

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 31387
)
 JOE NAVA) **BOARD DECISION**
) (Precedential)
)
 From rejection during probation)
 period from the position of) **NO. 95-05**
 Employment Program Representative)
 with the Employment Development)
 Department at Ontario) February 7-8, 1995

Appearances: Mary Jean Mee, Staff Counsel, Employment Development Department on behalf of respondent, Employment Development Department; Baltazar Baca, Attorney, on behalf of appellant, Joe Nava.

Before Richard Carpenter, President; Lorrie Ward, Vice President; Alice Stoner and Floss Bos, 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 Joe Nava (appellant) from rejection during probationary period from the position of Employment Program Representative [permanent-intermittent] with the Employment Development Department (Department). The appellant was rejected during probation for failing to process unemployment claims in an efficient and competent manner and for being inexcusably absent on a few occasions.

In his Proposed Decision, the ALJ found substantial reasons supported appellant's rejection during probation and further determined that there was no fraud or bad faith involved. The

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ALJ, however, chose to modify the rejection action pursuant to Government Code section 19175(b)¹, on the grounds that while the rejection action was warranted due to the preponderance of evidence that appellant's claim processing fell below that required to pass probation, the Department never told appellant that his work performance was unacceptable until his last day of work, so that the appellant had no opportunity to improve his performance. As a result, the ALJ ordered the Department to reinstate appellant as a permanent-intermittent Employment Program Representative and allow him to serve a new one-year probationary period. In addition, the ALJ awarded appellant backpay, including backpay for the period of time during which the Department did not call appellant into work while it was preparing to reject him during probation.

The Board rejected the Proposed Decision initially to determine whether appellant should be entitled to backpay when a rejection action is modified to allow an employee to serve a new probationary period and/or, whether backpay should be awarded for the period of time the appellant was not called into work while the rejection action was being prepared. We do not address these questions in this decision, however, because upon review of the record, including the transcript, exhibits and the written and

¹ All statutory references are to the Government Code unless otherwise indicated.

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oral arguments of the parties², we find that the Department acted in "bad faith" in rejecting appellant during probation and, accordingly, we restore appellant to his position as a permanent-intermittent Employment Program Representative pursuant to section 19175(d).

STATEMENT OF FACTS

The appellant began his probationary period with the Department on or about February 5, 1991 in the Department's Ontario office. He was one of three Spanish-speaking probationers who were hired at the same time to serve the large number of Spanish-speaking customers in that office. Although intermittent employees are employees who work periodically or for a fluctuating portion of a full-time work schedule (section 18552), the record reflects that appellant routinely worked close to a full-time schedule throughout his probationary period.

As a probationary employee, the appellant should have been given three reports of performance during his probationary period at approximate four-month intervals to identify any performance deficiencies and to keep him informed of his progress on the job (Cal. Code Regs., tit. 2, section 599.795). On August 9, 1991, the appellant was given his first Report of Performance for

² The Department did not appear for oral argument before the Board. Appellant and his attorney participated by telephone.

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Probationary Employee covering his employment from the beginning through May 1991. The appellant was marked "standard" in five categories, "outstanding" in one category, and "standard" overall. In the narrative portion of the report, the appellant was told, "when compared to others at the same stage of training your quality was far better." The appellant was rated "outstanding" in attitude and complimented on his willingness to undertake assignments. He was urged to continue his hard work to improve and contribute to the goal of providing quality service to the public. After the appellant signed the report, it was signed by his supervisor, John Rodriguez (Rodriguez), and became a part of appellant's personnel file.

On November 25, 1991, the appellant was given his second Report of Performance for Probationary Employee. He was again rated "standard" in five categories, "outstanding" in attitude, and "standard" overall. The report was intended to cover the period ending September 1991. Although the appellant was told that his average for claims completed was right around 3.14 claims per hour, the report stated that his overall output in claims completion was satisfactory.³ He was again rated "outstanding" in attitude and complimented on his flexibility and willingness to take on different assignments. The narrative

³ The record reveals that appellant was expected to complete approximately four claims per hour.

