BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal By	)	SPB Case No. 28807
	)	
ARMANDO D. RIVERA	)	**BOARD DECISION**
	)	(Precedential)
From rejection during probationary	)	
period from the position of Cook with	)	**NO. 92-12**
the California Conservation Corps	)	
at San Luis Obispo	)	July 13, 1992

Appearances: Kathleen D. Thompson, Labor Relations representative, California State Employees' Association, representing appellant, Armando D. Rivera; Rudolf H. Michaels, Attorney, representing respondent, California Conservation Corps.

Before Carpenter, President; Stoner, Vice-President; Burgener and Ward, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the attached Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Armando Rivera (appellant or Rivera) from his rejection during probation from the position of Cook with the California Conservation Corps (herein CCC).

The ALJ found that the rejection during probation, effective October 8, 1990, did not comply with the procedural requirements of the State Civil Service Act[1] in that appellant was denied his "Skelly" rights as set forth in the case of Skelly v. State

[1]The State Civil Service Act is contained in Government Code sections 18500-19799.

Personnel Board (1975) 15 Cal.3d 194 and SPB Rule 61.[2] On the merits, the ALJ found substantial evidence to support the rejection and no evidence of fraud or bad faith on the part of CCC in rejecting appellant during probation. After review of the entire record, including the transcripts and briefs submitted by the parties, the Board finds that the ALJ's findings of fact are free from prejudicial error. We are also in substantial agreement with his conclusions of law, and adopt his decision as our Precedential Decision, consistent with the discussion below.

We note that the ALJ, in a lengthy discussion, identified several factors to support his conclusion that appellant was denied his Skelly rights: the fact that CCC was aware that appellant's designated union representative was in Los Angeles and was unable to return to San Luis Obispo in sufficient time to consult with her

[2]The SPB Rules are codified in Title 2 of the California Code of Regulations. The Proposed Decision erroneously references SPB Rule 61. Former Rule 61 was amended and renumbered SPB Rule 52.3 effective May 26, 1990, before the date of the instant adverse action (October 8, 1990). Not until Rule 52.3 was again amended, effective April 18, 1991, did the rule expressly include a reference to rejections during probation. Nevertheless, even prior to the 1991 amendment of the rule, the SPB had interpreted Government Code section 19173 to require that persons rejected during their probationary period be accorded the same notice considerations (as set forth in Board Rule 61 and the first enacted Rule 52.3) as persons served with adverse action. Thus, the earlier versions of the rule were interpreted as being applicable to rejections during probation by virtue of Government section 19173, and the 1991 language expressly referencing rejections during probation was added for clarification and to assure the regulation comported with existing law and practice.

client and represent him at a Skelly hearing before the effective date of the rejection[3]; the fact that although CCC knew appellant's representative was out of town and unable to return to town before the effective date of the rejection, it scheduled the Skelly hearing for October 5, 1990 with appellant's wife without clearing the date and time with appellant's representative; the fact that CCC initially agreed to the cancellation of the October 5 Skelly to accommodate the representative's schedule, so long as the representative agreed to attend the Skelly hearing in Sacramento rather than in San Luis Obispo; the fact that CCC subsequently declined to hold the Skelly in Sacramento, asserting that appellant waived his right to the Skelly hearing; and, the fact that no good reason was put forth as to why the hearing could not have been rescheduled for San Luis Obispo for the week immediately following the rejection.

While not mentioned in the Proposed Decision, the evidence also established the fact that although appellant told CCC that he wanted to be represented at the Skelly hearing, CCC insisted that the Skelly be scheduled prior to the time appellant's representative would return to town. Appellant testified that the only reason he initially agreed to his wife's setting of the

[3]We note that CCC scheduled the Skelly hearing for 1:00 p.m on October 5. Appellant's representative was attending a conference in Los Angeles and did not arrive back in San Luis Obispo until 3:00 or 4:00 p.m. on October 5.

(Rivera continued)

Skelly

on October 5, is that he and his wife were informed that the hearing had to be scheduled on that day or appellant would lose his right to the hearing. Appellant further testified he felt "forced" to schedule the hearing before his representative was back in town.[4] We note also that appellant testified that he has some difficulty with his speech and the English language. That difficulty heightened appellant's discomfort in proceeding without a representative, caused him to cancel the October 5 hearing his wife had scheduled when pressured to do so, and calls into question whether appellant was even offered the opportunity for a meaningful hearing.

We do not, by this decision, imply that an employee is always entitled to the representative or scheduling of his or her choice, without regard to the convenience of the employer. We agree with the ALJ's conclusion, however, that in this case CCC did not act reasonably under all the circumstances in compelling appellant to choose between having his Skelly hearing without a representative and not having his Skelly hearing at all.

ORDER[5]

Upon the foregoing findings of fact and conclusions of law,

---

[4]There was no evidence presented by CCC as to whether there might have been another union representative in town who might have been able to represent appellant at a Skelly hearing.

