

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

	)	BOARD DECISION
	)	(Precedential)
In the Matter of the Appeal by	)	NO. 02-01
ANTONIO ARCHULETA	)	February 7-8, 2002
From five percent reduction in pay for six	)	SPB Case No. 01-2615
months from the position of Hydroelectric)	
Plant Mechanic with the California)	
Department of Water Resources)	
ANDREW MADISON	)	SPB Case No. 01-4125
From dismissal from the position of)	
CalTrans Landscape Maintenance)	
Leadworker with the Department of)	
Transportation at Camarillo)	
RAYMOND S. PROCHNOW	)	SPB Case No. 01-2900
From five percent reduction in salary for)	
three months from the position of CalTrans)	
Landscape Maintenance Worker with the)	
Department of Transportation at Irvine)	
GREG FRANCIS	)	SPB Case No. 01-3255
From five percent reduction in salary for six)	
months from the position of CalTrans)	
Equipment Operator II with the Department)	
of Transportation at San Luis Obispo)	
LARRY K. WATKINS	)	SPB Case No.01-4218
From dismissal from the position of)	
CalTrans Highway maintenance Worker)	
with the Department of Transportation in)	
Nevada City)	
CHRISTIAN BANZET	)	SPB Case No. 01-2868
From a two-step reduction in salary for six)	
months from the position of Transportation)	
Engineering Technician with the)	
Department of Transportation at Marysville)	

BEFORE: Ron Alvarado, President; William Elkins, Vice President, Florence Bos and Sean Harrigan, Members.

DECISION

This case is before the State Personnel Board (Board) after the above-referenced parties submitted to the Board stipulated settlement agreements settling their respective disciplinary actions and seeking the Board's approval of the settlement agreements pursuant to Government Code section 18681. Each of the employees affected by these settlement agreements is a member of a bargaining unit governed by a memoranda of understanding that provides for the review of disciplinary actions by a grievance and arbitration process that fails to provide for review by the Board. The Board has no way of knowing whether the parties to these agreements entered into them after the matters were submitted to a grievance/arbitration process or even whether these agreements serve to implement a decision arising out of one of these processes. Because the Board has taken the position in litigation that such processes are illegal, a position that has been vindicated by two superior court decisions enjoining the parties to the MOUs from using such processes, the Board cannot consider for approval agreements that may have arisen out of such processes without accurate information as to the true procedural status and history of the case.

BACKGROUND

(Summary of Litigation)

It is the Board's position that a process that provides for the review of disciplinary actions and rejections during probation by an arbitrator, Board of Adjustment, or similar body is unconstitutional in that it deprives the Board of its constitutionally mandated

review function under Article VII, Section 3(a) of the California Constitution. On December 22, 1999, Judge Lloyd Connelly of the Sacramento Superior Court agreed with the Board's position, finding that the review of disciplinary actions by the grievance and arbitration process prescribed by State Bargaining Unit 8's Memorandum of Understanding (MOU), is unconstitutional.¹

On January 25, 2001, the Board filed a Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief in the Sacramento Superior Court, Case No. 01CS00109, against the Department of Personnel Administration (DPA), the Director of DPA, the California State Employees' Association, Local 1000 SEIU (CSEA), and the International Union of Operating Engineers (Craft Maintenance Division, Locals State of California, Locals 3, 12, 39, and 501, and Sanitary Engineers Division, State of California, Locals 39 and 501) (IUOE). The petition/complaint alleged that certain provisions of the MOUs covering employees in State Bargaining Units 11, 12 and 13, and implementing legislation, that provide for review of disciplinary actions and rejections during probation through a grievance and arbitration process without ultimate and meaningful review by the Board violate Article VII, section 3(a) of the California Constitution by depriving the Board of its constitutional authority to review disciplinary actions.

On October 17, 2001, Judge Gail Ohanesian issued a tentative decision concluding that the grievance and arbitration procedures set forth in the MOU for Bargaining Units 11, 12 and 13, and the implementing legislation providing for the

¹ The Board was not a party to this case. Judge Connelly's ruling has been appealed and is presently pending before the Court of Appeal, Third Appellate District, Case No. 3 Civil CO 34943.

arbitration of disciplinary and other actions deprives the Board of its constitutional authority to review disciplinary actions and are unconstitutional on their face. Judge Ohanesian further ruled that a writ of mandate should issue and injunctive relief should be granted commanding the parties (DPA, IUOE and CSEA) to cease and desist from enforcing the provisions of the MOU covering Bargaining Units 11, 12, and 13 with respect to the review of disciplinary and other actions and to cease and desist from submitting any appeal of adverse action to the processes set forth in those MOU. On November 27, 2001, the court adopted its tentative decision as its statement of decision and entered judgment permanently enjoining the parties to the MOUs from submitting cases to those processes and from otherwise enforcing those provisions.

