SHEENA DAVIS v. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION Appeal from Rejection During Probation	Case No. 12-1688A **BOARD DECISION AND ORDER** **(Precedential)** **SPB Dec. No. 13-01** September 26, 2013

APPEARANCES: Brian Hoeber, Staff Counsel, Service Employees International Union, Local 1000, appeared on behalf of Appellant, Sheena Davis; Sarah R. Hartmann, Attorney, appeared on behalf of Respondent, California Department of Corrections and Rehabilitation.

BEFORE: Patricia Clarey, President; Richard Costigan, Maeley Tom, and Lauri Shanahan, Members.[1]

DECISION

This case is before the State Personnel Board (SPB or the Board) after the Board rejected the Proposed Decision of the Presiding Administrative Law Judge (PALJ) in the matter of the appeal of Sheena Davis (Appellant) from rejection during probation from the position of Dental Hygienist with the California Medical Facility, California Department of Corrections and Rehabilitation (Respondent). The PALJ determined that Respondent failed to timely effectuate Appellant's rejection during probation because it extended Appellant's probationary period by four working days when it only needed to extend the probationary period by one working day to provide Appellant with the notice required by statute and Board rule. Accordingly, the PALJ determined that Appellant's rejection during probation should be revoked. The Board

[1] Vice President Kimiko Burton did not participate in this Decision.

rejected the PALJ's Proposed Decision. While not limiting the issues the parties could address, the Board specifically requested the parties to brief the following:

Did Respondent timely serve Appellant with the Notice of Rejection During Probation?

After hearing oral argument and reviewing the entire record in this matter, including the transcripts, exhibits, and the written and oral arguments of the parties, the Board finds that Respondent was entitled to extend Appellant's probationary period by up to five working days in order to provide the notice required by California Code of Regulations, title 2, section 52.6. Accordingly, the Board remands this matter to the Chief Administrative Law Judge for further proceedings consistent with this Decision.

FACTUAL SUMMARY

On May 22, 2012, Respondent appointed Appellant to the position of Dental Hygienist. The position was subject to a six-month probationary period that was scheduled to end on Wednesday, November 21, 2012.[2]

[2] The relevant calendar dates for 2012 were as follows:

Thursday, November 15, 2012:	Working day
Friday, November 16, 2012:	Working day
Saturday, November 17, 2012:	Non-working day (weekend)
Sunday, November 18, 2012:	Non-working day (weekend)
Monday, November 19, 2012:	Working day
Tuesday, November 20, 2012:	Working day
Wednesday, November 21, 2012:	Working day
Thursday, November 22, 2012:	Non-working day (Thanksgiving holiday)
Friday, November 23, 2012:	Non-working day (day after Thanksgiving)
Saturday, November 24, 2012:	Non-working day (weekend)
Sunday, November 25, 2012:	Non-working day (weekend)
Monday, November 26, 2012:	Working day
Tuesday, November 27, 2012:	Working day

On November 15, 2012, four working days before the end of Appellant's probationary period, Respondent personally served Appellant with a Notice of Rejection During Probation (Notice). The Notice stated that, pursuant to Government Code section 19173 and SPB Rule 321(c) (2 Cal. Code Reg., § 321, subd. (c)), Appellant's probationary period was being extended in order to provide Appellant with the full notice period required by SPB Rule 52.6 (2 Cal. Code Reg., § 52.6). The Notice further stated that the rejection during probation would be effective at the close of business on November 29, 2012. Thus, the Notice extended Appellant's probationary period by four working days.

The ALJ granted Appellant's Motion to Dismiss the action, finding that Respondent lacked the authority to extend Appellant's probationary period beyond November 26, 2012 because it was not necessary to do so to in order to provide Appellant the requisite legal notice.

