b).) To go beyond that unambiguous limitation would impermissibly add to or alter the statute’s plain language, subverting the Legislature’s intent.

Turning to Penal Code section 6007, the annual tuberculosis testing provision is purposeful without reliance on Government Code section 19585. Section 6007 provides that “[a]s a condition of continued employment with the department, those employees who are skin-test negative shall receive an examination or test at least once a year” The phrase “[a]s a condition of continued employment” is independently meaningful. Under an ordinary, plain language reading, section 6007 provides that by virtue of their

continued employment with CDCR, employees must submit to continual tuberculosis testing on at least an annual basis. (Pen. Code, § 6007, subd. (b).) Employers have no general authority to demand medical testing from their employees. But because section 6007 makes annual testing a condition of continuing employment, employees who have contact with inmates cannot refuse testing for as long as they remain in CDCR's employ. (*Id.* at §§ 6006, 6007, subd. (b).) Declining to incorporate Government Code section 19585 into Penal Code section 6007 thus does not strip section 6007 of meaning or otherwise produce an absurdity.

Reading section 6007 in inverse—that if annual testing is not completed employment must be discontinued—is an unwarranted overreach. It does not appear that the Legislature intended to create a mechanism for personnel action through Penal Code section 6007. The statutory scheme, Penal Code sections 6006 to 6009, concerns tuberculosis control. The Legislature's express goal is to protect health and safety by controlling the spread of tuberculosis in California's prisons. (Pen. Code, § 6009.) The express means for controlling the spread of tuberculosis are ensuring that employees with inmate contact are screened for tuberculosis before beginning work, employees are thereafter tested annually, and employees who test positive follow tuberculosis control protocols. (Pen. Code, §§ 6006, 6007.) Nothing in the statutory scheme addresses consequences for failing to complete annual testing; there is no language authorizing termination, demotion, transfer, or any other personnel action by CDCR. Nothing in the legislative history of section 6007 indicates the Legislature considered non-punitive termination, or any other type of personnel action, when drafting section 6007. (Assem. Bill No. 3467 (1991-1992 Reg. Sess.); Sen. Bill No. 910 (1993-1994 Reg. Sess.); Sen.

Bill No. 2025 (1993-1994 Reg. Sess.); Assem. Bill No. 1470 (2011-2012 Reg. Sess.).)

The Legislature did not amend Government Code section 19585 when enacting section 6007, or when amending section 6007 three times thereafter. (*Ibid.*) Indeed, there is no indication in section 6007's legislative history that the Legislature considered any interplay with Government Code section 19585 when creating the annual testing requirement. (*Ibid.*) Section 6007's statutory language and legislative history therefore do not support finding legislative intent to authorize non-punitive termination for failure to complete annual tuberculosis testing.

Moreover, separating state employees from their employment is no simple matter. Because permanent civil servants have a constitutionally protected property interest in their positions, due process rights must be observed. (*Skelly vs. State Personnel Bd.* (1975) 15 Cal.3d 194, 206.) Additionally, as provided by the California Constitution, state employment is governed by the civil service statutes and overseen by the SPB. (Cal. Const., art. VII, §§ 1-3.) Given that context, it is unreasonable to read Penal Code section 6007 as creating grounds for summary termination, punitive or otherwise, outside of the civil service law.

In sum, while the Legislature made annual tuberculosis testing a "condition of continued employment" in Penal Code section 6007, there is no viable basis for concluding that by those words the Legislature intended to implicate Government Code section 19585. The phrase "requirement for continuing employment" as used in section 19585 has a specific, and limited, meaning—it refers only to requirements prescribed by the SPB in the classification specification. (Gov. Code, § 19585, subds. (a), (b).) Thus, permitting non-punitive termination for failure to complete annual tuberculosis testing

required by section 6007 would be crafting a personnel action provision from whole cloth, outside of section 19585's plain language and without support from section 6007's statutory language or legislative history. Such a result would not harmonize the statutes, but undermine section 19585.

