

State of California

MEMORANDUM

To: PERSONNEL MANAGEMENT LIAISONS

Date: February 2, 1989  
Reference Code: 88-118

**THIS MEMORANDUM SHOULD BE DISTRIBUTED TO:**

Personnel Officers  
Labor Relations Officers

From: Department of Personnel Administration  
Office of the Director

Subject: Resignation "With Fault"

The State civil service has had a practice over the years of marking resignations "with fault" in cases where an employee had an unsatisfactory work record, resigned while punitive action was being considered, etc. The purpose of the designation was to alert future State employers of the past employment record.

Through the appeal of a recent case where an employee's resignation was designated "with fault" over his objections, it was determined that a legal basis to permit such a resignation does not exist. Attached is a copy of the case. As indicated, this practice is based on instructions in the Personnel Transactions Manual rather than on rule as required by the Administrative Procedures Act and does not provide due process to the employee.

DPA is planning to review this issue with interested-departments within the next several weeks to determine what action should be taken regarding current records, whether the State needs to continue the process through new rules which provide due process, etc. In the meantime, Departments should not use the designation of resignation "with fault."

Questions regarding this issue should be directed to Ann McWherter on (916) 324-9367 or ATSS 454-9367.

*Lillian Rowett*

Lillian Rowett  
Deputy Director

Attachment

JENC301





(Robertson continued)

October 21, 1986. The matter was thereafter referred to the State Personnel Board where it was assigned to an Administrative Law Judge for hearing.

An evidentiary hearing was held on January 21, 1987. Post-hearing briefs were received on February 9, 1987. On March 25, 1987, the Administrative Law Judge requested that respondent provide certain additional documents concerning the appeal. These documents were not provided until September 10, 1987. The appellant's response to the documents was filed on October 5, 1987. The matter was considered submitted as of that date.

## II

The appellant was employed as a Maintenance Mechanic with the Department of Corrections from March 22, 1982, through the date of his resignation on March 21, 1986. He has no prior adverse actions.

## III

The appellant resigned from his position as a Maintenance Mechanic to accept a position as a Labor Relations Representative with the California State Employees' Association (CSEA). The appellant had been an active job steward for CSEA and was interested in working full-time in the labor relations field. He submitted an application for employment with CSEA in early 1985 and was interviewed for a position in January 1986 when a vacancy occurred on the CSEA staff. Appellant was offered the position in early March and immediately accepted it. He told CSEA that he would be able to report to work after giving the customary two weeks' notice to the Department of Corrections.

(Robertson continued)

#### IV

When the appellant submitted his resignation, the respondent informed him that it was accepting his resignation "with fault." The reason given for the "with fault" designation was that the appellant was then under investigation for his actions during a recent escape at the institution. The escape occurred on February 21, 1986, after the appellant had already interviewed with CSEA but before he had been offered the position. The appellant was aware of the investigation at the time of his resignation because he had been the subject of an investigatory interview on February 28, 1986.

#### V

When the appellant protested the "with fault" designation, he was advised by the Superintendent that he could rescind the resignation, await the outcome of the investigation, and contest the charges against him when and if such charges were filed. Otherwise, the Superintendent said, the appellant's resignation would be designated "with fault" on his official employment record. The appellant declined to rescind his resignation, but requested the Superintendent to expedite the investigation so the matter could be resolved before he left State service.

#### VI

The respondent did not complete its investigation until several days after the effective date of appellant's resignation. Despite the fact that the appellant was no longer employed by the State, the Superintendent completed a written recommendation to the Department of Corrections that the

(Robertson continued)

appellant be dismissed from State service for inefficiency, inexcusable neglect of duty, and other failure of good behavior causing discredit to the agency. The basis for the recommendation was the appellant's alleged failure to maintain adequate supervision of an inmate work crew which resulted in the escape of two inmates from the institution. The recommendation was never acted upon because the appellant had already left State service. The results of the investigation and the Superintendent's recommendation for dismissal were not disclosed to the appellant until the date of his hearing on this appeal.