[5]We do not adopt the WHEREFORE IT IS DETERMINED paragraph set forth on p. 8 of the Proposed Decision.

(Rivera continued)

and the entire record in this case, it is hereby ORDERED that:

1. The above-referenced action of the California Conservation Corps in rejecting Armando Rivera from his position as Cook is sustained;

2. This matter is hereby referred to the 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, if any, due appellant, as a result of CCC's violation of appellant's Skelly rights, as set forth in SPB Rule 52.3, made applicable to probationary employees under Government Code section 19173. Back pay is ordered under the rationale set forth in Barber v. State Personnel Bd. (1976) 18 Cal.3d 395 and pursuant to the formula set forth in Government Code section 19180.

3. This decision is certified for publication as a Precedential Decision (Government Code section 19582.5).

THE STATE PERSONNEL BOARD*

Richard Carpenter, President
Alice Stoner, Vice-President
Clair Burgener, Member
Lorrie Ward, Member

*Member Richard Chavez did not participate in this decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on July 13, 1992.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by ARMANDO D. RIVERA From rejection during probationary period from the position of Cook with the California Conservation Corps at San Luis Obispo	)	Case No. 28807

PROPOSED DECISION

This matter came on regularly for hearing before Byron Berry, Administrative Law Judge, State Personnel Board, on December 4, 1990 and May 10, 1991, at Grover City, California.

The appellant, Armando D. Rivera, was present and was represented by Kathleen D. Thompson, Labor Relations Representative, California State Employees' Association.

The respondent was represented by Rudolf H. Michaels, Attorney, California Conservation Corps.

Evidence having been received and duly considered, the Administrative Law Judge makes the following findings of fact and Proposed Decision:

I

The above rejection effective October 8, 1990, does not comply with the procedural requirements of the State Civil Service Act. The case of Skelly v. State Personnel Board 15 Cal. 3d 194, and State Personnel Board Rule 61, gives the appellant the right

to a Skelly hearing prior to the effective

date of the rejection.

The rejection was effective October 8, 1990. The appellant's counsel, Kathleen D. Thompson, Labor Relations Representative, California State Employees' Association, learned of the appellant's dismissal on October 2, 1990, while working out of town. She was not able to return to the San Luis Obispo area to prepare for the Skelly hearing until October 5, 1990. On October 2, 1990, Ms. Thompson called the Department and attempted to speak to Chief of Personnel Services, Renee Renwick, who was unavailable. She spoke to Karen Roth and explained that she was out of town, and was unable to consult with her client before October 5, 1990. She left her answering service number in San Luis Obispo, and stated that she would call Ms. Renwick back on Friday morning October 5, 1990.

On October 5, 1990, she called the Department again and spoke to Karen Roth who stated that Ms. Renwick was still unavailable. Ms. Thompson informed her of the need to schedule a Skelly hearing for the appellant. Ms. Roth then told Ms. Thompson that a Skelly hearing was going to be held for the appellant that afternoon at 1:00 p.m. She stated that the appellant's wife had requested it due to the necessity of holding the Skelly hearing prior to the effective date of the rejection (October 8, 1990). The appellant told Ms. Thompson that the Department stated that the Skelly hearing must be held no later than Friday (October 5, 1990), because the effective date was Monday, a State holiday, and that

(Rivera continued)

they had

to schedule it for Friday, or he would lose his right to a Skelly hearing.

Ms. Thompson subsequently reached Ms. Renwick who agreed to reschedule the Skelly hearing until after the effective date of the rejection if she and the appellant were willing to come to Sacramento (a distance of 280 miles) for the Skelly hearing. Ms. Thompson agreed to this condition as long as she could do it after October 12, 1990, due to previously scheduled commitments.

Ms. Renwick subsequently informed Ms. Thompson that she considered Ms. Thompson's response and request for a Skelly hearing a waiver of her client's right to a Skelly hearing; and as a result, the appellant was not given his Skelly Hearing.

The Skelly hearing was supposed to give the appellant the right to respond to the charges before a reasonably impartial, non-involved reviewer who has the authority to recommend a final disposition of the matter. A wrongful denial of the appellant's Skelly hearing rights is a denial of the appellant's Skelly hearing rights is a denial of the appellant's due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 7 and 15 of the California Constitution. In determining whether or not the appellant was denied due process, the reasonableness of Ms. Thompson's conduct and the Department's conduct must be discussed and examined.

Ms. Thompson notified the Department on October 2, 1990, that she was representing the appellant. She told the

(Rivera continued)

Department (through Ms. Roth), that she was out of town and could not return before October 5, 1990. At that point, the Department was put on notice that Ms. Thompson would be representing the appellant.

A subsequent arrangement by the appellant's wife to arrange a Skelly hearing on October 5, 1990, without the Department clearing this with the appellant's legal counsel should be null and void. Ms. Thompson was the appellant's legal representative. Arrangements for a Skelly hearing should have been made with Ms. Thompson, and not the appellant's wife.

