

A PETITION FOR REHEARING WAS FILED ON JUNE 6, 2002.

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	SPB Case No. 00-2927
)	
MIKE DORRI)	BOARD DECISION
)	(Precedential)
From rejection during probationary)	NO. 02-05
period from the position of Transportation)	
Engineer (Civil) with the Department of)	
Transportation at Mission Hills)	May 7, 2002
)	

APPEARANCES: Stephen D. Beck, Staff Consultant, Professional Engineers in California Government on behalf of appellant, Mike Dorri; Patrick H. Barney, Deputy Attorney, on behalf of respondent, Department of Transportation.

BEFORE: Ron Alvarado, President; William Elkins, Vice President; and Florence Bos, Member.

DECISION

This case is before the State Personnel Board (Board) after the Board rejected the Proposed Decision of the Administrative Law Judge. Appellant Mike Dorri (appellant) was rejected during his probationary period from the position of Transportation Engineer (Civil) with respondent Department of Transportation (Department), based upon allegations that, during the relevant probationary period, he repeatedly failed to complete his assigned duties in an efficient and competent manner, repeatedly failed to follow instructions from his supervisor, and repeatedly failed to operate his state-assigned vehicle in a safe manner.

In this Decision, the Board finds that service of the Notice of Rejection During Probationary Period on appellant was not effective within the statutorily required time

period. As a result, the Board revokes the Notice of Rejection During Probationary Period as untimely.

BACKGROUND

Employment History

Appellant was appointed as a Transportation Engineer (Civil) with the Department on September 21, 1998. On September 20, 1999, he was rejected during his probationary period. He appealed his rejection to the Board in SPB Case No. 99-4107. That appeal was subsequently resolved when the parties entered into a stipulated settlement agreement, whereby respondent withdrew the Notice of Rejection During Probationary Period, and appellant agreed to serve a new one-year probationary period. The new probationary period began on September 1, 1999, and was scheduled to conclude on August 31, 2000. The instant rejection during probationary period is based on actions that occurred during the second probationary period.

Factual Summary¹

The Department set forth three separate categories of acts or omissions by appellant that the Department contends justify his rejection during probationary period. The Department alleged seven instances of failure to complete assigned duties in an efficient and competent manner, six instances of failing to follow instructions, and three occasions of failing to operate a state-assigned vehicle in a safe manner.

(Notice of Rejection During Probation)

¹ As the Board decides this case on procedural grounds, we do not recite the allegations in detail.

Based on the foregoing allegations, on August 30, 2000, the Department mailed a Notice of Rejection During Probationary Period appellant's home address. The Notice informed appellant that his rejection during probation was to be effective at the close of business on September 11, 2000, and that, "in accordance with Government Code Section 19173 and State Personnel Board Rule 321(c), your probationary period is being extended through the close of business on September 11, 2000, to allow for the full notice period required by State Personnel Board Rule 52.3."

Procedural Summary

Appellant filed an appeal of the rejection with the Board, and a hearing was conducted before a Board ALJ. Prior to the hearing, appellant filed a Notice of Motion to Dismiss, contending that the Notice of Rejection had not been served in a timely manner. At the commencement of the hearing, the ALJ denied appellant's Motion to Dismiss and, after the conclusion of the hearing, issued a Proposed Decision sustaining the rejection during probation. The Board rejected the Proposed Decision in order to decide the matter itself. While not limiting the parties' right to address any issue, the Board requested that the parties submit written briefs addressing the particular issues of whether appellant established that the Department had acted in bad faith in rejecting him, and whether the Department failed to disclose all required documents to appellant prior to the effective date of his rejection from probation. Appellant addressed both issues in his brief filed with the Board, in addition to again raising the argument that the Notice of Rejection had not been served within the required time period. The Department did not address the issue of the timeliness of the rejection in its brief filed with the Board, but did address the issue during oral argument before the Board.

ISSUES

1. Whether the Notice of Rejection During Probationary Period was served within the requisite limitations period?
2. Whether the Department acted in bad faith in rejecting appellant during his probationary period?
3. Whether the Department committed a *Skelly* violation by not providing appellant copies of all materials upon which the Notice of Rejection During Probationary Period was based, prior to the effective date of the rejection?

DISCUSSION

(The Notice of Rejection During Probationary Period Was Not Timely)

As a result of the stipulated settlement agreement entered into between the parties in SPB Case No. 99-4107, appellant was required to serve an additional one-year probationary period in the position of Transportation Engineer (Civil). That probationary period commenced on September 1, 1999, and concluded on August 31, 2000.

