

CalHR Case Number 13-D-0055  
Appeal of Transfer in Lieu of Layoff  
Final Decision Adopted 12/12/2013  
By: Julie Chapman, Director

## **PROPOSED DECISION**

This matter was heard before Karla Broussard-Boyd, Administrative Law Judge (ALJ), Department of Human Resources (CalHR) on September 23, 2013 at 9:00 a.m. in Sacramento, California.

Appellant was present and represented by Sumaira Arastu, Staff Counsel, California Correctional Peace Officers Association (CCPOA). Cathleen P. Demant, Labor Relations Counsel, CalHR, represented the California Department of Corrections and Rehabilitation (CDCR), Board of Parole Hearings (BPH), respondent.

### **I**

#### **JURISDICTION**

On March 25, 2013, respondent, CDCR, Board of Parole Hearings, issued appellant a notice to report to Kern Valley State Prison, Kern County, effective May 1, 2013. On May 6, 2013, Sumaira Arastu, Staff Counsel, CCPOA, filed a transfer in lieu of layoff appeal with CalHR on behalf of appellant.

Government Code section 19997.14 provides an employee may appeal to CalHR within 30 days<sup>1</sup> after receiving a notice of layoff on the ground that the required procedure has not been complied with or the layoff has not been made in good faith or was otherwise improper. The appeal complies with the procedural requirements of Government Code section 19997.14. CalHR has jurisdiction over the appeal.

### **II**

#### **PROCEDURAL HISTORY**

On July 8, 2013, Cathleen P. Demant, Labor Relations Counsel, CalHR, on behalf of CDCR, respondent, filed a Motion to Dismiss appellant's appeal. On July 12, 2013, a telephonic pre-hearing conference was held. Appellant and her counsel, Sumaira Arastu,

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<sup>1</sup>Pursuant to Labor Relations negotiations, CalHR and CCPOA agreed to extend the time-period to file a layoff appeal to 50 days.

Staff Counsel, CCPOA appeared telephonically. At the pre-hearing conference, the ALJ denied respondent's motion to dismiss and set the matter for a full evidentiary hearing.

### **III ISSUES**

Appellant argues respondent's layoff plan was otherwise improper and appellant should be allowed to follow the demotion path denied her because of the arbitrary actions of respondent.

Respondent contends its layoff plan was properly administered and made in good faith.

The issues to be determined are:

1. Were the statutes and rules applicable to layoffs followed?
2. Was the layoff made in bad faith?
3. Was the layoff otherwise improper?

### **IV FINDINGS OF FACT**

Appellant began her career with the State of California, CDCR, on November 18, 1994. Her first appointment was as a Youth Correctional Counselor with the California Youth Authority (CYA).<sup>2</sup> On February 9, 1998, she was promoted to a Parole Agent I – Youth Authority with CYA. On January 1, 2004, she was appointed to her current position of Correctional Counselor I (CCI) for respondent's BPH. Throughout her tenure with respondent, appellant's job has been physically located in Ventura County. She was assigned to Region II.

BPH Correctional Counselor II, was responsible for Region II. Region II is bordered on the north by Del Norte County, Ventura County to the south and Solano County to the east. She supervised 10-12 CCIs, including appellant, in approximately 12 different counties. Each CCI was assigned to work at the county jails. Appellant was responsible for two jails in Ventura County.

As a CCI, appellant gathered and evaluated information from a variety of sources to assist in classifying inmates and making a prognosis for parole suitability. When a

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<sup>2</sup>In 2005, CYA became the Department of Juvenile Justice (DJJ).

parolee was revoked, the parolee's file was sent to a Decentralized Revocation Unit (DRU). Parole revocation files originating in Kern County were sent to appellant in Ventura County. She explained that even though Los Angeles County is closer to Ventura County, Kern County parole office work had always been handled by Ventura County.

Kern County is in respondent's Region I. The Kern County DRU included Wasco State Prison and Kern Valley State Prison, and was commonly called the Wasco DRU. The Wasco DRU processed the necessary revocation files and overnighted the information to appellant in Ventura County for review via Golden State Overnight (GSO). Appellant scheduled any required hearings and then returned her work via GSO back to the Wasco DRU. Appellant was never required to travel to Kern County to process work from the Wasco DRU.

Shortly after the passage of Assembly Bill 109 (AB 109)<sup>3</sup>, which required revocation hearings be held by County Superior Courts, appellant's supervisor told respondent the county codes assigned to her staff were not all representative of their actual work location. She was asked to make a list of all of her CCI employee's county codes and the location of the DRU where each of the CCI files were processed. She prepared a list of her employees indicating the county jails each CCI serviced and the originating DRU.

