

**BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD  
OF THE STATE OF CALIFORNIA**

In the Matter of the Application of:

**Melissa J.**

**Precedent Decision 11-01**

**Summary**

The application for compensation from the California Victim Compensation Program is based on the alleged rape and sexual assault committed against Melissa J. by her father, mother, and other persons between the years of 1988 through 2008. Melissa J. requested compensation for medical and dental expenses, relocation expenses, job retraining, mental health treatment expenses, home security improvements, and income loss. Melissa J.'s application was received by the Program on May 23, 2008, and was recommended for denial because the Program staff determined that there was not a preponderance of evidence that Melissa J. was the victim of a qualifying crime. The Program staff also determined that Melissa J. pled guilty to embezzlement and was placed on felony probation from December 6, 2006, until March 3, 2009.

An in-person hearing on this application was held on May 6, 2010, in Sacramento, California. Melissa J. appeared at the hearing and testified under oath. The hearing officer determined that Melissa J. had proven by a preponderance of the evidence that she was the victim of a qualifying crime. It was also determined that any crime-related expenses that were incurred during the time that Melissa J. was on felony probation would not be eligible for reimbursement.

On October 20, 2010, the Program received Melissa J.'s timely request for reconsideration. Melissa J.'s attorney sent a two-page letter that argued that because her felony conviction was reduced to a misdemeanor on March 3, 2009, Melissa J. should therefore be treated no differently than any other eligible victim of crime because when her application was approved by the Board on August 19, 2010, she was not a convicted felon. The request for reconsideration also noted a clerical error in the August 19, 2010, Board decision.

1 A request for reconsideration must be filed with the Board within 30 calendar days of  
2 personal delivery or within 60 calendar days after the mailing of the original decision.<sup>1</sup> Requests for  
3 reconsideration shall not be granted unless the applicant produces new and additional evidence not  
4 reasonably available to the applicant at the time of the hearing.<sup>2</sup> Although Melissa J.'s appeal does  
5 not constitute new and additional evidence not reasonably available to the applicant at the time of  
6 the hearing, it is determined that the Board will grant reconsideration on its own motion<sup>3</sup> to  
7 determine the issue of the reduction of a felony conviction.

### 8 Discussion

9 Melissa J.'s request for reconsideration correctly points out that the earlier decision of the  
10 Board cited an incorrect statute in support of the recommendation not to pay for any crime-  
11 related expenses that were incurred while she was on felony probation. The cited statute,  
12 Government Code section 13956(c), refers to the denial of an application due to involvement.  
13 The appropriate section should be Government Code section 13956(d). This section states that  
14 no compensation may be paid to a person during the time they are incarcerated or on felony  
15 probation or parole.

16 The request for reconsideration argues that because Melissa J.'s felony conviction was  
17 reduced to a misdemeanor in March 2009, she was not on felony probation at the time the  
18 Board approved her application on August 19, 2010. Thus, she is eligible to be reimbursed for  
19 all her crime-related expenses.

20 Melissa J. cites *Gebremicael v. California Commission on Teacher Credentialing* (2004)  
21 118 Cal. App. 4<sup>th</sup> 1477, in support of this argument. In *Gebremicael*, the applicant pled no  
22 contest to one count of violating California Penal Code section 246.3, discharge of a firearm in  
23 a grossly negligent manner, a felony. In 1998, the applicant's petition to reduce the felony  
24 conviction to a misdemeanor was granted. Subsequently, the applicant applied to the  
25 Commission for a teaching credential. The applicant disclosed his prior conviction and its

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27 <sup>1</sup> Gov. Code, § 13959(i).

28 <sup>2</sup> Cal. Code Regs., tit. 2, § 649.21.

29 <sup>3</sup> Gov. Code, § 13959(j); Cal. Code Regs., tit. 2, § 649.21.

1 subsequent reduction to a misdemeanor. The applicant later filed an application for an  
2 emergency substitute teaching credential. The Commission denied both applications. The  
3 applicant brought the petition for writ of mandate, arguing that the reduction of his conviction to  
4 a misdemeanor "for all purposes" under California Penal Code section 17 included for purposes  
5 of teacher credentialing.

6 On appeal, the court reversed and held that the mandatory denial provision of California  
7 Education Code section 44346.1 did not apply to the applicant because at the time of his  
8 applications he stood convicted of a misdemeanor, not a felony. The court held that once a  
9 court has reduced a "wobbler"<sup>4</sup> to a misdemeanor pursuant to Penal Code section 17(b), the  
10 offense is treated as a misdemeanor *thereafter* "for all purposes," thus allowing the applicant to  
11 apply for a teaching credential.

