BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **STEPHEN W. VAN ZEE** From denial of transfer to the position of Deputy Inspector General with the Office of the Inspector General	))))))))))	SPB Case No. 01-3017 **BOARD DECISION** (Precedential) **No. 03-03** July 8, 2003

APPEARANCES: Stephen W. Van Zee, appellant, in pro per; Noreen P. Skelly, Deputy Attorney General, on behalf of respondent, Office of the Inspector General

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

DECISION

This appeal is before the State Personnel Board (SPB or Board) after the Board granted the petition for rehearing filed by the Office of the Inspector General (OIG) to examine whether the OIG wrongfully refused to offer Steve W. Van Zee (appellant) a transfer to the position of Deputy Inspector General (DIG) based upon the results of a background investigation, after appellant had passed a medical examination and a psychological evaluation. In this decision, the Board finds that, in order to comply with Government Code §§ 1031 and 12940(e), the OIG was required to complete the background investigation and give appellant an offer of employment before it could subject appellant to medical and psychological inquiries. The Board finds, however, that, because appellant has failed to submit any evidence to indicate that the OIG discriminated against him based upon disability, or any other protected status, the

Board will not overturn the OIG's determination not to offer appellant a transfer to a DIG position.

BACKGROUND

In March 2001, appellant spoke with the OIG about the possibility of transferring from the Employment Training Panel, where he was a Staff Management Auditor, a non-peace officer position, to the OIG, where he would be a DIG, a sworn peace officer position. Although the OIG never extended to appellant a formal conditional offer of employment, it informed him that, before he could be appointed as a peace officer, he had to successfully complete medical and psychological tests, fingerprinting, and a background investigation. Appellant successfully completed the medical and psychological evaluations before the OIG informed him that, based upon its background investigation, it would not hire him as a DIG.

Procedural History

Appellant appealed to SPB from the OIG's refusal to hire him as a DIG. SPB designated appellant's appeal as a merit issue complaint and assigned it to a staff hearing officer. On February 7, 2002, the hearing officer conducted an informal, non-evidentiary hearing. During that hearing, the OIG agreed that it would provide a written explanation of its reasons for not hiring appellant. On February 14, 2002, the OIG sent appellant a letter that stated as follows:

> Pursuant to the agreement entered at the State Personnel Board Hearing, I am generally explaining the basis why no final employment offer was extended to you. Based on our background investigation, we believe that you would not be an adequate candidate for a peace officer position with this office. Specifically, we believe that you demonstrated numerous instances of poor judgment in the handling of a failed relationship during the past five years. Further, facts concerning your interaction with females

> and mistrust of females was troubling to this office. Therefore, the final offer of employment as a peace officer with the Office of Inspector General was not extended to you.

At its meeting on July 9-10, 2002, the Board adopted the recommendation of the hearing officer and granted appellant's appeal, finding that: (1) the OIG's collection of medical and psychological information with respect to appellant constituted a conditional offer of employment; (2) the OIG had no authority to eliminate appellant from the selection process on the basis of the background investigation after it had collected medical and psychological information; and (3) because appellant was medically and psychologically cleared, the OIG was required to proceed with its offer to appellant of employment as a DIG. Thereafter, at its meeting on October 22, 2002, the Board granted the OIG's petition for rehearing.

The Board has reviewed the record in this matter, including the transcripts, exhibits and written arguments, and has heard the oral arguments of the parties, and now issues the following decision.

ISSUES

The following issues are before the Board for review:

1. Was the OIG required to complete its background investigation of appellant and make appellant an offer of employment before it could subject appellant to a psychological or medical inquiry?
2. Did the OIG illegally discriminate against appellant when it refused to grant him a transfer to the position of Deputy Inspector General?

DISCUSSION

Government Code § 1031

Government Code § 1031, in relevant part, provides that:

> Each class of public officers or employees declared by law to be peace officers shall meet all of the following minimum standards:
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> …
>
> (c) Be fingerprinted for purposes of search of local, state, and national fingerprint files to disclose any criminal record.
>
> (d) Be of good moral character, as determined by a thorough background investigation.
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> ….
>
> (f) Be found to be free from any physical, emotional, or mental condition which might adversely affect the exercise of the powers of a peace officer. Physical condition shall be evaluated by a licensed physician and surgeon. Emotional and mental condition shall be evaluated by a licensed physician and surgeon or by a licensed psychologist who has a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders.

The OIG asserts that, even though appellant's appointment to a peace officer position would have been pursuant to a lateral transfer and not a list appointment, and a state agency generally may transfer a state employee to a position that is within transfer range of the employee's existing position without requiring that the employee meet all the minimum qualifications of the transfer position, an employee who transfers into a peace officer classification from a non-peace officer classification must meet all the minimum standards set forth in Government Code § 1031.