#### VII

When the appellant resigned, respondent's Personnel Office completed a separation form which designated his separation as a "voluntary resignation with fault--under unfavorable circumstances." This information was entered on the State's central personnel computer and would be made available to any person, public or private agency that requested information concerning the appellant's work history. Details concerning the investigation and the Superintendent's recommendation for dismissal were not entered on the computer and would only be disclosed to other Corrections or Youth Authority institutions.

#### VIII

There was no credible evidence that the respondent designated the appellant's resignation "with fault" in retaliation for his union activities as alleged by appellant in his closing brief.

(Robertson continued)

IX

The appellant does not wish to return to his former position with the Department of Corrections. His only purpose in pursuing this appeal is to eliminate the "with fault" designation from his record. At the hearing, the parties stipulated that the only issues before the Department of Personnel Administration are whether the Department of Corrections had authority to designate the appellant's resignation "with fault," and if so, whether it properly did so under the facts of this case.

\* \* \* \* \*

PURSUANT TO THE FOREGOING FINDINGS OF FACT THE ADMINISTRATIVE LAW JUDGE MAKES THE FOLLOWING DETERMINATION OF ISSUES:

No statute or regulation specifically authorizes the State to designate an employee's separation as a "resignation with fault." Government Code section 19996.1 provides in pertinent part:

"Resignations from the state civil service are subject to (D)epartment (of Personnel Administration) rules. A resignation, except as provided in this section, does not jeopardize any rights and privileges of the employee except those pertaining to the position from which he or she resigns. A written resignation may expressly waive all or any rights or privileges provided for by this chapter, including but not limited to, accumulated vacation, and in such event the records of the department shall be made to conform therewith. ..."

Department of Personnel Administration Rule 599.825 provides:

"An employee may resign from state service by submitting a written resignation to the appointing power. A copy of such resignation shall immediately be filed by the appointing power in a manner prescribed by the Department of Personnel Administration." (Cal. Adm. Code, tit.2, sec. 599.825.)

(Robertson continued)

The only written authority cited by respondent for designating the appellant's resignation "with fault" is the Personnel Action Manual (PAM) issued by the State Controller's Office. This publication contains instructions for users of the State's computerized personnel system. PAM section 3.214 provides that the appointing power may designate a "resignation with fault--under unfavorable circumstances" by entering code S20 on the employee's separation form. "Substantiation for this type of separation must be on file with the appointing power." (PAM sec. 2.204.) The authority cited for this transaction is Personnel Transactions Manual (PTM) section 525. The PTM is an internal manual published by the State Personnel Board for the use of departmental personnel offices in completing personnel transactions. PTM sections 525.15-525.153 provide a fuller explanation of the transaction:

"If an employee's resignation is under unfavorable circumstances an explanation to justify this type of separation must be entered (on the separation form). Careful consideration should be made of this information in the event of a request for reinstatement.

"The explanation must include specific reasons for reporting this type of resignation and must also indicate the reasons why the employee would not be considered suitable for future State employment. A statement on the (separation form) that information is on file at the department is not sufficient justification.

"If the employee resigned when unfavorable action had already been taken to separate him, a copy of that written notification to the employee may be submitted with the (separation form) in lieu of a separate explanation.

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"If a favorable resignation was submitted to the Personnel Board and the department later wishes to submit unfavorable information or if the resignation occurred while the department was contemplating action against the employee and it is the department's intent to have this information reflect a resignation under unfavorable circumstances, the department must submit a replacement (separation form). The department copy of the (separation form) must be signed by the employee."

The appellant claims that the respondent's actions were improper for two reasons: (1) there was no statutory or regulatory authority for designating his resignation "with fault"; and (2) the procedure employed in doing so violated his due process rights. Each claim will be examined separately.