Government Code section 19173, which governs the time period in which a Notice of Rejection During Probationary Period must be served on a probationary employee, provides, in pertinent part:

(b) (1) A rejection during probationary period is effected by the service upon the probationer of a written notice of rejection which shall include: (A) an effective date for the rejection that shall not be later than the last day of the probationary period; and (B) a statement of the reasons for the rejection. Service of the notice shall be made prior to the

effective date of the rejection, as defined by board rule for service of notices of adverse actions. Notice of rejection shall be served prior to the conclusion of the prescribed probationary period. The probationary period may be extended when necessary to provide the full notice period required by board rule. Within 15 days after the effective date of the rejection, a copy thereof shall be filed with the board.²

Board Rule 52.3 provides, in pertinent part:

(a) At least five working days before the effective date of a proposed ... rejection during the probationary period ... the appointing power, as defined in Government Code Section 18524, or an authorized representative of the appointing power shall give the employee written notice of the proposed action ... The notice shall include:

- (1) the reasons for such action,
- (2) a copy of the charges for adverse action,
- (3) a copy of all materials upon which the action is based,
- (4) notice of the employee's right to be represented in proceedings under this section, and
- (5) notice of the employee's right to respond to the person specified in subsection (b).³

Board Rule 321, in turn, provides:

(c) The probationary period may be extended when necessary to provide the full notice period required by Section 52.3 for rejection during probation.⁴

The “notice period” referenced in both Section 19173 and Rule 321(c), is the five working day notice period set forth in Rule 52.3. The probationary period may be extended only to afford the employee a five working days notice period prior to the

² Govt. Code § 19173(b)(1) (emphasis added).

³ Title 2, Cal. Code Regs., § 52.3(a) (emphasis added).

⁴ Title 2, Cal. Code Regs., § 321(c).

effective date of the action, so that the employee may request and receive a pre-deprivation hearing, as required by Skelly v. State Personnel Board.⁵ Put another way, irrespective of how or when the employee is served with the Notice of Rejection During Probation, the employee's probationary period cannot, under the provisions of Rule 321(c), be extended beyond the five working day notice period contemplated by Rule 52.3.⁶

Since appellant's probationary period concluded on August 31, 2000, the Department was entitled, under Rule 321(c), to extend appellant's probationary period five working days, but in no event to a date later than September 8, 2000.⁷ Here, however, the Department designated the rejection during probation as being effective September 11, 2000. Since the rejection during probation did not become effective until after September 8, 2000, it must be revoked as untimely.

Because the Board revokes the Notice of Rejection During Probationary Period on the grounds that it was not timely served, we need not reach the issues of whether the rejection was taken in bad faith, or whether the Department failed to provide appellant with copies of all applicable documents prior to the effective date of the rejection.

⁵ (1975) 15 Cal.3d 194.

⁶ The Board previously reached the opposite conclusion in its precedential decision, A [REDACTED] H [REDACTED] (1998) SPB Dec. No. 98-09 (SPB Case No. 96-3491). That decision was overturned and vacated by the Los Angeles County Superior Court (Case No. BS 054467), which found that Government Code section 19173 authorized a probationary period to be extended for a maximum of five-working days, and solely for the purpose of providing the probationary employee a five working day notice period in which to request, receive, and have a decision rendered, in his or her pre-deprivation hearing under Rule 52.3.

⁷ August 31, 2000, fell on a Thursday. The five working day notice period would have commenced on Friday, September 1, 2000. Monday, September 4, 2000, was a holiday (Labor Day), and cannot be counted toward the five working day notice period, so the fifth and final day of the notice period would have occurred on Friday, September 8, 2000.

CONCLUSION

Board Rule 321(c) permits an appointing power to automatically extend an employee's probationary period for a maximum of five working days, in order to comply with the notice requirements set forth in Rule 52.3. As a result, because appellant's probationary period ended on August 31, 2000, his rejection during probation had to become effective on or before September 8, 2000. Here, however, the Department designated the Notice of Rejection During Probationary Period as effective on September 11, 2000, three days past the last permissible date on which appellant could be rejected during probation. Consequently, the Board is required to revoke the rejection during probationary period as untimely.

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 rejection during probationary period taken against Mike Dorri in the position of Traffic Engineer (Civil), is revoked;
2. Pursuant to Government Code section 19180, the Department of Transportation shall pay to Mike Dorri all back pay, if any, that would have accrued to him had he not been rejected during his probationary period in the position of Traffic Engineer (Civil);
3. This matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary due appellant.

STATE PERSONNEL BOARD⁸

Ron Alvarado, President
William Elkins, Vice President
Florence Bos, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on May 7, 2002.

Walter Vaughn
Executive Officer
State Personnel Board

[Dorri-dec]

⁸ Member Sean Harrigan did not participate in this decision.