Since the court's ruling, the Board has been asked, on at least one occasion, to approve a stipulated settlement agreement that arose out of the unconstitutional arbitration and grievance procedure. On December 11, 2001, the Department of Transportation submitted a request to the Board to review and approve a stipulated settlement agreement signed by the parties to a disciplinary action, Michael Wellins and the Department of Transportation. The agreement disclosed on its face that the matter was before an arbitrator and the Board subsequently was advised that the arbitrator has retained jurisdiction over the case for future litigation related to backpay issues. In a resolution dated January 23, 2002, the Board refused to approve the parties' stipulated settlement agreement on the grounds that it arose out of an unconstitutional process, but declared that the disapproval was without prejudice to the parties' right to resubmit the agreement if they withdrew the matter from the arbitration process entirely and filed a late appeal with the Board agreeing to the Board's jurisdiction.

On January 18, 2002, IUOE filed with the Sacramento Superior Court a Petition to Confirm the arbitration awards pertaining to the appeal of Mr. Wellins.² The Board was not named as a party in this action but was granted leave to intervene in that action on February 6, 2002. No ruling has yet been reached on IUOE's Petition to Confirm the arbitration award. Regardless of the outcome of these proceedings, however, it is clear that the parties to the MOUs at issue are still seeking the Board's approval on settlement agreements that, in at least some fashion, arose out of or were submitted to a process that has been determined to be unconstitutional.

(Summary of the Stipulated Settlement Agreements)

There are six stipulated agreements settling six separate adverse actions that have been submitted to the Board by the parties for review and approval. A brief summary of each settlement agreement is set forth below.³

Antonio Archuleta:

During all relevant times, Mr. Archuleta was employed as a Hydroelectric Plant Mechanic I with the California Department of Water Resources and a member of Bargaining Unit 12, represented by IUOE. On or about August 6, 2001, Mr. Archuleta was served with a Notice of Adverse Action of a five percent reduction in salary for six months effective August 31, 2001. IUOE filed a notice of appeal with the SPB on his behalf on or about August 20, 2001. The Board sent out a notice of hearing to the parties, setting a hearing for October 30, 2001. On October 29, 2002, Administrative

² Case No. 02CS00064

³ Each summary is taken directly from the parties' settlement agreements and submissions to the Board requesting review and approval.

Law Judge Shawn Cloughesy took the hearing offcalendar at the request of the parties, pending submission of a stipulated settlement agreement. On December 17, 2001, an attorney with the Department of Water Resources submitted to the Board a request that the Board review and approve the stipulated settlement agreement entered into between the parties pursuant to Government Code section 18681. The agreement, attached and labeled as Attachment 1, provides, among other things, that the Department of Water Resources agrees to modify the adverse action to a five-percent reduction in salary for three months in exchange for Mr. Archuleta's withdrawal of his appeal and waiver of his right to appeal the modified adverse action.

Andrew Madison:

Mr. Madison was employed as a Landscape Maintenance Leadworker with the Department of Transportation and a member of Bargaining Unit 12, represented by IUOE. Mr. Madison was served with a Notice of Adverse Action of dismissal from his position effective December 7, 2001. There is no record of an appeal filed with the Board. On December 19, 2001, the Department of Transportation submitted a stipulated settlement agreement to the Board for its review and approval pursuant to Government Code section 18681. The agreement, attached and labeled as Attachment 2, states that the parties wish to avoid "...the expense, inconvenience and uncertainty attendant upon possible litigation of an appeal before the State Personnel Board, or possible Arbitration of the action herein settled...(emphasis added)." The agreement further provides, among other things, that the Department of Transportation will modify the dismissal to a 20 working days' suspension and that Mr. Madison will withdraw his appeal and waive his right to appeal the adverse action as modified.

Raymond S. Prochnow:

Mr. Prochnow was employed as a Highway Maintenance Worker with the Department of Transportation and a member of Bargaining Unit 12, represented by IUOE. Mr. Prochnow was subsequently served with a five-percent reduction in salary for three months from his position effective August 15, 2001 and appealed the action to the Board on or about August 29, 2001. On November 7, 2001, the Board mailed out a notice of hearing, setting the appeal hearing for December 5, 2001.⁴ On December 21, 2001, the Department of Transportation submitted a stipulated settlement agreement to the Board, a copy of which is attached and labeled as Attachment 3, asking for the Board's review and approval of the agreement pursuant to Government Code section 18681. This stipulated settlement agreement provides, among other things, that the Department of Transportation will modify the penalty to a five percent reduction in salary for two months and that Mr. Prochnow will withdraw any appeal from the adverse action and waive any right to appeal the modified action.

