CalHR Case Number 15-O-0009
Petition to Set Aside Resignation
Final Decision Adopted 10/27/2015
By: Richard Gillihan, Director

PROPOSED DECISION

This matter was heard before Karla Broussard-Boyd, Administrative Law Judge II (ALJ), Department of Human Resources (CalHR) at 10:00 a.m. on September 23, 2015 in Sacramento, California.

The appellant, was present and represented by Thomas Perez, Attorney at Law. Jaynie Hickok-Siess, Senior Attorney, California Department of Corrections and Rehabilitation (CDCR), represented CDCR, California Health Care Facility (CHCF), respondent.

I

JURISDICTION

The appellant tendered a written resignation from his position as a Correctional Officer with respondent, CDCR, CHCF on December 12, 2014. On January 9, 2015, appellant filed a petition to set aside his resignation with CalHR.

Government Code section 19996.1 authorizes CalHR to set aside a resignation "on the ground that it was given or obtained pursuant to or by reason of mistake, fraud, duress, undue influence or that for any other reason it was not the free, voluntary and binding act of the person resigning, unless a petition to set it aside is filed with [CalHR] within 30 days after the last date upon which services to the state are rendered or the date the resignation is tendered to the appointing power, whichever is later." The appeal complies with the procedural requirements of Government Code section 19996.1. CalHR has jurisdiction over the appeal.

II

PROCEDURAL HISTORY

On December 12, 2014, the appellant tendered his written resignation from his position as a Correctional Officer with respondent, CDCR, CHCF. On December 17, 2014, respondent entered the "S21" resignation transaction code into the State Controller's employee history summary. The appellant filed a petition to set aside his resignation with CalHR on January 9, 2015.

On January 14, 2015, CalHR set the matter for a March 12, 2015 evidentiary hearing. On January 29, 2015, the respondent requested a short continuance of the hearing which the appellant did not oppose. The matter was rescheduled for March 16, 2015 at 1:00 p.m. The parties appeared at 9:00 a.m. because the hearing notice incorrectly indicated a morning hearing. The ALJ was not available and the hearing was rescheduled to May 18, 2015.

On April 20, 2015, appellant's counsel verbally requested a continuance which was formalized in a written request on May 12, 2015. There was no objection from opposing counsel. The continuance was granted and the hearing was rescheduled for July 22, 2015. On June 10, 2015, respondent's counsel objected to the July 22, 2015 hearing date due to a calendar conflict. The hearing was rescheduled for September 23, 2015 in Sacramento, California.

III

ISSUE

Appellant argues his resignation was not a free and voluntary act and should be set aside.

Respondent contends the appellant did not suffer from mistake, fraud, duress or undue influence and his resignation was a free and voluntary act.

The issue to be determined is:

1. Was the appellant's resignation a free and voluntary act?

IV

FINDINGS OF FACT

The evidence established the following facts by a preponderance of the evidence.

The appellant began his career with the State of California on October 29, 2007 as a Correctional Officer at respondent's San Quentin facility. On November 18, 2013, he was appointed to a Correctional Officer position at respondent's California Health Care Facility (CHCF) in Stockton, California. The Correctional Officer position requires the equivalent of a high school diploma. The appellant understands written and spoken English and has a 2-year criminal justice degree.

Sometime in late 2013, a complaint was filed against the appellant. The appellant's union assigned him an attorney[1] to assist with the investigative process. The investigation was conducted by respondent's Investigative Services Unit (ISU). The appellant does not recall when he first learned of the allegations against him. Friday, September 19, 2014, was the appellant's last workday at CHCF.

On Sunday, September 21, 2014, respondent's Employee Relations Officer (ERO), personally served the appellant with an Administrative Time Off (ATO)[2] letter. This was the first time the ERO met with the appellant and she briefly explained the letter which placed him on ATO. As respondent's ERO, she drafts and serves *Skelly* letters, Notices of Adverse Action (NOAA), ATO letters, Letters of Intent, and other disciplinary actions.

