BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **HERNANDO MORALES** From dismissal from the position of Senior Materials and Research Engineer with the Department of Transportation at Los Angeles	)))))))))	SPB Case No. 97-2744 **BOARD DECISION** (Precedential) **NO. 98-07** August 4, 1998

APPEARANCES: Dennis F. Moss, attorney, on behalf of appellant, Hernando Morales; Michael F. Yoshiba, attorney, Department of Transportation on behalf of respondent, Department of Transportation.

BEFORE: Florence Bos, President; Richard Carpenter, Vice President; Ron Alvarado, James Strock and Lorrie Ward, Members.

DECISION

In this decision, the Board adopts the attached ALJ's findings of fact and determination of issues with the exception of the discussion of the "Skelly Issue" at page 17, as discussed herein.

BACKGROUND

Procedural Summary

Appellant was dismissed from his position of Senior Materials and Research Engineer with the Department of Transportation. After a hearing, the ALJ issued a proposed decision modifying the penalty to a demotion to the position of Associate Materials and Research Engineer. The ALJ rejected, however, appellant's contention that the Department violated his due process rights as set forth in Skelly v. State

Personnel Board,[1] by failing to provide appellant, at the time he was served with notice of the adverse action, with photos and a report. The ALJ concluded that appellant failed to establish that the person who made the ultimate decision to terminate appellant relied on those materials to terminate appellant. The Board rejected the ALJ's Proposed Decision to consider the issue of whether appellant's Skelly rights were violated.

Factual Summary

The only relevant facts in deciding the Skelly issue in this case are that: (1) James Roberts, Director Engineering Services Center, approved and "signed off" on appellant's adverse action; (2) Roberts was shown photos and a report on the Elysian Viaduct project; and (3) Appellant was not provided with these materials upon service of the notice of adverse action.[2]

DISCUSSION

In Skelly, the California Supreme Court set forth certain notice requirements that a public employer must fulfill to satisfy an employee's pre-removal procedural due process rights:

> As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and

[1] (1975) 15 Cal.3d 194.
[2] Although given an opportunity to do so, neither party disputed these findings by the ALJ, nor did any party request that the Board order a transcript to review the evidence in support of these findings. Accordingly, the Board adopts these factual findings as its own.

> materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.[3]

Pursuant to Skelly, the Board enacted Rule 52.3, which provides, in pertinent part:

> (a) Prior to any adverse action . . . the appointing power . . . shall give the employee written notice of the proposed action. This notice shall be given to the employee at least five working days prior to the effective date 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….

The Board has clarified that the "material upon which the action is based" referred to in Skelly and Board Rule 53.2 is not all the material in the possession of the Department at the time the adverse action is taken. It is, rather, all the material relied upon by the individual who makes the ultimate decision to take adverse action against an employee.[4] The Board has consistently held that appellant has the burden of proving a Skelly violation.[5]

This case is similar to Karen Johnson (1992),[6] in which an investigative report was provided to and reviewed by the ultimate decision maker in connection with the adverse action. The department contended that, because the report did not corroborate

[3] 15 Cal.3d at 215.
[4] Jerome King (1997) SPB Dec. No. 97-06; Lorenzo Galvan (1997) SPB Dec. No. 97-04; Sharp-Johnson (1995) SPB Dec. No. 95-14; Joseph Garcia (1998) SPB Dec. No. 98-03.
[5] Jerome King (1997) SPB Dec. No. 97-06.
[6] SPB Dec. No. 92-02.

the allegations against the appellant, the adverse action was not "based" upon the report, and thus the department was not obligated to disclose the report to the appellant under Skelly. The Board disagreed, concluding that the report was relevant to the appellant's ability to convince the Skelly officer to modify or revoke the adverse action.

Similar considerations apply in this case. Unlike in Galvan, Sharp-Johnson, King and Garcia, the materials in question were actually provided to the individual who made the ultimate decision to take adverse action. As in Karen Johnson, regardless of whether these materials actually corroborated the Department's allegations, they were relevant to appellant's ability to adequately present his case to the Skelly officer. In determining whether an appellant has met his or her burden of establishing what materials were "relied upon" by the ultimate decision maker, we will not delve into the decision maker's subjective thought processes to evaluate what materials actually convinced the decision maker to take the adverse action.[7] It is sufficient that appellant established that the documents were actually provided to the decision maker in connection with the adverse action.

CONCLUSION

The Board adopts the ALJ's determination modifying the penalty imposed by the Department for the reasons stated in the attached Proposed Decision. The Board also concludes, however, that the Department violated appellant's Skelly rights by failing to

[7] The Board does not consider the declaration submitted by the Department in support of its argument on rehearing before the Board, as the Department has not established good cause for reopening the record.

provide him with a copy of the photos and report of the Elysian Viaduct project at the time of service of the notice of adverse action.

Given the Board's reduction of the penalty, appellant would generally be entitled under Government Code section 19584 to all back pay and benefits he would have accrued had he been demoted rather than dismissed. This remedy under section 19584, however, is largely subsumed in the remedy for the Skelly violation. Because the discipline was procedurally invalid, due to the Skelly violation, appellant is entitled to an award of back pay and benefits from the date of the dismissal to the date the Board files its decision.[8] Thus, appellant's demotion only becomes effective as of the date the Board files its decision, and appellant is entitled to an award of all back pay and benefits that he would have accrued had he not been dismissed prior to that date. Appellant is also entitled to back pay as an Associate Materials and Research Engineer from the date of this decision to the date of his reinstatement.