12 A review of additional case law proves helpful in determining this issue. The court in  
13 *People v. Marsh* (1982) 132 Cal. App. 3d 809, reviewed the appeal of a defendant who sought to  
14 enter drug diversion. Pursuant to a plea bargain, defendant pleaded guilty to a felony charge of  
15 cultivation of marijuana. Subsequently, the public defender moved to be relieved as defendant's  
16 counsel, claiming that he had inadequately represented the defendant. When the defendant had  
17 been arrested, it appeared he was eligible for diversion,<sup>5</sup> which applies only if a defendant has no  
18 prior felony conviction within five years prior to the charged offense. In *Marsh*, diversion was  
19 denied by the trial court because the defendant had been convicted of receiving stolen property  
20 four years and nine months prior to the charged offense. However, defendant's prior conviction  
21 was a "wobbler," punishable either as a felony or a misdemeanor, and could have been reduced  
22 to a misdemeanor by a request to the court.<sup>6</sup> It was argued that had it been so reduced,  
23 defendant would have been eligible for diversion.

24 The court noted that the crucial question in this case is whether a reduction of the wobbler  
25 to a misdemeanor would have related back to the time of the commission of the instant offense

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27 <sup>4</sup> A wobbler is a crime punishable by either state prison or county jail.

28 <sup>5</sup> Cal. Pen. Code, § 1000.

29 <sup>6</sup> Cal. Pen. Code, § 17(b)(3).

1 for purposes of determining eligibility for diversion. In determining that it would not, the court held  
2 that the fact that the offense may have been reduced to a misdemeanor after the commission of  
3 the marijuana offense *should not retroactively* render appellant eligible for diversion. The court  
4 also held that the subsequent sentence to straight time in the county jail, which reduced the  
5 offense to a misdemeanor, *did not relate back* to the time when he was in possession of the  
6 firearm.

7 In *People v. Holzer* (1972) 25 Cal. App. 3d 456, the defendant pleaded guilty to a drug  
8 offense "wobbler" in 1968 and was given probation. In 1969 he was found to have violated Penal  
9 Code section 12021, an ex-felon in possession of a firearm. In 1971 he was found in violation of  
10 the terms of his 1968 grant of probation on the drug charges and was sentenced to county jail,  
11 thus rendering that offense a misdemeanor. It previously had been considered a felony and was  
12 the basis for the section 12021 charge. In 1972 the defendant attacked his conviction for  
13 violation of section 12021, arguing that because his drug charge was ultimately reduced to a  
14 misdemeanor by virtue of the county jail sentence, any use of that conviction as a felony must  
15 fail. The court rejected his argument noting that the offense had not been determined to be a  
16 misdemeanor until revocation of defendant's probation, about a year and a half after the Penal  
17 Code section 12021 offense. The court noted that the defendant had pleaded guilty to a felony at  
18 the time he was alleged to have been in violation of section 12021, and that the offense was later  
19 made a misdemeanor *cannot change that fact*.

20 In the context of compensation as a victim of crime, California Code of Regulations, title 2,  
21 section 649.4(b)(1) prohibits compensation to a person who has been convicted of a felony when  
22 the pecuniary loss is sustained after the person is convicted of the felony and before the person  
23 is discharged from probation. Section 649.4(b)(2) allows compensation when the pecuniary loss  
24 was incurred after discharge from probation or parole. Finally, section 649.4(b)(3) states that  
25 pecuniary losses that *were incurred while on felony probation or parole will not become*  
26 *reimbursable* upon the person's discharge from probation or release from a correctional institution  
27 and discharge from parole.

28 In her request for reconsideration, Melissa J. seeks compensation for pecuniary losses  
29 that were incurred while she was on felony probation. Melissa J. argues that the Board should

1 allow compensation for these expenses because at the time her application was approved by the  
2 Board, her felony conviction had been reduced to a misdemeanor.

3 Melissa J.'s pecuniary losses were incurred while she was on felony probation. The fact  
4 that her felony was subsequently reduced to a misdemeanor does not wipe the slate clean.  
5 California Code of Regulations, title 2, section 649.4(b)(2) clearly states that the Program can  
6 only pay pecuniary loss when the losses were incurred after discharge from probation or parole.  
7 In addition, case law is clear that the reduction of a felony to a misdemeanor is not retroactive.

8 Melissa J. is therefore not eligible for Program compensation during the period of time that  
9 she was on felony probation, from December 6, 2006, through March 3, 2009. If Melissa J. can  
10 prove by a preponderance of the evidence that she incurred crime-related losses prior to  
11 December 6, 2006, or after March 3, 2009, those crime-related expenses are eligible for  
12 reimbursement.

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14 Date: February 3, 2011

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16 Kyle Hedum  
17 Hearing Officer  
18 California Victim Compensation and  
19 Government Claims Board  
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**Precedent Decision 11-01**

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10 On May 19, 2011, the California Victim Compensation and Government Claims Board  
11 designated as precedent its decision In the matter of the Application of Melissa J., Precedent  
12 Decision 11-01.

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15 Date: May 19, 2011

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Tisha Heard  
Board Liaison  
California Victim Compensation and  
Government Claims Board