The ATO letter advised the appellant he would receive his regular pay, was not allowed on the facility grounds and must be available by telephone during regular business hours. On November 12, 2014, respondent called the appellant and told him to report to CHCF. When the appellant reported to respondent's facility, the ERO served him with a Letter of Intent. A Letter of Intent is a written tool used by respondent after the completion of an ISU investigation and provides an employee with a 30-day notice of the disciplinary action to follow. The appellant's Letter of Intent advised him he would soon be dismissed from state service.

On December 5, 2014, the ERO once again told the appellant to report to respondent's CHCF. When he arrived at the facility, she served him with a NOAA dismissing him from state service. The appellant's union representative was also present at this meeting. The appellant admits the ERO never discussed the possibility of criminal charges or a resignation with him.

On December 10, 2015, the appellant was provided a *Skelly*[3] hearing. He admits the *Skelly* officer never discussed possible criminal charges with him. After the *Skelly* hearing, the union representative asked the ERO the last day the appellant could resign his position. She told the union representative the last day the appellant could tender a resignation would be before close of business December 12, 2014, the NOAA effective date. He did not ask for an extension of time of the NOAA effective date.

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[1]This is not the same attorney that represented the appellant at this hearing.
[2]ATO is a form of administrative leave status initiated by appointing authorities for a variety of reasons. (http://www.calhr.ca.gov/PML Library/2012008.pdf (as of October 13, 2015).)
[3]A *Skelly* hearing is an appeal right of any employee served with a Notice of Adverse Action pursuant to Government Code section 19572.

At approximately 2:00 p.m. on December 12, 2014, the appellant appeared at the ERO's office with his letter of resignation. He did not request an extension of time of the NOAA effective date. The resignation letter was typed and read:

"To whom it may concern,

I Correctional Officer (appellant) wish to resign from my work duties as a Correctional Peace Officer for the California Department of Corrections and Rehabilitation, on December 12, 2014 at 1500 Hours.

(appellant) /s/"

At 2:46 p.m. on December 12, 2014, the Warden's office acknowledged receipt of the appellant's resignation.

The appellant claims his resignation was not a free and voluntary act because, "I've never been in trouble, honestly I was scared, I was stressed out, I didn't know what I was doing, I didn't know my rights like that and so . . . I was confused." He further claims he submitted his resignation because, "I didn't know what to do – I didn't want to get charged criminally, I was scared . . . and I just thought that was the day I had to do [sic], and I didn't want to be labeled as fired and have a hard time you know getting a job, so that's why I think I did it."

The appellant admits that no one from respondent ever told him it would be better if he resigned. He also testified he understood resignation was a better option for him; he could apply for other state jobs and knew if the dismissal went forward, he would be unable to apply for other Peace Officer positions. The appellant admits that at the time of tendering his resignation he was thinking of applying to other law enforcement agencies stating, "I just thought it wouldn't look good if I was terminated from CDCR."

V

CREDIBILITY DETERMINATION

The ALJ makes the following credibility determination. Except as otherwise provided by statute, the court or jury may consider, in determining the credibility of a witness, any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including, but not limited to . . . (f) The existence or nonexistence of a bias, interest, or other motive . . . (h) A statement

made by him that is inconsistent with any part of his testimony at hearing. (Evid. Code, § 780.)

The appellant's testimony he did not know about his dismissal until he received the NOAA is not believable. There is credible testimony from the ERO, the appellant was told of the NOAA dismissal penalty on November 12, 2014 when he received the Letter of Intent. However, despite receiving the Letter of Intent weeks earlier, the appellant incredibly insists he did not know he was going to be dismissed until he received the NOAA in December.

The appellant's claim he asked the ERO for an extension of time of the NOAA effective date is equally unbelievable. The ERO testified credibly she never spoke with the appellant regarding an extension of time. Moreover, his testimony she told him to turn in a letter of resignation before December 12, 2014, and subjected him to duress because she did not give him an extension of time, is not believable. There is credible testimonial evidence he never asked for an extension of time or discussed resignation with any of respondent's employees.

The appellant does not recall when he received the Letter of Intent or the NOAA, and feigns ignorance when asked when he learned of the allegations against him. Later, during cross-examination, he finally admits he knew of the allegations against him a year before he was served with the NOAA. The appellant's memory lapses do not assist him in meeting his burden of proof his resignation was not a free and voluntary act. Lastly, his claim, "I relied on what [my attorney] told me," is belied by his testimony, "I did not solely rely on [my attorney's] advice when I resigned."