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portion of the report expressed some concern about attendance. The appellant had apparently moved his residence and was having some car problems and had taken off some time from work with his supervisor's permission. The report noted that the appellant had taken constructive steps to correct the attendance problem and his immediate response was appreciated. Nothing in the report indicated any major dissatisfaction concerns with the appellant's work performance. The appellant's supervisor, Rodriguez, gave the appellant the report to sign. The appellant signed the report and returned it to Rodriguez. The appellant assumed that the report was approved and placed in his personnel file. The appellant was never told otherwise.

Rodriguez normally had his manager review performance reports in draft before giving them to his employees. In this case, however, his supervisor, manager Candace Quiroz (Quiroz) was on vacation, and Rodriguez gave the second performance report to another manager who signed off on the draft without any changes. When Quiroz returned from vacation, she reviewed the report and told Rodriguez that she disagreed with it, finding it to be inconsistent with information she had received about the appellant's performance. She also felt that it contradicted information that the supervisor himself had previously given her about the appellant's performance. According to Quiroz's testimony, she and Rodriguez met in late November/early December

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wherein they discussed appellant's performance and Rodriguez agreed to rewrite the report with different ratings to reflect the changes she suggested. Neither Rodriguez nor Quiroz informed Nava that the report was being revised.

Rodriguez drafted a revised second Report of Performance for Probationary Employee, covering the same period as the original second Report of Performance, June 1991 through September 1991. In this report, Rodriguez rated appellant as "unacceptable" in the categories of skill, knowledge, and work habits, "standard" in relationships with people and learning ability, "outstanding" in attitude. The overall rating of appellant was marked as "unacceptable." The narrative portion of this report now concluded that appellant's performance was unacceptable, that his production continued to lag behind others, that he had not been rotated into assignments because of his lack of knowledge, that he had asked too many questions. Finally, the report acknowledged that while there was a recent improvement in his attendance, his absences were enough to rate his work habits as "unacceptable."

At no time prior to January 13, 1992, appellant's last day of work, was appellant ever told that there were problems with the second Report of Performance or that Rodriguez was working on revising it. In fact, appellant testified that at a meeting on January 3, 1992 with Rodriguez, Quiroz and Ellen Mayfield, the

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head manager, Mayfield told appellant he was to attend a training class the following week. In response to appellant's inquiry as to what she thought of his work performance, Mayfield told him he was "doing well."

It was not until after returning from a week of training, on Monday, January 13, 1992, one day before appellant's four-day scheduled vacation, that the appellant was called into a meeting with Rodriguez and, without any warning, was handed the revised second Report of Performance which indicated that his work performance for the period covered by the report was unacceptable. The appellant refused to sign the revised report saying that it was a fraud. The report was later forwarded to the manager who approved it and made it a part of the appellant's personnel file. The appellant subsequently went on his vacation leave and when he returned to the office from vacation the following Monday, January 20, he was told he was not scheduled to work that day and was told to call in on Friday to see when he would be scheduled for work.

Appellant called in that Friday and was again told to call back the following week when Rodriguez would return from vacation and find out about his schedule. When he called in the next week, he was again told he was not scheduled to work, but to call in again in a few days. Finally, on January 31, Rodriguez told appellant that he would not be scheduled for work again until

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further notice. Appellant asked about his employment status, but Rodriguez told him he did not know.

The appellant did not find out that he was being rejected during probation until he was served with the papers on or about April 28, 1992. At the time of his rejection, the appellant still needed to work some 31 hours to fulfill the minimum hours required to pass probation.

In his Proposed Decision to the Board, the ALJ found that the appellant credibly testified that he was given no indication that his job performance was unacceptable until January 13, 1992, when he was given the revised second Report of Performance. Because of the Department's refusal to schedule appellant for further days of work thereafter, that day also turned out to be his last day of work.

At the hearing, the appellant suggested that his immediate supervisor, Rodriguez, had a sudden change of heart about his performance only because the appellant was assisting another Spanish-speaking probationer who was having performance difficulties at about the same time. He claimed that Rodriguez became upset when the appellant continued to help this probationer and at one point told appellant "vas-a-marchar" which means "you're going to march" in Spanish. The appellant interpreted this to mean that he was on his way out at that

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point. This was the only reason that he could think of for such a drastic change in Rodriguez' opinion of his performance.