DISCUSSION

The probationary period is the final step in the examination process used to determine whether an employee is fit to perform the duties of the position. (*D* [redacted] *R* [redacted] (1994) SPB Dec. No 94-29.) As described by the California Supreme Court:

> The object and purpose of a probationary period is to supplement the work of the civil service examiners in passing on the qualifications and eligibility of the probationer. During such period the appointive power is given the opportunity to observe the conduct and capacity of the probationer, and if, in the opinion of that power, the probationer is not fitted to discharge the

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Wednesday, November 28, 2012: Working day
Thursday, November 29, 2012: Working day

> duties of the position, then he may be discharged by the summary method provided for in the Civil Service Act before he acquires permanent civil service status.

(*Wiles v. State Personnel Bd.* (1942) 19 Cal.2d 344, 347; *State Personnel Board v. California State Employees Assn.* (2005) 36 Cal.4th 758, 766.)

A probationary employee is entitled to have the statutory procedure for termination strictly followed. (*Wiles v. State Personnel Board*, *supra*, at p. 351, citing *Brown v. State Personnel Board* (1941) 43 Cal.App.2d 70 and *Nilsson v. State Personnel Board* (1938) 25 Cal.App.2d 699.) If the statutory procedures are not followed, the rejection fails to go into effect and the employee obtains permanent civil service status. (*M[redacted] L[redacted]* (2007) SPB Dec. No. 07-02; *Wiles v. State Personnel Board*, *supra*, at p. 352; *Santillano v. State Personnel Board* (1981) 117 Cal.App.3d 620, 625.)

Government Code section 19173 sets forth the following statutory requirements for effecting a rejection during probation:

> (a) Any probationer may be rejected by the appointing power during the probationary period for reasons relating to the probationer's qualifications, the good of the service, or failure to demonstrate merit, efficiency, fitness, and moral responsibility, but he or she shall not be rejected for any cause constituting prohibited discrimination as set forth in Sections 19700 to 19703, inclusive.
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> (b) 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. (Emphasis added.)

Pursuant to Board rule, written notice of rejection must be given at least five working days before the end of the probationary period. (2 Cal. Code Reg., § 52.6, subd. (a), emphasis added.) The notice must 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;
> (5) Notice of the employee's right to respond to the person specified in subsection (b); and
> (6) A statement advising the employee of the time within which to file an appeal with the SPB.

(*Ibid*.)

Board rule further provides: "The probationary period may be extended by a maximum of five working days in order to comply with notice requirements as set forth in Section 52.6 for rejection during probation." (2 Cal. Code Reg., §321(c).)

The purpose of the notice period referenced in both Government Code section 19173 and Rule 52.6 is to ensure that the employee's due process rights are protected. Thus, the probationary period may be extended only to afford the employee a five working days' notice period prior to the 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* (1975) 15 Cal.3d 194. (*M[redacted] D[redacted]* (2002) SPB Dec. No. 02-05.) While

probationary employees are generally entitled to lesser procedural protections upon termination than those afforded to employees who have attained permanent status, they are entitled to notice of the proposed action and the opportunity to respond prior to the effective date of the rejection. (*M[redacted] L[redacted]*, *supra*.)

The issue in this case is whether, upon serving the Notice four working days before the end of Appellant's probationary period, Respondent had the authority to extend the probationary period by four working days, thereby giving Appellant an eight working day notice period within which to exercise her *Skelly* rights.

Appellant argues that, pursuant to Government Code section 19173, subdivision (b), and the Board's decision in *M[redacted] D[redacted]*, *supra*, Respondent was not entitled to extend her probationary period by more than the one day actually necessary to afford her the five working days' notice required by SPB Rule 52.6. Thus, Appellant argues, it was not "necessary" for Respondent to extend her probationary period to November 29, 2012, since an extension of only one working day would have been sufficient to afford Appellant the five working days' notice required by that rule. Accordingly, Appellant contends, Respondent failed to timely serve her with the Notice and the rejection during probation must be revoked.