VI
ANALYSIS

An employee may resign from state service by tendering a written resignation to the appointing power. (Cal. Code Regs., tit. 2, § 599.825.) Appellant tendered his written resignation to respondent on December 12, 2014. His resignation was acknowledged and accepted by the Warden's office later that afternoon.

Government Code section 19996.1 provides: "[N]o resignation shall be set aside on the ground that it was given or obtained pursuant to or by reason of mistake, fraud, duress, undue influence or that for any other reason it was not the free, voluntary and

binding act of the person resigning." In seeking reinstatement, the appellant has the burden of proof to show by a preponderance of the evidence his resignation was by reason of mistake, duress or that it was not a free and voluntary act. (*Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826.)

The appellant's resignation was a free and voluntary act.

California Civil Code section 1567 provides that an apparent consent is not "free" when obtained through duress, menace, fraud, undue influence, or mistake. The appellant claims duress and mistake made his resignation not a free and voluntary act. A "voluntary act" is an act proceeding from one's own choice or full consent unimpelled by another's influence. (See Black's Law Dict. (6th ed. 1990) p. 1575, col 1.) "To determine whether an act is voluntary, the trier of fact must determine all relevant facts and circumstances which might cause the actor to depart from the exercise of free choice and respond to compulsion from others." (*Kasumi Nakashima v. Acheson* (1951) 98 F.Supp. 11.)

The appellant's argument circumstances which took place after his December 2014 resignation are relevant, is not persuasive. Facts or circumstances which occurred after his resignation are not relevant to determine what caused him to depart from his exercise of free choice at the time he tendered his resignation. Additionally, his argument the NOAA dismissing him from state service was defective or incomplete does not assist the trier of fact in determining the appellant's state of mind at the time of his resignation.

In his claim he suffered duress, the appellant testified the ERO did not pressure him to resign. His argument of duress was because he, "was stressed out – did not understand the entire package process – I've never been in trouble before – I was scared." Duress is any unlawful threat or coercion used by a person to induce another to act in a manner he otherwise would not. (See Black's Law Dict. (6th ed. 1990) p. 504, col. 1.) The appellant's fear does not support a credible claim of duress.

The appellant claims mistake because he was confused and, "not knowing my rights." In the law, there are two legal definitions of mistake. The first, a mistake of fact is, "a mistake about a fact that is material to a transaction; any mistake other than a

mistake of law." The second is a mistake of law. A mistake of law "happens when a party, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect." (See Black's Law Dict. (6th ed. 1990) p. 1001, col. 2.)

The appellant did not suffer from a mistake of law because by his own admission he "didn't know what to do." Because he claims he did not have full knowledge of the facts, his mistake was not a mistake of law. His claim to a mistake of fact may have more merit. His claim of confusion and "not knowing my rights" could lead to a mistake of fact – if it were true. However, the appellant's lack of credibility vitiates his claim he was confused as does his testimony, "I did not solely rely on what [my attorney] told me."

The appellant was not a mere bystander during the events of December 2014. He was a trained Correctional Officer with a 2-year criminal justice degree. Moreover, he testified he had no problems reading or writing English and understood the English language well. The appellant's argument he was confused and didn't know his rights does not have the weight of credible evidence.

Furthermore, and perhaps most important, the appellant testified, "I didn't want to be labeled as fired and have a hard time you know getting a job, so that's why I think I did it." His testimony he understood resignation was a better option for him, and he could apply for other state jobs unless the dismissal went forward, is diametric to his claim of mistake. The appellant admitted that at the time of tendering his resignation, he was thinking of applying to other law enforcement agencies stating, "I just thought it wouldn't look good if I was terminated from CDCR."

Because the appellant was able to reason that resignation was a better option for him, he did not suffer under duress or make a mistake of law or fact. His resignation was a free and voluntary act.

VII

CONCLUSIONS OF LAW

The appellant's resignation was a free and voluntary act and should not be set aside.

* * * * *

THEREFORE, IT IS DETERMINED, the petition to set aside his December 12, 2014 resignation from the position of a Correctional Officer with respondent's California Department of Corrections and Rehabilitation, California Health Care Facility is denied.