The ALJ took Official Notice of appellant's work history generated by the State Controller's Office (SCO). A CDCR employee, with 20-years of experience, has spent most of her tenure working in Human Resources and is familiar with the SCO work history. For the last year and a half, she has worked in the Office of Workforce Planning (OWP) formerly known as the Office of Resource Planning (ORP). OWP is the department responsible for developing a layoff plan for CalHR approval. Once the layoff plan is approved by CalHR, she is responsible for implementation of the layoff plan.

She explained she changed appellant's county code from 56-Ventura County; to 15-Kern County through the SCO process on July 11, 2011. She was told the purpose of changing appellant's county code was because it was, "misidentified incorrectly in the wrong county." Respondent made the determination to change the county code. She

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<sup>3</sup>AB 109 is one of several bills passed in 2011 aimed at reducing state prison populations through realignment. It shifts the responsibility for incarcerating many low-risk offenders from the state to the counties and is also referred to as "prison realignment."

further explained a changed work location required appellant to be in a new county. She does not know if any documentation is produced by the SCO process when a change is made to the county code. She did not notify the appellant of the change in county code from Ventura County to Kern County.

Appellant's supervisor saw the seniority list prepared in anticipation of the Wave 2 layoff. It was then she learned appellant's county code had been changed from Ventura County to Kern County. She believed this change in county code was 'unreasonable' because appellant had never worked in Kern County. Appellant also voiced her concerns to her. The appellant's supervisor, who had no authority to change the county code, again expressed her concern to respondent because, "the county codes do not reflect where the employees actually work."

On December 27, 2012, respondent issued its SROA<sup>4</sup>/Surplus Status letter to appellant. The letter indicated she could apply for a CCI position using her SROA status. Appellant participated in the options process, but did not receive any offers for a CCI position near her home. She did not participate in the Statewide Bid Process because the available positions were even farther away than Kern County. She also attempted to find a Parole Officer position in Ventura County.

Appellant contacted OWP regarding the changes to her county code in December 2012 and again on January 4, 2013. On January 11, 2013 respondent's Executive Officer expressed her concern with appellant's problem stating, "I understand the impact the county designations have had on you and am truly sorry . . . [A]bsent an alternate agreement reached at the BU 6 negotiation table, we will not be changing anyone's county designation. We had to come up with a way of designating counties that was uniform for all CCIs, otherwise it would have resulted in arbitrary designations, leading to even more people wanting to change their county designations."<sup>5</sup>

Appellant was impacted by respondent's Wave 2 layoffs and began reporting to Kern Valley State Prison (KVSP) as a CCI on May 1, 2013. She now has a five (5) hour 150 plus mile daily commute to Kern County. Had her county code not been changed,

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<sup>4</sup>The SROA Program assists in placing affected employees by temporarily restricting the methods of appointments available to appointing powers. Employees on SROA lists are granted preferential consideration over all other types of appointments except appointments from reemployment lists and mandatory reinstatements." The State Restriction of Appointments is intended, to the extent that it is administratively feasible, to prevent the layoff and separation of skilled and experienced employees from State service. (CCR, tit 2, § 599.854(b).)

she could have taken a pay cut as a Parole Agent I with DJJ in Ventura County. The appellant was never issued a Notice of Personnel Action (NOPA) for the Kern County code change.

The CDCR Human Resources employee relies heavily on the Personnel Action Manual (PAM). PAM is the SCO manual used by state departments to process personnel documents. PAM defines the purpose and use of the NOPA. The NOPA “provides employees with an informational copy of certain actions affecting their status; reports to employees, in layman terminology, their rights concerning the action that has taken place; serves as a legal document for recording the employee’s signature on appointments and some miscellaneous changes; and allows employees to notify their departmental personnel office of erroneous information and verifies corrections or changes have been accomplished.” She acknowledged there are various transactions which change an employee’s work history that require employee notification.

She does not know who would notify an employee of a county code change. A county code change is designated as a miscellaneous change transaction “130.” PAM states a “130” code, “[i]dentifies the county in which the employee works.” The PAM requires a NOPA be produced for, “[a]ll appointment transactions with the exception of mass updates and A35 transactions . . .” The appellant’s SCO work history indicates the “130” transaction, which changed her county code from Ventura County to Kern County, is an “A” transaction. The SCO work history legend at the bottom of the SCO work history defines an “A” as an appointment. No one from SCO testified.