In determining the meaning of a statute, the Board applies traditional principles of statutory construction. (See, e.g., *P.S.* (2002) SPB Dec. No. 02-09; *Pamela King* (1999) SPB Dec. No. 99-11.) The fundamental rule of statutory construction is to ascertain the legislative intent so as to effectuate the purpose of the law. (*People ex rel. Younger v.*

Superior Court (1976) 16 Cal.3d 30, 40; *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-87.) As stated by the Supreme Court:

> Under settled canons of statutory construction, in construing a statute we ascertain the Legislature's intent in order to effectuate the law's purpose. (*Dyna–Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386, 241 Cal.Rptr. 67, 743 P.2d 1323.) We must look to the statute's words and give them "their usual and ordinary meaning." (*DaFonte v. Up–Right, Inc.* (1992) 2 Cal.4th 593, 601, 7 Cal.Rptr.2d 238, 828 P.2d 140.) "The statute's plain meaning controls the court's interpretation unless its words are ambiguous." (*Green v. State of California* (2007) 42 Cal.4th 254, 260, 64 Cal.Rptr.3d 390, 165 P.3d 118; see also *Gattuso v. Harte–Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 567, 67 Cal.Rptr.3d 468, 169 P.3d 889.) "If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737, 21 Cal.Rptr.3d 676, 101 P.3d 563.)

(*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387-88.)

The same rules of construction apply to statutes and administrative regulations (*Farm Sanctuary, Inc. v. Department of Food & Agriculture* (1998) 63 Cal.App.4th 495, 505-06; *Industrial Indemnity Co. v. City and County of San Francisco* (1990) 218 Cal.App.3d 999, 1008.) "The aim of such construction is to determine the legislative intent so that the purpose of the statute or the regulation promulgated pursuant to the statute may be given effect." (*Industrial Indemnity Co.*, at p. 1008, citations omitted.) If two constructions appear possible, a court must adopt the one that leads to the most reasonable result. (*Ibid*, citations omitted.)

Applying these principles, we note first that the language of Government Code section 19173, subdivision (b), that the probationary period "may be extended when

necessary to provide the full notice period required by board rule" is not entirely clear on its face. It could mean, as argued by Appellant and found by the PALJ, that the probationary period may be extended only to the extent minimally necessary to provide the required five working days' notice. Alternatively, as argued by Respondent, it could mean that, when an appointing power finds that it is necessary to extend the probationary period in order to provide the employee with the notice period required by Board Rule 52.6, it has the discretion to extend the probationary period for up to five working days, but no more. Thus, we turn to extrinsic aids to ascertain the meaning of the statutory and regulatory provisions.

It is evident that the legislative purpose of Government Code section 19173 and Board Rules 52.6 and 321(c), is to ensure protection of a probationary employee's due process rights to notice and an opportunity to be heard prior to termination. (*M[redacted] D[redacted]*, *supra*.) Allowing an extension of the probationary period acknowledges the practical reality that an appointing power may not always be able to effectuate service of the notice on the employee on a specific date or to conduct a pre-deprivation *Skelly* meeting within five working days from service of the Notice. For example, the employee's absence from the workplace, the employer's ability to obtain a *Skelly* officer, and the employer's desire to afford the employee the greatest possible opportunity to demonstrate his or fitness for the position may all affect the timing of the pre-deprivation notice and hearing process. Therefore, section 19173, subdivision (b) and Rule 321(c)

permit extension of the probationary period by up to five working days in order to provide the requisite notice to the employee.