Greg Francis:

Mr. Francis was serving as a Landscape Maintenance Leadworker with the Department of Transportation and a member of Bargaining Unit 12, represented by IUOE. Mr. Francis was served with an adverse action of a five percent reduction in salary for six months from his position effective September 30, 2001 and appealed the action to the Board on or about October 10, 2001. At a hearing on December 11, 2001, the parties appeared before Administrative Law Judge (ALJ) Mary T. Horst and entered

⁴ The hearing did not take place as scheduled.

into a stipulated agreement on the record. ALJ Horst submitted a Proposed Decision to the Board, incorporating the terms of the parties' stipulated settlement agreement, a copy of which is attached and labeled as Attachment 4. The Proposed Decision provides, among other things, that the Department of Transportation will modify the adverse action to a five percent reduction in salary for three months and eliminate charge "B" from the notice of adverse action and that, in turn, Mr. Francis will withdraw his appeal of the adverse action and not appeal the action as modified. There was no declaration or testimony placed in the record at this hearing attesting that the parties did not utilize the grievance and arbitration process set forth in the Unit 12 MOU before coming to the Board.

Larry K. Watkins:

Mr. Watkins was employed as a Highway Maintenance Worker with the Department of Transportation and a member of Bargaining Unit 12, represented by IUOE. On or about December 18, 2001, Mr. Watkins was served with a dismissal action effective December 28, 2001. There is no record of Mr. Watkins filing an appeal of this action to the Board. In a letter dated December 27, 2001, the Department of Transportation submitted to the Board a stipulated settlement agreement, a copy of which is attached and labeled as Attachment 5 that states the parties wish to avoid "...the expense, inconvenience and uncertainty attendant upon possible litigation of an appeal before the State Personnel Board, or possible Arbitration of the action herein settled... (emphasis added)." In that stipulated settlement, the Department of Transportation agrees, among other things, to modify the dismissal to a 20 working

days' suspension and Mr. Watkins agrees to withdraw his appeal and to waive any rights he may have to appeal the modified adverse action.

Christian Banzet:

Mr. Banzet was employed as a Transportation Engineering Technician with the Department of Transportation and a member of Bargaining Unit 11, represented by CSEA. On or about August 8, 2001, Mr. Banzet was served with a two-step reduction in salary for six months effective August 31, 2001. Mr. Banzet filed a notice of appeal with the Board on August 28, 2001. On November 5, 2001, the Board sent the parties a notice of hearing, setting the appeal hearing for December 3, 2001. On November 8, 2001, the Board was informed that the appeal had been withdrawn by the appellant and closed the file on November 26, citing the withdrawal of the appeal as the basis for closing the file. In a letter dated November 30, 2001 to the Board, the Department of Transportation submitted a stipulated settlement agreement, a copy of which is attached and labeled as Attachment 6. The agreement provides, among other things, that the Department of Transportation will modify the adverse action to a two-step reduction in salary for four months and Mr. Banzet will withdraw any appeal with the Board and waive his right to appeal the adverse action as modified.

ISSUE

Under what circumstances, if any, shall the Board review and approve settlement agreements that may be subject to or arise out of a grievance and arbitration process that the Board contends is unconstitutional?

DISCUSSION

The Board is vested with the discretionary authority to review and approve settlement agreements entered into between employees and appointing powers. When the Board approves settlement agreements, those approvals constitute final and binding decisions and orders of the Board, enforceable pursuant to Government Code section 18681. In each of the above stipulated settlement agreements presented to the Board for review and approval, the affected employees were members of a bargaining unit whose MOUs provide for the review of disciplinary actions by a grievance and arbitration process as an alternative to or replacement of the Board's constitutionally mandated review process. Moreover, in two of the settlement agreements presented to the Board (Attachments 2 and 5), the parties' agreement expressly provides that the parties "desire to avoid... possible arbitration of the action".

The Board cannot condone the submission of disputed disciplinary actions to a process that conflicts with its constitutional mandate to review disciplinary actions and then issue a decision approving a settlement agreement that may have arisen out of one of those processes. Since the parties to these settlement agreements may have previously submitted the disciplinary actions at issue to the grievance and arbitration processes provided for in their respective MOUs, since the Board contends that the processes are unconstitutional, and since the parties have been enjoined from using them, the Board must have some assurance that the agreements did not arise out of such processes and that employees had the opportunity to exercise their constitutional right to have the Board review their disciplinary action before agreeing to settle their cases.

Therefore, prior to approval of the instant settlement agreements, the Board will require that the parties either: resubmit the agreements to the Board with language that provides that the disciplinary actions settled by these agreements have not been subject to, submitted to, or settled by any process for review other than that provided by the Board, including but not limited to, any Board of Adjustment, arbitrator, or any other similar process outside of the Board that has not been sanctioned by the Board as consistent with its constitutional review function; or submit to the Board a separate declaration, in the format of Attachment 7 hereto, that attests to the fact that the disciplinary action settled by the agreement has not been subject to or settled by any process for review other than the Board, including but not limited to, any Board of Adjustment, arbitrator, or any other similar process outside of the Board that has not been sanctioned by the Board as consistent with its constitutional review function.