Enforcement of Penal Code section 6007

Despite not creating grounds for non-punitive termination, Penal Code section 6007 is enforceable. Because section 6007 gives Respondent lawful authority to demand annual tuberculosis testing—indeed, requires that Respondent implement it—Respondent is empowered to enforce annual testing through adverse action under Government Code section 19574. Employees are obliged to follow lawful instructions from their employer. And failure to complete tuberculosis testing could endanger coworkers, inmates, and the public. Prisons are an environment where a large number of people live in close quarters; under such conditions a contagious disease could easily spread quickly, and could be introduced to the public as employees return to the community after interacting with inmates at work. Additionally, failure to complete tuberculosis testing can cause significant disruption to prison operations, as employees who have not timely screened negative for tuberculosis would likely be removed from duties involving inmate contact, requiring others to cover those duties. Accordingly, it is not difficult to imagine valid grounds for disciplinary action for inefficiency, inexcusable neglect of duty, willful disobedience, other failure of good behavior, and perhaps insubordination, against employees who fail to comply with annual tuberculosis testing as directed by Respondent. (Gov. Code, § 19572, subds. (c), (d), (e), (o) & (t).) And as harm, or likely harm, to the public service is the SPB's primary consideration in

determining a just and proper penalty, a significant penalty would likely be warranted. (*Skelly, supra*, 15 Cal.3d at p. 218.) Respondent thus has effective means enforcing annual tuberculosis testing.

Inmate Contact as a Condition of Employment

Respondent also argued non-punitive termination was proper because Appellant's non-compliance with Penal Code section 6007 precluded her from having contact with inmates, and the ability to contact inmates is an eligibility requirement for her classification. Appellant's classification—Licensed Vocational Nurse, CDCR—is specific to a correctional environment. The specification defines the classification as working "in a program providing care to inmates." The typical tasks of the classification, which involve providing nursing care to inmates, necessarily requires contact with inmates. Thus, if Appellant were prohibited from contact with inmates, she would be ineligible to continue her employment as outlined in the classification specification. Non-punitive termination therefore would be appropriate under Government Code section 19585. (*Stanley McNicol* (1994) SPB Dec. No. 94-14 [sustaining psychiatrist's non-punitive termination where probationary restrictions on medical license imposed by Osteopathic Medical Board of California prohibited prescribing controlled substances and treating patients].)

Respondent's argument, however, must fail for two reasons. First, Respondent did not purport to non-punitively terminate Appellant due to an inability to contact inmates. The only reason asserted in the Notice for the non-punitive termination was failure to complete annual tuberculosis testing as required by Penal Code section 6007. Respondent may not now expand the scope of the Notice. (See *Brown v. State Personnel Bd.* (1985) 166 Cal.App.3d 1151, 1165.)

Second, Penal Code section 6007 did not prohibit Appellant from inmate contact. Annual tuberculosis testing applies to all employees who have contact with inmates. (Pen. Code, § 6006.) Nothing in the statutory scheme, however, bars employees who fail to complete annual tuberculosis testing from having inmate contact. (Pen. Code, §§ 6006-6009.) While removing employees who fail to complete testing from duties involving inmate contact would be a sound decision, and further the statutory purpose of preventing the spread of tuberculosis, that action is simply not statutorily mandated. Where an outside entity's lawful exercise of authority prevents an employee from meeting the requirement of their classification specification, non-punitive termination is proper. (*McNicol, supra*, SPB Dec. No. 94-14; *George Lannis* (1992) SPB Dec. No. 92-10 [sustaining non-punitive termination where employee's driver's license was suspended due to conviction for driving under the influence].) However, Respondent cannot be permitted to create grounds for non-punitively terminating its employees based on its own, internal decision-making. If such were permitted, Respondent could invoke Government Code section 19585 whenever it assigns an employee away from a duty designated as a typical task in the employee's classification specification, or places an employee on administrative time off. That result is plainly untenable.

Medical Standards

Appellant argues that she cannot be non-punitively terminated for failing to complete annual tuberculosis testing, because under Government Code section 19585 the requirements for continuing employment may not include medical standards. (Gov. Code, § 19585, subd. (d).) As discussed above, the requirements for continuing employment that may form the basis for non-punitive termination are limited to those

designated by the SPB in the applicable classification specification. (*Id.* at § 19585, subds. (a), (b).) Because annual tuberculosis testing is not a requirement for continuing employment prescribed by the SPB in specification for the classification of Licensed Vocational Nurse, CDCR, it is not a valid basis for non-punitive termination. It therefore is inappropriate and unnecessary to determine whether annual tuberculosis testing would be an impermissible medical standard.

ORDER

Appellant's Motion to Dismiss is **GRANTED**. The Notice of Termination Without Fault issued by Respondent non-punitively terminating Appellant is **REVOKED**.

Respondent is to pay Appellant all backpay, benefits, and interest, if any, which would have accrued to her had she not been non-punitively terminated from her position as a Licensed Vocational Nurse, California Department of Corrections and Rehabilitation. This matter is referred to the Chief Administrative Law Judge and shall be set for hearing on written request of either party, within one year of the effective date of the SPB's decision, in the event that the parties are unable to agree as to the salary and benefits due Appellant.

DATED: October 4, 2019



AMY FRIEDMAN
Administrative Law Judge
State Personnel Board