Rodriguez testified that although he had verbally counseled the appellant about various aspects of his job performance, he had never told the appellant that his performance was unacceptable. He admitted that the original version of the second Report of Performance was his true opinion of the appellant's work performance at the time but claimed that, after discussions with Quiroz, he voluntarily decided to change the ratings. According to Rodriguez, the appellant's performance had deteriorated and this should have been reflected on the second Report of Performance. He admitted that he has been criticized by his managers in the past for being too lenient on performance evaluations. At first, he denied telling the appellant "vas-a-marchar", but later testified he may have used that term with appellant.

The manager, Quiroz, testified that she was surprised when she saw the original second Report of Performance because it was inconsistent with negative information Rodriguez had orally conveyed to her about the appellant's performance. She also testified that other employees had also complained about appellant's failing to carry his weight and asking too many questions. She did not believe that the report was official until it was signed by her, so she discussed it with Rodriguez

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who agreed to revise the ratings after the discussion. She denied ordering Rodriguez to change his ratings and claimed that he had done so voluntarily. She testified that had Rodriguez not modified the ratings, she would have prepared a supplemental report to state her disagreement with Rodriguez' ratings.

ISSUE

This case presents the following issue for our determination:

Did the Department act in bad faith in rejecting appellant during probation?

DISCUSSION

Government Code section 19175(d) provides:

The board at the written request of a rejected probationer, filed within 15 calendar days of the effective date of rejection, may investigate with or without a hearing the reasons for rejection. After investigation, the board may do any of the following:

(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. At any such hearing, the rejected probationer shall have 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 therefor in the notice of rejection is true.

While the appellant bears a heavy burden in having to overcome a presumption that the rejection is free from bad faith,

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in this particular case, we find appellant has carried the burden.

Recently, the Court of Appeal in Kuhn v. Department of General Services (1994) 22 Cal.App.4th 1627 had the opportunity to discuss the meaning of "bad faith" in the context of section 19175(d). Kuhn was suffering severe psychological disorders and was eventually medically terminated by the Department of General Services (DGS) in 1987 pursuant to the State's medical termination process. (Section 19253.5.) The following year, Kuhn petitioned DGS for reinstatement, claiming he had recovered and was medically fit to again perform his duties. Eventually, Kuhn and DGS came to an agreement whereby Kuhn was reinstated to his position, subject to serving a new probationary period.

Kuhn's psychological disorder soon reappeared and Kuhn eventually ceased coming to work. DGS served Kuhn with a rejection during probation based upon the numerous performance problems stemming from his medical problems. On appeal to the SPB, the SPB revoked Kuhn's rejection action, finding that DGS acted in bad faith by rejecting Kuhn during probation for medical reasons as opposed to using the medical termination statute which would have given him mandatory reinstatement rights upon recovery.

The Court of Appeal overturned the SPB's decision, finding that DGS did not act in bad faith in rejecting Kuhn during

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probation rather than medically terminating him. In rejecting SPB's findings of bad faith, the Kuhn court defined, for the first time, what constitutes bad faith for purposes of section 19175(d). The Kuhn court held:

[W]e agree with the suggestion by DGS that there is no reasoned basis for giving "bad faith" here a definition different from that developed in the general employment context. Viewing the terms and conditions of employment as creating a species of contract between employer and employee, there is implied in this relationship (as in all contracts) a covenant of good faith and fair dealing; the obligation imposed by this covenant is measured by the provisions of the particular agreement at issue. (citation). In essence, it is an implied promise that neither party will take any action extraneous to the defined relationship between them that would frustrate the other from enjoying benefits under the agreement to which the other is entitled. (citations omitted.) Thus, under its obligation to act in good faith DGS could not take any action with the intention that the procedural or substantive entitlements of its probationary employees be illegitimately thwarted. (Id. at 1637, 1638 [emphasis added].)

The Kuhn court further held that, in the absence of finding that a department acted in a manner to intentionally deprive a probationary employee of the benefit to which he or she was entitled, a finding of bad faith could be premised upon some evidence from which an inference of the department's "animus" or "improper motive" against the employee might be found. Id. at 1638, 1640.