The Department did not present any evidence at the hearing to show why Ms. Thompson could not have been accommodated by allowing the Skelly hearing to proceed on a date other than October 5, 1990. If it was a primary concern of the Department to conduct the Skelly hearing before the October 8, 1990, effective date, the effective date could have been changed to a later date.

Another alternative was to allow the appellant to waive his right to have his Skelly hearing prior to the effective date, and proceed with his Skelly hearing after the effective date. In fact, in a letter dated October 5, 1990, from Ms. Renwick to Ms. Thompson, the Department agreed to such a procedure if the appellant and his representative agreed to have the Skelly hearing in Sacramento. The Skelly hearing did not proceed in this manner because Ms. Thompson told the Department that she had commitments which prohibited her from coming to Sacramento until after October 12, 1990 (It should

(Rivera continued)

be noted that October 15, 1990, was the next available work day after October 12, 1990 - 10 days after the originally scheduled October 5, 2990, Skelly hearing date).

The Department presented insufficient evidence at the hearing to explain why the Department did not conduct the Skelly hearing in San Luis Obispo, where the appellant worked, on either October 9, 10, 11, or 12, 1990. Additionally, the Department presented no evidence to explain why the Skelly hearing was not held in Sacramento after October 12, 1990, as Ms. Thompson requested.

Regarding the Department's failure to conduct the Skelly hearing in San Luis Obispo on October 9, 10, 11, or 12, 1990, the Department took the position that since the Skelly Officer went to San Luis Obispo to conduct the Skelly hearing on October 5, 1990, a subsequently scheduled Skelly hearing must be held in Sacramento.

However, it should be noted that the Department arranged for the October 5, 2990, Skelly hearing after talking to the appellant's wife, without discussing it with Ms. Thompson, the appellant's legal representative (which was know to the Department). Obviously, Ms. Thompson would be more knowledgeable about the appropriate time to conduct the hearing than the appellant's wife, especially in view of the fact that, at that time, Ms. Thompson had not consulted with her client.

In conclusion, the appellant was unnecessarily denied a very basic right by the Department when it failed to provide him with a Skelly hearing. The remedy for a Skelly violation

(Rivera continued)

is back pay from the effective date of the rejection, October 8, 1990, until the date that the decision is adopted by the State Personnel Board. The aforementioned back pay is so ordered.

II

The appellant has worked as a Cook, California Conservation Corp since his appointment April 9, 1990. He has no prior adverse actions.

III

The Notice of Rejection alleged that the appellant failed to meet the standards of his position.

IV

The appellant's cooking knowledge needed improvement. He did not know basic cooking skills; and he has asked corpsmember helpers and the cook specialist to assist him with recipes and instruction.

When asked to prepare a basic biscuit recipe from scratch, the appellant stated that he didn't know how to do it. He had to ask for the entire recipe and baking instructions.

On one occasion, the appellant used pizza dough to make cinnamon rolls. As a result, the entire batch was inedible and had to be thrown away.

On September 7 through 10, 1990, the appellant failed to prepare "deadman plates" (food to be examined in case of illness resulting from eating the food, as required by law).

On July 26, 1990, two corpsmembers came into the kitchen after the appellant had finished serving breakfast to

(Rivera continued)

prepare sack lunches for themselves. The appellant objected to the amount of food that they were taking. He also objected to them coming in late. The appellant list his temper; and the corpsmembers started cussing at him. The appellant's conduct caused the situation to unnecessarily escalate to a volatile situation. At the hearing, the appellant admitted that he overreacted in this matter.

On August 15, 1990, corpsmember, Mitzi Marshall told the appellant that she was not feeling well. The appellant accused her of feigning illness. An argument ensued; and Mitzi was in tears and very scared. The appellant cussed at her in Spanish. Mitzi was uncomfortable working in the kitchen for the remainder of the day.

In order to assist the appellant in improving his supervisorial skills, his supervisor instructed him to attend a course in August 1990, entitled "How to be a More Effective Supervisor." In spite of these instructions, the appellant failed to attend the class.

* * * * *

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

Although the appellant contested some of the allegations against him, he admitted that most of the allegations were true. All of the allegation were established with persuasive and credible testimony. There was substantial

evidence to support the rejection; and there was no evidence of fraud or bad faith by the respondent.

* * * * *

WHEREFORE IT IS DETERMINED that the action of the appointing power in rejecting Armando D. Rivera from his said position effective October 8, 1990, is hereby affirmed and his appeal is denied. Said matter is hereby referred to the Administrative Law Judge and shell be set for hearing on written request of either party in the event the parties are unable to agree as to the salary, if any, due appellant under the provisions of Government Code Section 19584.

* * * * *

I hereby certify that the foregoing constitutes my Proposed Decision in the above-entitled matter and I recommend its adoption by the State Personnel Board as its decision in the case.

DATED: November 27, 1991

BYRON BERRY
Byron Berry, Administrative Law Judge, State Personnel Board