#### STATUTORY OR REGULATORY AUTHORITY

In Armistead v. State Personnel Board (1978) 22 Cal.3d 198, a unanimous California Supreme Court held that a provision of the Personnel Transactions Manual (PTM) which purported to limit the circumstances under which an employee could withdraw a resignation was invalid because the PTM was not promulgated and published in accordance with the California Administrative Procedure Act (APA) (Gov. Code sec.11371 et seq.). The court noted that Government Code section 19503 (the predecessor to section 19996.1) provided that resignations "are subject to board rules." Since the State Personnel Board had failed to adopt any formal regulations limiting the withdrawal of resignations, the court held that the PTM provision purporting to do so was invalid, even as an expression of the Board's "administrative interpretation" of the statute. According to the court, the sole

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method for placing limitations on the resignation statute was through properly enacted regulations. The court invited the board to enact such regulations, if it so chose, by complying with the requirements of the APA (Id., p.201).

Despite the explicit invitation of the Supreme Court, neither the State Personnel Board nor the Department of Personnel Administration (the successor to the board's regulatory authority over resignations) has adopted any additional regulations on the subject in the almost ten years since Armistead was decided. The statute (now renumbered as section 19996.1) still provides that resignations are "subject to department rules." The sole regulation on the subject (renumbered as DPA rule 599.825) provides that an employee may resign by submitting a written resignation to the appointing power which must be filed in the manner specified by DPA. The regulation contains no other procedural requirements or limitations. In a previously published opinion, the Attorney General concluded that where an employee submits his or her written resignation in accordance with these requirements, the resignation cannot be rejected and becomes effective without the necessity of acceptance by the appointing power (29 Ops.Cal.Atty.Gen. 117 (1957)). The statute itself provides that the resignation "does not jeopardize any rights and privileges of the employee except those pertaining to the position from which he or she resigns," unless the employee expressly waives those rights.

In the instant case, the respondent sought to designate the appellant's resignation, over his objection, as a "resignation

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with fault." As the respondent concedes, this designation was entered on the state's centralized computer and would be disclosed to any person, public or private agency that inquired about the appellant's work history. Such a designation would have a substantial impact on the appellant's reentry into State service both because the State's standard application form requires disclosure of any resignation "under unfavorable circumstances" and because the State Personnel Board is authorized to refuse to examine or certify any applicant who resigned from any position "not in good standing" (Gov. Code sec. 18935(i)). The respondent thus sought to place a limitation on the appellant's reentry rights into State service by placing this negative designation on his record. That this was the purpose of the entry is demonstrated by the fact that the Superintendent was willing to drop the "with fault" designation if the appellant waived future employment with the Department of Corrections.

The difficulty with the respondent's action is that there is nothing in the statute or regulations which authorizes an appointing power to place such a significant limitation on an employee's resignation, absent the agreement of the employee. As respondent concedes, the only written authority for its action is contained in the Personnel Action Manual and the Personnel Transactions Manual, neither of which was ever adopted pursuant to the APA. Armistead makes it crystal clear that such "underground regulations" are invalid to the extent that they seek to take the place of properly enacted regulations. Thus, in

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the absence of any statute or regulation so providing, respondent was without authority to designate the appellant's resignation "with fault" over his objection. Accordingly, this designation must be stricken from the appellant's employment records.

The limitations on this holding should be noted. Nothing in this decision prevents an appointing power from maintaining information on a former employee's service (including information on pending investigations or adverse actions) for the purpose of evaluating the employee's application for reemployment. Nothing herein prevents the appointing power from sharing this information with other State agencies who are evaluating the appellant for possible employment (subject of course to the limitations of the various privacy acts). Appointing powers may still enter into voluntary agreements with employees to substitute an "at fault" resignation to settle a pending adverse action. They may still file adverse actions against former employees (such as the appellant) whose names appear on employment lists (Gov. Code sec. 19571). Moreover, the State Personnel Board still retains its authority to investigate and refuse to examine or certify candidates who resigned from any position "not in good standing." These tasks may be more difficult because of the absence of the "with fault" designation, but the solution to this difficulty is to enact valid regulations to provide the necessary authority for the transaction as suggested by the Supreme Court in Armistead.

(Robertson continued)

DUE PROCESS CONCERNS

Appellant also contends that the current practice of designating resignations "with fault" violates due process rights guaranteed by the federal and state constitutions. This contention also has merit.