After reviewing the record in this case, we find sufficient evidence, based upon the totality of circumstances as revealed in the record, that the Department not only misled appellant about

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its satisfaction with his work performance but, by refraining from issuing the revised second Report of Performance until his final day at work, gave him no opportunity to address the newly leveled criticisms. In addition, we find that the Department continued to mislead appellant for a few weeks thereafter regarding his employment status with the Department. Based upon all the circumstances, we conclude that the Department's actions demonstrate an intent to "illegitimately thwart" appellant's entitlement to a fair opportunity to demonstrate his ability to pass probation.

In general, a probationary employee has no contractual or property rights in employment. (Swift v. County of Placer (1984) 153 Cal. App.3d 209, 215.) As this Board recently stated in David Rodriguez (1994) SPB Dec. No. 94-29:

[T]he purpose of a probationary appointment and the rights of the employee are far different from those of a permanent employee...The object and purpose of a probationary period is to supplement the work of the civil service examiners in passing on the qualifications and eligibility of the probationer. During such period, the appointive power is given the opportunity to observe the conduct and capacity of the probationer, and if, in the opinion of that power, the probationer is not fitted to discharge the duties of the position, then he may be discharged by the summary method provided for in the Civil Service Act before he acquires permanent civil service status. (Rodriguez at p. 9, citing Dona v. State Personnel Board (1951) 103

Cal.App.2d 49, 51.)

Furthermore, we emphasize that a department's failure to provide a probationary employee with probation reports in a

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specific time and manner does not necessarily constitute bad faith or provide justification for restoring a rejected probationer. (See Title 2, Cal. Code of Regs, section 599.795, requirement to issue probationary reports on a tri-annual basis is directory only.) Notwithstanding the clear limitations upon the rights of probationary employees, however, the law requires that departments seeking to reject a probationary employee proceed in good faith and refrain from "illegitimately thwart[ing]" those limited entitlements that have been accorded the probationary employee. (Section 19175(d); Kuhn v. Department of General Services, supra, at pp. 1637, 1638.)

In this case, the Department not only changed its position as to appellant's work performance, but thereafter kept this important information from the appellant until it was too late for appellant to address the newly raised concerns. The evidence in the record reflects that until his last day of work, on January 13, appellant was given the distinct impression through his first two performance reports that he was performing in an acceptable manner and, accordingly, that he was progressing well towards passing probation. The Department's shifting evaluation of appellant's performance, whether initially negligent or intentional, lulled appellant into a false sense of security: appellant was led to believe that if he continued to perform the work as he had been performing it, he would pass probation. By

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informing appellant of the Department's "change of heart" as to its earlier assessment of his performance on the same day the Department effectively rejected him, the appellant was denied any opportunity to address the Department's newly expressed criticisms.⁴

While the Department argues that its last-minute revision of the second Report of Performance was attributable to merely an oversight on its part, not "bad faith", we note too many instances in the record of unfair treatment toward appellant to casually dismiss the Department's actions as an oversight.

Appellant's first Report of Performance, which was rather complimentary, gave appellant no clue that his performance was anything but acceptable. Neither did the original version of the second Report of Performance contain anything that would lead the appellant to believe that he would not pass probation if he continued working in the same manner. Rodriguez himself testified that at the time the second Report of Performance was issued, he was generally happy with appellant's performance and the report reflected his true opinion of appellant's performance

⁴ This does not mean that departments may not reject an employee after the employee has previously received one or two favorable reports. If the rejection is solely based upon performance which has dramatically changed since the time the favorable probation reports were issued, rejection may very well be warranted. In this case, however, the department attempted to revise its previous favorable assessments of the appellant, and even then, did not inform appellant that they were doing so until his last day of work.

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at the time. Had appellant's performance in processing claims actually been as poor as Rodriguez claimed in the revised report, one would have expected Rodriguez would have either expressed these reservations more directly in appellant's report or discussed his concerns with either Quiroz or the manager who signed the original second Report of Performance. In fact, Rodriguez was satisfied with the report. Moreover, the manager who signed the report in Quiroz' absence was not concerned with appellant's performance. Had there been evidence in the record that Rodriguez wavered as to whether to give appellant a satisfactory report at that time, the fact that Rodriguez later so drastically changed the report would not have been unremarkable.