Moreover, since it is possible that parties to future settlement agreements may have submitted the disciplinary action at issue in those agreements to a similar process at some time, the Board will require similar assurances in all future cases. Parties may include written assurance to this effect directly in the settlement agreement itself, or may submit a separate declaration such as that set forth in Attachment 7.⁵ If the Board receives a stipulated settlement agreement from parties that have not provided such an assurance in substantially this form, the Board may exercise its discretionary authority and refuse to approve the agreement, unless and until such assurance is provided.

⁵ When parties are before an ALJ, a verbal declaration on the record will suffice. The ALJ shall note the assurances in their Proposed Decision recommending the stipulation for adoption by the Board. In all other instances, a written declaration, either in the body of the settlement agreement or in a separate declaration, will be required.

The Board recognizes, however, that an employee may have been prevented under the terms of their MOU from appealing an action to the Board and may have had no choice but to utilize the arbitration and grievance procedures, making their case “subject to” those proceedings. The Board is concerned that a settlement may reflect an employees unwillingness to roll the dice before an arbitrator, whose decision is final and binding and not appealable to the courts. In such a case, an employee who is unable to submit the required declaration because he or she had no choice but to settle or subject themselves to the bargained for grievance and arbitration or similar process may request leave to file a late appeal with the Board, setting forth the grounds for the request. If the Board finds good cause for the late-filed appeal, the Board will accept the late-filed appeal on the condition that the employee agrees to withdraw jurisdiction from the arbitrator and to submit to the Board’s jurisdiction. In cases where the employee had the opportunity to file an appeal with the Board, but chose not to, the Board will consider accepting late-filed appeals on a case-by-case basis, for good cause shown. If the parties to an appeal before the Board then wish to enter into a stipulation and seek Board approval, they may do so. In such cases, however, the Board will require assurances that the stipulation does not incorporate or reflect a decision or award of an arbitrator.

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 attached stipulated settlement agreements in the cases of Antonio Archuleta, SPB Case No. 01-2615; Andrew Madison, Case No. 01-4125;

Raymond S. Prochnow, Case No. 01-2900; Greg Francis, Case No. 01-3255; Larry K. Watkins, Case No.01-4218; and Christian Banzet, Case No. 01-2868 are not approved;

2. This order is without prejudice to the parties' right to resubmit the stipulated settlement agreements to the Board for approval with the same substantive terms and conditions as previously submitted, so long as the parties include in their stipulated agreement, or provide separately, a declaration that attests to the fact that the disciplinary action settled by the agreement has not been subject to, submitted to, or settled by any process for review other than the Board, including but not limited to, any Board of Adjustment, arbitrator, or any other similar process outside of the Board that has not been sanctioned by the Board as consistent with its constitutional review function;
3. The Board finds that a declaration, such as set forth in Attachment 7, meets the Board's needs in assuring itself that it is not inadvertently condoning the use of an unconstitutional process when it approves a settlement agreement. Therefore, settlement agreements submitted to the Board in the future for review and approval may not be approved by the Board unless there is a declaration from the parties, either as part of the settlement agreement itself or as contained in a separate declaration, that substantially complies with Attachment 7;
4. In cases where an appeal would be subject to the MOU processes or where the parties have previously submitted a disciplinary or other action to the grievance and arbitration process, including but not limited to, a Board of

Adjustment or arbitrator, the employee may request leave to file a late appeal with the Board setting forth the reason for the late filing and the Board may exercise its discretion to accept jurisdiction over the appeal.

5. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD

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

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on February 7-8, 2002.

Walter Vaughn
Executive Officer
State Personnel Board

[BOAPrec.Dec]

DECLARATION RE: DISCIPLINARY PROCESS

The undersigned parties and/or their representatives declare under penalty of perjury that the stipulation for settlement submitted to the State Personnel Board (SPB) for approval pursuant to Government Code section 18681 was entered into knowingly and voluntarily by the parties. The parties further declare under penalty of perjury that the disciplinary action settled by this stipulation has not been submitted to or settled by any process for the review of disciplinary action other than the SPB, including but not limited to any Board of Adjustment, arbitrator, or any other similar process set forth in any memorandum of understanding that has not been sanctioned by the SPB as consistent with the SPB's constitutional review function.

_____ Date: _____
Appellant

_____ Date: _____
Appellant's Representative

_____ Date: _____
Appointing Power

_____ Date: _____
Appointing Power's Representative

[Stip-dec.]