We agree. We have found nothing in the law to suggest that the minimum standards for peace officers set forth in Government Code § 1031 may be waived for non-peace officer employees who wish to transfer into peace officer classifications.

To the contrary, regulations adopted by the California Commission on Peace Officer Standards & Training (POST) clearly provide that individuals who laterally transfer to peace officer positions must meet all the same minimum qualifications that list appointees must meet.[1]

Psychological and Medical Inquiries

When deciding whether to hire a candidate for a peace officer position, state agencies must not only assure that the candidate meets all the requirements of Government Code § 1031, they must also comply with all other applicable laws, including the anti-discrimination provisions set forth in Government Code § 19702.[2] When implementing Government Code § 19702, the Board applies the California Fair

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[1] See, Title 11, California Code of Regulations, § 1002(b), which provides:

> All requirements set forth in Regulation 1002(a) shall apply to each lateral entrant, regardless of the rank to which the person is appointed, unless waived by the Commission.

[2] Government Code § 19702, in relevant part, provides:

> (a) A person shall not be discriminated against under this part because of sex, race, religious creed, color, national origin, ancestry, marital status, physical disability, or mental disability. A person shall not be retaliated against because he or she has opposed any practice made an unlawful employment practice, or made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. For purposes of this article, "discrimination" includes harassment. This subdivision is declaratory of existing law.
>
> (b) As used in this section, the term "physical disability" has the definition set forth in Section 12926, as that section presently reads or as it subsequently may be amended.
>
> (c) As used in this section, the term "mental disability" has the definition set forth in Section 12926, as that section presently reads or as it subsequently may be amended.
>
> (d) Notwithstanding subdivisions (b) and (c), if the definition of disability used in the federal Americans with Disabilities Act of 1990 (Public Law 101-336) would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (b) or (c), then that broader protection shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (b) and (c). The definitions of subdivisions (b) and (c) shall not be deemed to refer to or include conditions excluded from the federal definition of "disability" pursuant to Section 511 of the federal Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12211).

Employment and Housing Act (FEHA), [3] unless the federal Americans with Disabilities Act of 1990 (ADA)[4] would offer greater protection.[5]

Government Code § 12940 of the FEHA, in relevant part, provides:

> It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:
> …
> (e) (1) Except as provided in paragraph (2) or (3), for any employer or employment agency to require any medical or psychological examination of an applicant, to make any medical or psychological inquiry of an applicant, to make any inquiry whether an applicant has a mental disability or physical disability or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.
>
> (2) Notwithstanding paragraph (1), an employer or employment agency may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation.
>
> (3) Notwithstanding paragraph (1), an employer or employment agency may require a medical or psychological examination or make a medical or psychological inquiry of a job applicant <u>after an employment offer has been made but prior to the commencement of employment duties</u>, provided that the examination or inquiry is job-related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry. (Emphasis added.)

We have not found any cases or administrative guidance or rulings that analyze the intended scope and application of Government Code § 12940(e). Although the

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[3] Government Code § 12900 et seq.

[4] 42 U.S.C. § 12101 et seq.

[5] <u>See</u>, <u>Andrew Ingersoll</u> (2000) SPB Dec. No. 00-01, p. 24.

FEHA generally provides greater protections than the ADA,[6] because the FEHA's limitations with respect to medical and psychological testing are based upon similar limitations in the ADA, the administrative guidance and cases that have analyzed and applied the ADA's medical examination provisions provide valuable assistance in determining how Government Code § 12940(e) should be interpreted and applied.

With respect to medical examinations and inquiries, the ADA, in relevant part, provides:

> (d) Medical examinations and inquiries
> (1) In general
> The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.
> (2) Preemployment
> (A) Prohibited examination or inquiry
> Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.
> …
> (3) Employment entrance examination
> A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if -
> (A) all entering employees are subjected to such an examination regardless of disability;
> (B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, …

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[6] See, Government Code § 12926.1, which, in relevant part, provides:

> The Legislature finds and declares as follows:
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> (a) The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (Public Law 101-336). Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections.

> (C) the results of such examination are used only in accordance with this subchapter. [7]

In its "Enforcement Guidance: Disability-Related Inquiries And Medical Examinations Of Employees Under The Americans With Disabilities Act (ADA)" (Enforcement Guidance),[8] the Equal Employment Opportunity Commission (EEOC) stated that:

> The ADA's provisions concerning disability-related inquiries and medical examinations reflect Congress's intent to protect the rights of applicants and employees to be assessed on merit alone, while protecting the rights of employers to ensure that individuals in the workplace can efficiently perform the essential functions of their jobs.