She indicated an employee is typically notified regarding work history changes. When a NOPA is generated, SCO mails the NOPA to the appointing power who in turn is responsible for sending it to the employee. She explained the Layoff Manual<sup>6</sup> designates when employees can be impacted by county, meaning a reduction in staff in a specific county. She has no personal knowledge whether CCI employees were provided a NOPA for the county code change.

Chief Deputy of State Operations has been employed by respondent since 2011. She explained there were five (5) regions in California to which CCIs were assigned to cover the workload of the county. And depending on the county, could cover a variety of

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<sup>5</sup>The parties stipulated there was no side agreement reached regarding appellant’s particular situation.

<sup>6</sup>The Layoff Manual contains the rules governing State of California layoffs and is relied upon by departments and CalHR in administering layoff plans.

jails. With prison realignment, respondent realized it had six (6) months to conform to AB 109. Before realignment, she testified, “we were always moving people around” without changing county codes. Appellant was never moved during her nine (9) year tenure.

In March 2011, when respondent knew layoffs were imminent, “we needed a plan to go from state operations to zero operations by July 1, 2013.” She and her supervisor made the decision to change appellant’s county code. They changed the CCI county codes of approximately 60-70 employees statewide. She explained, “the county code became important because as soon as we knew that there would be layoffs we needed a plan – so we decided that we needed to consolidate and streamline to make it a fair process for our – for the layoff.” She further explained, “while there was nothing wrong with the county code assignments of the CCIs, people worked in regions and were hired for the region and were given a particular county jail.” She does not know how the original county codes were assigned.

They knew there were CCIs in counties where there were no CDCR facilities. “If a CCI worked in Tulare or Orange County, depending on the demotion path, if there was nothing in the county – they would be laid off.” Because there were many counties with no CDCR facilities, they changed the county code, “to get everybody into a demotion path with a county code where a CDCR office was located – to impact CCIs demotion path in the new county. [I]t was streamlined . . . we wanted to make it fair.”

Another reason for changing the county code, she testified, was to have individuals compete in the region together: “[I]t was a fairer way, they had been hired for the region . . . it would be happenstance of where they were.” She went on to explain the thought process, “it was very difficult for the majority of CCIs . . . how would we select what county they would be in?” It was decided the best way would be to tie every CCI to the DRU which generated their workload because it would be fair and there would be an institution where there would be a demotion path for the most senior employees.

She continued, “[o]kay, we don’t calculate the seniority but, what we wanted to do, I’ll try to make this as clear as I can. Because people, 95% of our people, work in multiple counties. If we never changed the county codes, our most senior person would have no demotion path in Tulare County and would have been laid off. Therefore, all were coded to Kern County. We were looking for systemic remedies because the layoff would impact all the CCIs by county and it was our good faith attempt to help people out.”

She was unaware appellant had a DJJ background. She did not take into consideration the appellant worked and lived in Ventura County, Region II, before changing her county code to Kern County, Region I. When she learned appellant's county code had deprived appellant of her demotion pattern, it was too late to change the layoff plan. She does not know what type of notification employees were given after their county codes were changed. She does know, "we, as the program, would have notified CalHR the control agency. I'm not involved with that type of notice – the control agency – we give them the information. We don't send out the notice, the control agencies do that."

## V ANALYSIS

Pursuant to Government Code section 19997<sup>7</sup>, "[w]henver it is necessary because of lack of work or funds, or whenever it is advisable in the interests of economy, to reduce the staff of any state agency, the appointing power may lay off employees pursuant to this article and department rule." Respondent, acting on AB 109's demand for prison realignment, was within its authority to administer its Wave 2 layoff plan and surplus its CCI employees by geographic location, specifically by county.

Section 19997.14 provides an employee may appeal to CalHR within 30 days after receiving a notice of layoff on the ground that the required procedure has not been complied with or the layoff has not been made in good faith or was otherwise improper, and authorizes CalHR to order the reinstatement of the employee with or without pay. It is well-settled in California that [administrative] officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as may fairly be implied from the statute granting the powers. (*Rich Visions Centers, Inc. v. Board of Medical Examiners* (1983) 144 Cal.App.3d 110.)

The appellant has the burden of proof in these matters and must prove by a preponderance of the evidence the statutes and rules applicable to layoffs were not followed, the layoff was not made in good faith or was otherwise improper. (*Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826.)

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<sup>7</sup>All future references are to the California Government Code unless otherwise specified.