The courts have recognized that due process protections apply whenever the government takes an action which "stigmatizes" an employee, "seriously impairs" his or her opportunity to make a living, or "might seriously damage his (or her) standing and associations in the community." (Lubey v. City and County of San Francisco (1979) 98 Cal.App.3d 340, 346.) These protections arise because of the employee's "liberty interest" in his or her good name and reputation. In such circumstances, the government must provide an opportunity for the employee to refute the charges and clear his or her name. This must include notice and opportunity for hearing appropriate to the nature of the case before the deprivation occurs. (Id., pp. 346-347.)

In the instant case, respondent's action of designating the appellant's resignation "with fault" implicated his liberty interests. Such information would be disclosed to prospective employer's who called for references and could result in the appellant's disqualification from future State employment under section 18935(i). The fact that the respondent does not disclose the underlying reasons for such a designation adds to these concerns since a prospective employer is left to speculate about the reasons for such an ominous designation and is likely to assume the worst. Thus, in light of the serious consequences of

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an "at fault" designation, the appellant was entitled to the protections of due process before the designation was carried out. (See Zike v. State Personnel Board (1983) 145 Cal.App.3d 817, 821.) Such protections should include notice of the proposed designation, a copy of the charges and materials upon which the action is based, an opportunity to respond to the authority proposing the action prior to the effective date, and a post-deprivation hearing before a neutral decision-maker (Skelly v. State Personnel Board (1975) 15 Cal.3d 194).

In the instant case, the appellant was afforded none of these rights except for this post-deprivation hearing before the Department of Personnel Administration. Ordinarily, such a proceeding could cure any pre-hearing defects by simply adjusting the date of the action to the date of the final decision (Barber v. State Personnel Board (1976) 18 Cal.3d 395). However, this proceeding did not cure the due process defects because the respondent did not notify the appellant of the basis of the "at fault" designation until the day of the hearing, did not provide him with a copy of the charges until sometime thereafter, and has never provided him with a copy of the investigative report. Thus the appellant has never been provided with an opportunity to contest the charges against him. Under ordinary circumstances, the appropriate remedy for this due process violation would be to direct the respondent to provide the appellant with a complete copy of the investigative report and remand the case for a new evidentiary hearing to give the appellant an opportunity to clear his name. However, since it has already been determined that the

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"at fault" designation must be stricken from the appellant's record, such a remedy would be superfluous. If the Department of Personnel Administration chooses to adopt regulations to provide authority for such designations in the future, it should include sufficient procedural protections to meet these concerns.

\* \* \* \* \*

WHEREFORE IT IS DETERMINED that the respondent's designation of Arthur Robertson's resignation effective March 21, 1986, as a "resignation with fault--under unfavorable circumstances" is hereby set aside, and the respondent is directed to take all necessary steps to eliminate any reference to such designation from the appellant's employment records.

\* \* \* \* \*

I hereby certify that the foregoing is my Proposed Decision in the above matter, and I recommend its adoption by the Department of Personnel Administration as its decision in the case.

DATED: January 11, 1988.



PHILIP E. CALLIS

Philip E. Callis, Administrative Law  
Judge, State Personnel Board.

PROOF OF SERVICE  
(Code Civ. Proc. § 1013(a))

I declare that I am employed in the County of Sacramento, California, I am over the age of 18 and not a party to the within-captioned cause; my business address is 1515 - S Street, Suite 400, P.O. Box 944234, Sacramento, California 94244-2340. On September 21, 1988, I served the DECISION on the parties listed below by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California addressed as follows:

Jeffrey Young  
Labor Relations Representative  
California State Employees'  
Association  
2020 Challenger Drive  
Suite 102  
Alameda, CA 94501

Ramon de la Guardia  
Deputy Attorney General  
P.O. Box 944255  
Sacramento, CA 94244-2550

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on September 21, 1988, at Sacramento, California.

  
\_\_\_\_\_  
DEE ANNE D'OTTAVIO