As the EEOC explained, under the ADA, with respect to an employee who applies for a new position, an employer

> is prohibited from asking disability-related questions or requiring a medical examination before making the individual a conditional offer of the new position. …
> After the employer extends an offer for the new position, it may ask the individual disability-related questions or require a medical examination as long as it does so for all entering employees in the same job category. If an employer withdraws the offer based on medical information (i.e., screens him/her out because of a disability), it must show that the reason for doing so was job-related and consistent with business necessity.

[7] 42 U.S.C. § 12112(d).

[8] The Enforcement Guidance may be accessed on the EEOC's website at http://www.eeoc.gov/docs/guidance-inquiries.html

The U.S. District Court in Barnes v. Cochran explained the importance of the ADA's provision with respect to medical examinations as follows:

> First, it allows an applicant to demonstrate that he has the necessary job qualifications without regard to any disability; second, by permitting the examination to take place only after an offer of employment is made, it forces employers to demonstrate that their reason for not hiring an applicant is job related, or a business necessity; third, this scheme requires an employer to make an effort to reasonably accommodate an applicant's disability.[9]

In applying the ADA's provisions, the U.S. District Court in O'Neal v. City of New Albany described the type of job offer that an employer must make before conducting a medical examination as follows:

> For purposes of § 12112(d)(3), "a job offer is real if the employer has evaluated all relevant non-medical information that it reasonably could have obtained and analyzed prior to giving the offer." … "This requirement is intended to ensure that an applicant's possible hidden disability (including a prior history of a disability) is not considered before the employer evaluates an applicant's non-medical qualifications." ... Accordingly, if a job offer is conditioned not only on the applicant successfully passing a medical examination but also a myriad of non-medical screening tests, the offer is not real.[10] (Emphasis added.)

In Buchanan v. City of San Antonio,[11] the Fifth Circuit Court of Appeals found that a police department had not made a real offer of employment under the ADA when it conditioned a police officer applicant's appointment not only on passing a medical examination, but also on the "successful completion of the 'entire screening process,' which included 'physical and psychological examinations, a polygraph examination, a

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[9] (S.D. Fla. 1996) 944 F.Supp. 897, 905, fn. 3, citing to Stacy J. Bagley, "Enough is Enough! Congress and the Courts React to Employers' Medical Screening and Surveillance Procedures," 99 Dick.L.Rev. 723, 730-31 (1995).

[10] (7th Cir. 2002) 293 F.3d 998, 1008-9. (Citations omitted.)

[11] (5th Cir. 1996) 85 F. 3d 196, 1999.

physical fitness test, an assessment board, and an extensive background investigation.'"

Government Code § 12940(e) was intended to serve the same purpose as Section 12113(d)(3) of the ADA: to ensure that an employer makes an initial selection decision based upon merit without consideration of an applicant's disability status, by prohibiting any medical and psychological inquiries before an employment offer has been extended.

Reconciling Government Code §§ 1031 and 12940

Because the OIG is subject to both Government Code §§ 1031 and 12940(e), in order to effectuate the intent of the Legislature, the OIG must comply with the terms of both statutes to the extent they can be reconciled.[12]

Under Government Code § 1031(f), before an applicant may be appointed as a peace officer, he or she must be found to be free from any physical, emotional, or mental condition which might adversely affect the exercise of peace officer powers, as determined by a qualified physician or psychologist. Under Government Code § 12940(e), an employer cannot subject an applicant to a medical or psychological inquiry until after an employment offer has been made.

To comply with both Government Code § 1031 and § 12940(a), a state agency must make a "real" offer of employment to a peace officer applicant before that applicant may be examined to determine whether he or she meets the psychological and medical standards of Government Code § 1031(f). In order for an employment

[12] See, Walters v. Weed (1988) 45 Cal.3d 1, 9; Building Material & Construction Teamsters' Union v. Farrell (1986) 41 Cal.3d 651, 665.

offer to be considered "real," the agency must first have evaluated all relevant non-medical information that it reasonably could have obtained and analyzed prior to making the offer and made a selection decision based upon that non-medical information. In other words, an appointing power must complete a background investigation and make a determination to hire based upon that background investigation and other relevant non-medical information before it extends an offer of employment and subjects an applicant to a medical or psychological inquiry.

In this case, because the OIG did not make appellant a real offer of employment before conducting the medical and psychological evaluations, the OIG did not comply with the provisions of Government Code § 12940(e).

OIG's Reasons for Not Offering Appellant a Transfer

The OIG asserts that, even though it may not have conducted the background investigation and psychological and medical evaluations in the proper order, because appellant has no disability, he has no grounds to complain in this matter. The OIG's position is not well-taken.