Despite the somewhat suspicious circumstances surrounding Rodriguez's revision of the second Report of Performance, we do not believe that the fact Ramirez revised appellant's report, after further reflection and discussion with Quiroz, is alone sufficient evidence that the Department acted in bad faith. When the revision is considered, however, together with the Department's actions after Quiroz informed Rodriguez that she disagreed with Rodriguez's original second Report of Performance, we reach the conclusion that the Department acted in bad faith.

Quiroz and Rodriguez admitted to having numerous discussions as early as late November concerning appellant's second

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performance report and their intent to revise it. The record is clear, however, that neither Quiroz or Rodriguez bothered to tell appellant that a revised probation report was being prepared or even contemplated, even though they knew the revised report was drastically different in tone than the previous performance reports and therefore would catch appellant off guard.

Not only was the Department remiss in failing to inform appellant promptly that it would be revising his second performance report, but it appears further evident from the record that the Department was purposefully trying to hide its intentions from appellant. The revised report came as a total surprise to appellant who had, just the week before, been sent to a week-long training session and who, about that same time, had been told by the head manager, Ellen Mayfield, that he was doing a "good job." Moreover, despite the fact Rodriguez and Quiroz spent time in late November and during December discussing appellant's performance and their intent to revise the second Report of Performance, Rodriguez waited until Monday, January 13, 1995, the day before appellant's four-day scheduled vacation, to "spring" the revised second report on the appellant. Finally, we note the important fact that the Department continued to mislead the appellant as to the status of his employment with the Department even after he was given the revised performance report. While Rodriguez admitted at the hearing that he had been

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previously instructed not to schedule further work for the appellant, he failed to tell appellant at the meeting of January 13 that appellant would not be scheduled for further work. Instead, appellant showed up at work the following week, as he had regularly done over the past year, only to be told that he was not scheduled for that day. The Department continued to give appellant the "run around" by repeatedly telling appellant to call in for work during the following weeks, even though the record reflects that the Department had no intention of working appellant and was, in fact, initiating rejection proceedings.

We believe that the Department "illegitimately thwarted" appellant's limited rights as a probationary employee when it gave appellant positive probationary reports over a long period of time, and then radically changed its previous assessment of him on the last day appellant was scheduled to work, depriving appellant of even a minimal opportunity to counter the revised assessment or show improvement. Such conduct, when considered together with the other misleading actions noted above, not only frustrated appellant from enjoying the limited benefits to which he was entitled (a fair opportunity to pass probation) but further creates the inference of an "improper motive" on the Department's part. Accordingly, we find sufficient evidence to support a finding that the Department has engaged in "bad faith."

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Since we find that the totality of the Department's actions in this particular case constitute bad faith, we restore appellant to his position pursuant to section 19175(d).⁵ As the parties have not had the opportunity to brief the issue of whether or not appellant, as a permanent-intermittent employee, under these facts, is entitled to backpay and benefits pursuant to section 19180, we leave the issue of backpay to the parties and refer said matter to the Administrative Law Judge in the event that the parties are unable to agree on the amount of backpay and benefits due appellant, if any.

ORDER

WHEREFORE IT IS DETERMINED that:

1. The rejection during probation taken by the Employment Development Department against Joe Nava effective May 8, 1992 is hereby set aside.
2. The appellant shall be restored to his position as a permanent Employment Program Representative (Intermittent).
3. This matter shall be referred to the Administrative Law Judge in the event that the parties are unable to agree as to the amount of salary and benefits due Joe Nava;

⁵ While appellant's claim processing was not at the level of production regularly expected of permanent Employment Program Representatives, the Department indicated in the first two favorable performance reports that the deficiency was not so serious as to cause them genuine concern as to appellant's overall performance. We are not persuaded that appellant will be unable to successfully perform in this position.

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

THE STATE PERSONNEL BOARD*

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

*Member Alfred Villalobos was not present when this decision was adopted and therefore did not participate in this decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on February 7-8, 1995.

WALTER VAUGHN

Walter Vaughn, Acting Executive Officer
State Personnel Board