The statutes and rules governing layoffs were not followed.

Section 19997 et seq. is the statutory scheme which defines the administration of state civil service layoffs to safeguard honorable and efficient employees from arbitrary ouster. (*Hanley v. Murphy* (1953) 40 Cal.2d 572.) When interpreting a statute, the court begins by examining the statutory language, giving the words their usual and ordinary meaning; if there is no ambiguity, then the court presumes the lawmakers meant what they said, and the plain meaning of the language governs. (*City and County of San Francisco v. Jen* (2005) 135 Cal.App.4th 305.)

Respondent's conduct prior to submitting its layoff plan does not reflect the layoff statutory scheme envisioned by Government Code section 19997 et seq. There is no statute or regulation governing layoffs of state employees which allows an appointing power<sup>8</sup> to amend an employee's work history in order to more perfectly predict the outcome of its layoff. Respondent's deliberate manipulation of the county codes of approximately 60-70 CCI positions is outside the plain meaning of the statute and was detrimental to appellant.

Because there is no layoff statutory or regulatory authority for an appointing power to manipulate the work histories of its employees, respondent failed to follow the statutes and rules governing layoffs. By creating its own preliminary step to the layoff process before submitting its layoff plan to CalHR for approval, it also failed to recognize or follow the rules as set out in the Layoff Manual. The Layoff Manual, relied upon by CalHR in layoff administration, is a set of rules applicable to layoffs. There are a plethora of measures outlined in the Layoff Manual to mitigate staffing reductions and make the layoff a fair process. Changing the county code of its employees without notice is not amongst them.

The Layoff Manual provides examples of various measures which departments may use to mitigate staffing reductions. For example the use of hiring freezes, reduction of intermittent and non-permanent work force, reduce work time, job sharing, early, partial or regular retirement, voluntary personal leave or the most recognized, SROA, are designated methods to mitigate staff reductions. The Layoff Manual does not indicate an appointing power may manipulate its employees work histories in order to mitigate staff reductions and bring about a particular result.

Nevertheless, respondent, determined it was in the best interests of its most senior employees working in Tulare County, circumvented the statutes governing layoffs. Respondent's Chief Deputy of State Operations testified its most senior employees in Tulare County would be lost to layoff unless the county codes were changed to accommodate those employees because there was no CDCR facility in that county. Respondent claimed it needed a plan to consolidate and streamline to make the layoff a fair process and embarked upon a plan to create more opportunity for its most senior employees.

By pre-determining the outcome of the layoff to accommodate its most senior employees, respondent failed to follow the statutory scheme. Pre-determining the layoff outcome and manipulating employee work histories is not an acceptable way to mitigate a layoff plan contemplated by Government Code section 19997 et seq., or the Layoff Manual rules. By selecting those employees they wanted to save from layoff, respondent abrogated appellant's layoff rights to demote in her county and did not follow the rules applicable to layoff.

The manipulation of employee work histories skewed the results of the layoff plan in favor of some employees and to the detriment of appellant. Because of respondent's actions, the appellant was unable to exercise her demotion pattern in Ventura County. Had appellant's county code not been changed to Kern County, she would have been able to exercise her demotion options and return to DJJ. Respondent attempts to mitigate the damage caused by its improper layoff by showing the concern of its Director. The Director's letter of apology to appellant does not undo the damage to appellant's demotion path, or conform respondent's actions to the statutory scheme.

#### The layoff was made in bad faith.

The civil service system rests on the principle of application of the merit system instead of the spoils system in the matter of appointment and tenure of office. (*Barry v. Jackson* (1916) 30 Cal.App. 165.) Respondent's county code change to appellant's work history indicates an intent to target favorites it did not wish to be adversely affected by the layoff. She admits, "if we never changed the county code, our most senior person would have no demotion path." She never inquired into the appellant's demotion path.

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<sup>8</sup>An appointing power means a person or group having authority to make appointments in the State civil

Black's Law Dictionary defines "bad faith" as the opposite of "good faith." Bad faith generally implies or involves actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation. (See Black's Law Dict. (6th ed. 1990) p. 139, col. 1.) Respondent changed the CCI county codes on the false premise, "we wanted to make it fair." Had respondent truly wanted to "make it fair," it could have followed the statutory scheme in Government Code section 19997 et seq., or the Layoff Manual. Instead, to the detriment of appellant, it changed county codes to benefit its most senior employees.