Construing the phrase "when necessary" in section 19173, subdivision (b) to permit an extension of the probationary period only to provide the minimum number of days' notice required by Rule 52.6 would not promote the legislative purpose of protecting employee due process rights and would unduly hamper the employer's ability to provide notice. Under such a construction, the employer would be forced to ensure that the notice is served exactly five working days before the end of the specified extended end date of the probationary period, as well as ensure that the *Skelly* meeting take place within that five working day period. Thus, once it determines that an extension of the probationary period is necessary, the employer would not be permitted to give the employee more than the minimum required notice of termination. Such a construction would, therefore, curtail, rather than protect, the employee's right to notice and an opportunity to be heard. Given the fundamental legislative purpose of ensuring protection of the employee's due process rights, we find nothing in section 19173, subdivision (b), that would preclude the appointing power from providing more than the minimum required notice. Consistent with the statutory purpose of protecting the employee's due process rights, we therefore conclude that the legislative purpose of the statute and implementing regulations would best be given effect, and lead to the most reasonable result, by construing the term "necessary" as used in Government Code section 19173, subdivision (b) to afford the appointing power the administrative latitude

to determine how many of the five permissible working days it requires to ensure compliance with Rule 52.6. (*Industrial Indemnity Co. v. City and County of San Francisco*, *supra*, at p. 1008.) This construction is consistent with Rule 321, subdivision (c), which allows the appointing power to extend the probationary period by "a maximum of five working days in order to comply with the notice requirements as set forth in Section 52.6 for rejection during probation." Thus, we conclude that Respondent had the discretion to use any or all of the five days authorized under Rule 321 to satisfy the notice requirement. While Respondent could have extended the probationary period by only one working day, it was not required to do so. We find that the legislative purpose would not be served by penalizing Respondent for providing Appellant more than the minimum required time for her to exercise her *Skelly* rights, up to the legal maximum extension of five working days.

M[redacted] D[redacted], *supra*, does not support Appellant's position. In that case, the appointing power attempted to extend an employee's probationary period by six working days. Because this extended the probationary period beyond the five working day period specified in former Board Rule 52.3,[3] the Board invalidated the rejection as untimely. As stated by the Board, "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." (*Ibid.*)

[3] Former Board Rule 52.3 was renumbered 52.6 effective August 18, 2012.

Unlike the employer in *M[redacted] D[redacted]*, Respondent in this case did not extend the probationary period beyond the five working day period authorized under Rule 52.6. Instead, it extended the probationary period by only four working days. Thus, the rationale for the decision in *M[redacted] D[redacted]* is inapplicable here.

In this case, having elected to serve the Notice less than five calendar days before the end of Appellant's probationary period, Respondent could not satisfy the notice requirement of Rule 52.6 without extending the probationary period. It was therefore "necessary" under Government Code section 19173(b) for Respondent to extend the probationary period in order to provide the full notice period required by Rule 52.6. Nothing in section 19173, subdivision (b) or Rule 321, subdivision (c) limits the number of days by which the probationary period may be extended under such circumstances, so long as the probationary period is not extended by more than five working days. (*M[redacted] D[redacted]*, *supra*.) Therefore, the Board concludes that Respondent lawfully extended Appellant's probationary period by four working days and timely served Appellant with notice of rejection prior to the expiration of the probationary period.

CONCLUSION

The probationary period serves as the final step in the examination process, during which an employee has the opportunity to demonstrate his or her fitness for the position. The due process considerations embodied in statute and Board rules require timely notice and an opportunity to be heard prior to the termination of probationary

employment, while allowing extension of the probationary period by a maximum of five working days in cases where an extension is necessary to provide the notice and opportunity to be heard prior to the termination. We find no harm to Appellant's due process rights in allowing the appointing power to provide more than the minimum notice required by law.

ORDER

Based upon the entire record in this matter, the foregoing findings of fact, and conclusions of law, it is hereby ORDERED that this matter is remanded to the Chief Administrative Law Judge with instructions to assign this matter to a hearing on the merits of Appellant's appeal from rejection during probation.

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STATE PERSONNEL BOARD

Patricia Clarey, President
Richard Costigan, Member
Lauri Shanahan, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Board Decision and Order at its meeting on September 26, 2013.

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SUZANNE M. AMBROSE
Executive Officer