As the EEOC made clear in its Enforcement Guidance, the restrictions in the ADA with respect to medical examinations "apply to all employees, not just those with disabilities." Therefore, an applicant or employee does not have to be a qualified individual with a disability in order to invoke the ADA's protections against improper medical examinations.[13] Similarly, under Government Code § 12940(e), there is no

[13] Fredenburg v. Contra Costa County Department of Health Services (9th Cir. 1999) 172 F.3d 1176, 1181.

requirement that an applicant for employment must first show that he or she has a disability in order to assert a violation of that subdivision.

The OIG contends further that, because appellant presented no evidence to suggest that the OIG based its determination not to hire appellant on disability or any other protected status, SPB has no jurisdiction to review that determination. The OIG correctly asserts that SPB has granted state agencies discretion to determine whether to offer employees transfers to other positions and that, absent an allegation of illegal discrimination or a violation of a civil service statute or regulation, SPB generally will not overturn a state agency's exercise of its transfer discretion.[14]

In this case, appellant has not alleged that the OIG discriminated against him based upon disability, or any other protected status. The information in the record indicates that appellant passed both his psychological and medical evaluations, and that no medical or psychological information was provided to the OIG, beyond summary notice that appellant had passed his evaluations, upon which the OIG could or did base its determination not to offer appellant a transfer to a DIG position.

In addition, appellant has not asserted that the OIG has violated any civil service statutes or regulations by refusing to hire him as a DIG. Instead, appellant challenges the validity of OIG's background investigation, asserting that the OIG did not follow the

POST Background Investigation Manual when it conducted its background investigation, did not establish a rational connection between its reasons for disqualification and the job requirements, did not properly evaluate the background information that it obtained, did not properly evaluate the credibility of the information it obtained regarding appellant's past personal relationship, and exceeded its authority by rendering a subjective conclusion on appellant's emotional and mental condition that contradicted the psychological evaluation he had passed. In addition, appellant asserts that the OIG violated the Information Practices Act by refusing to provide him with a copy of his background investigation.[15]

Even if appellant's assertions may be well-taken and are accepted as true, they do not constitute allegations of illegal conduct that would subject to SPB's scrutiny the OIG's determination not to transfer him into a peace officer position. In the absence of allegations of illegal discrimination or violations of the civil service laws, SPB will not

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[14] Government Code § 18935 provides that the Board may refuse to examine or, after examination, may refuse to declare as eligible or may withhold or withdraw from certification, prior to appointment, an applicant for a state job for a number of listed reasons, including but not limited to, failure to meet minimum requirements, addiction to alcohol or drugs, conviction of a felony or a misdemeanor involving moral turpitude, and dismissal for cause from any prior position. Under Government Code § 18935, SPB reviews appeals by candidates seeking list appointments, who assert that a department has not given a sufficient job-related reason for withholding them from appointment, to evaluate whether the department's reason for withholding the candidate is valid and supportable. In this case, because appellant did not seek appointment from an employment list and because the OIG did not seek to withhold him from appointment under Government Code § 18935, the rights applicants have under the Board's withhold process are not applicable.

[15] Civil Code § 1798.40 of the Information Practices Act provides, in relevant part, as follows:

> This chapter shall not be construed to require an agency to disclose personal information to the individual to whom the information pertains, if the information meets any of the following criteria: …

second guess a decision by an appointing power not to transfer an employee. SPB has granted appointing powers the discretion to make such transfer determinations. So long as the appointing power has not illegally discriminated against an applicant nor violated a law that SPB is required to enforce, SPB will not disturb the appointing power's exercise of its transfer discretion.

CONCLUSION

Even though the OIG improperly subjected appellant to psychological and medical inquiries before it extended to him an offer of employment, appellant has neither alleged nor shown that the OIG's refusal to offer him a transfer to a DIG position was the result of illegal discrimination or the violation of any laws that SPB enforces. Appellant's appeal must, therefore, be denied.

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 appeal of Steven Van Zee is denied and dismissed.
2. Pursuant to Government Code § 19582.5, this decision is certified for publication as a precedential decision.

(d) Is maintained for the purpose of an investigation of an individual's fitness for licensure or public employment, or of a grievance or complaint, or a suspected civil offense, so long as the information is withheld only so as not to compromise the investigation, or a related investigation. The identities of individuals who provided information for the investigation may be withheld pursuant to Section 1798.38.

STATE PERSONNEL BOARD[16]

William Elkins, President
Sean Harrigan, Member
Maeley Tom, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on July 8, 2003.

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Walter Vaughn
Executive Officer
State Personnel Board

[Van Zee.dec]

[16] Vice President Ron Alvarado did not participate in this decision.