Additionally, once the county code was changed, respondent failed to notify appellant until it was too late for her to challenge the county code change. A CDCR Human Resources employee testified an employee is typically notified regarding work history changes. The method of notification is a NOPA. The PAM requires a NOPA be produced for "all appointment transactions." Appellant did not receive a NOPA even though her work history indicated an "A" as an appointment transaction for the county code change.

Moreover, no one was willing to take responsibility for failing to notify the appellant her county code was changed. She believed it was CalHR's responsibility which contradicted the testimony of the CDCR Human Resources employee who believed respondent would have received the SCO NOPA directly from SCO. Nonetheless, had appellant been on notice the respondent changed her county code, she would have had an opportunity to challenge the action prior to the layoff implementation.

Furthermore, the county code change circumvented the laws governing transfer. The county code, "[i]dentifies the county in which the employee works." (SCO PAM.) In other words, to change appellant's county code had the same effect as a transfer. Transfers of employees is governed by Section 19994.1 and requires a 60-day written notice of the proposed transfer. Specifically, "[w]hen a transfer reasonably requires an employee to change his or her place of residence . . . the appointing power shall provide to the employee 60 days prior to the effective date of the transfer a written notice setting forth in clear and concise language the reasons why the employee is being transferred." Because appellant's new workplace requires her to commute over five (5) hours and 150 plus miles, she was entitled to due process.

At a minimum, due process requires notice and an opportunity to be heard. (Cal. Const., art. 1, § 7.) This is the essence of due process. Once respondent decided to change the county code of appellant, it essentially transferred her from Ventura County to Kern County without due process. The comprehensive personnel system of layoff in state civil service is well-defined, and it does not include the manipulation of employee's county codes to protect one group of employees to the detriment of others. If respondent undertook a project to correct county codes specifically, "misidentified incorrectly in the wrong county" in good faith, it could have easily notified the appellant of the county code change.

However, instead of relying on the state's SROA to keep its skilled and senior employees affected by layoff, respondent was determined to favor certain employees to the detriment of others, notably, the appellant. Because SROA is the appropriate method to protect skilled and senior employees, respondent acted in bad faith by intentionally ignoring the rules governing layoff, and transfer and failed to provide a modicum of due process to appellant.

The layoff was otherwise improper.

Improper is defined as, "not proper, not adapted or suited; unbecoming indecent; erroneous; not regular or normal." (The Living Webster Encyclopedic Dict. of the English Language (1977) p. 483, col. 3.) Respondent's manipulation of appellant's county code is not a proper activity contemplated within the layoff statutory scheme. In its attempt to "create a fair and equally distributed opportunity in the layoff," respondent denied appellant her demotion in her county by changing the county code, "to prevent the automatic layoff" of certain CCIs.

As noted, respondent's conduct prior to submitting its layoff plan to CalHR was outside the layoff statutory scheme. Moreover, because respondent intentionally targeted certain employees to the detriment of appellant, the layoff was in bad faith. Specifically, but for respondent's manipulation of its employees county codes, the appellant would have been able to demote to a facility near her home where she has worked for 18 years. As her supervisor correctly understood, but respondent failed or refused to ascertain, the appellant had demotion rights in her original county to a DJJ facility.

Respondent's arguments the Director was sorry about the layoff outcome; its actions were not illegal; and it was in the discretion of the hiring authority to manipulate the county codes, are unpersuasive. First, the Director's after-the-fact apology is irrelevant as to whether the layoff statutes were followed, the layoff was in bad faith or otherwise improper. Second, respondent's actions were unlawful and in derogation of the layoff statutory scheme. Lastly, manipulation of a state employee's work history without due process is not in the discretion of the hiring authority.

Changing the county codes without notice to appellant was irregular, abnormal and unlawful. If respondent determined county codes should be changed, it was incumbent upon it to give notice to appellant and provide her with an opportunity to be heard. Respondent's desire to protect certain employees in the layoff does not justify changing appellant's county code without due process and denying her demotion path through the layoff process. Appellant had a very high seniority score in Ventura County and should be able to exercise the demotion pattern she would have had but for the change to her county code.

## VI

### CONCLUSIONS OF LAW

Appellant proved by a preponderance of the evidence that the statutes and rules governing layoffs were not followed by respondent. Appellant proved by a preponderance of evidence that the layoff was in bad faith or was otherwise improper.

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**THEREFORE, IT IS DETERMINED,** the layoff appeal from the position of Correctional Counselor I, effective May 1, 2013, is granted. Respondent shall return appellant to Ventura County and allow her to exercise those rights she was denied when her county code was changed prior to the layoff.