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 Proposed Decision modifying the dismissal of Hernando Morales from the position of Senior Materials and Research Engineer to a demotion to the position of Associate Materials and Research Engineer is hereby adopted, with the exception of the discussion of the "Skelly Issue" at page 17, and the effective date of the discipline;

[8] Barber v. State Personnel Board (1976) 18 Cal.3d 395, 403.

2. The effective date of the demotion of Hernando Morales from the position of Senior Materials and Research Engineer to the position of Associate Materials and Research Engineer shall be the date the Board files this decision;
3. The Department shall pay to Hernando Morales all back pay and benefits, if any, that would have accrued to him had he not been dismissed from the position of Senior Materials and Research Engineer for the period July 22, 1997 to the date the Board files this decision;
4. The Department shall reinstate Hernando Morales to the position of Associate Materials and Research Engineer effective the date the Board files this decision, and shall pay him all back pay and benefits, if any, that would have accrued to him in that position from the date of this decision until he is reinstated;
5. 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 and benefits due appellant;
6. This decision is certified for publication as a Precedential Decision.

(Government Code § 19582.5)

STATE PERSONNEL BOARD

Florence Bos, President
Richard Carpenter, Vice President
Ron Alvarado, Member
James Strock, Member
Lorrie Ward, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on August 4, 1998.

_____
Walter Vaughn
Executive Officer
State Personnel Board

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BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by HERNANDO MORALES From dismissal from the position of Senior Materials and Research Engineer with the Department of Transportation at Los Angeles	Case No. 97-2744

PROPOSED DECISION

This matter came on regularly for hearing before Susan G. Kleinman, Administrative Law Judge, State Personnel Board on August 27 and November 24 and 25, 1997, at Los Angeles, California.

Appellant, Hernando Morales , was present and was represented by Dennis F. Moss, Attorney.

Respondent was represented by Michael F. Yoshiba, Attorney, Department of Transportation.

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

Jurisdiction

I

The above dismissal effective July 22, 1997, and appellant’s appeal therefrom, comply with the procedural requirements of the State Civil Service Act.

Work History

II

Appellant had been employed as a Senior Maintenance and Research Engineer with the Department of Transportation (Caltrans) since August 23, 1993. He has no prior adverse actions.

Allegations

III

As cause for the dismissal, it is alleged that appellant failed to arrange for the proper inspection of casting girders during the week of December 29, 1994 through January 6, 1995, that appellant issued a memorandum instructing a subordinate employee to issue lot tags to a contractor indicating Caltrans' approval of their work without making the inspections needed to do so, that appellant failed to monitor the work of a subordinate inspector at the Elysian Viaduct Project who approved numerous welds which were ultimately found defective at a cost of hundreds of thousands of dollars, and that appellant failed to monitor the seismic retrofitting for two projects which were found not to conform with standards specifications and/or contract plans. It is alleged that this conduct violated Government Code section 19572, subdivisions (b) incompetency, (c) inefficiency, (d) inexcusable neglect of duty,

(f) dishonesty, and (t) other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or appellant's employment.

Background

IV

Appellant was assigned as the supervisor for the Southern California Materials Engineering and Testing Services Laboratory (METS) for Caltrans at Los Angeles. METS is responsible for conducting inspections of various materials used to construct roadways and bridges, including the inspection of welding for these projects.

The Laboratory's territory extended from San Luis Obispo to Orange County. When hired, appellant had 11 inspectors,[1] three engineers, one laboratory manager and clericals. There was a manpower shortage during the period of appellant's employment.

Findings

Inspection of Casting Girders December 29, 1994 through January 6, 1995

V

Assistant Steel Inspector Richard Suydan (Suydan) testified that he had been assigned the responsibility of inspecting the

[1] During a brief period following the 1994 Northridge Earthquake the number of inspectors assigned increased from 12 to 15.

casting of girders, contract 07-119104, with Rockwin Corporation at Perris, California.[2] These girders were to be used as the main structure for California bridges. Appellant was Suydan's supervisor.

From December 29, 1994 through January 6, 1995, Suydan was assigned other projects as a result of the manpower shortage. Appellant agreed to take over the Rockwin assignment in Suydan's absence. According to Suydan, Rockwin expected to see appellant during the week of December 29, 1994 through January 6, 1995.

On December 29, 1994, Suydan introduced appellant to the principles at Rockwin. Suydan and appellant then inspected the pre-stressing of the forms for the girders. Thereafter, Suydan left for his other projects.

VI

Appellant admitted that he did not make any inspections of the girders at Rockwin after December 29, 1994. He testified that after Suydan left, appellant was informed that Rockwin would not be proceeding with the fabrication process during that week because Caltrans employees were on vacation, Monday, January 2, 1995. Appellant arranged for Rockwin to call him

[2] Perris is approximately 30 miles from the Los Angeles METS Laboratory.

when the fabrication was resumed. Telephone notification was not unusual in these outlying areas.

Appellant had attended meetings in Sacramento on January 5 and 6, 1995, and did not receive any calls from Rockwin. He was prepared to send another inspector if necessary.

VII

Appellant further testified that his supervisor, Richard Crozier (Crozier), Chief of the Office of Structural Materials, directed the inspectors to perform only random spot checks of the manufacturing process. According to appellant, viewing the initial pre-stressing of the forms on December 29, 1994 together with inspections after Suydan's return, satisfied that requirement.[3] He further testified that the December 29, 1994 through January 6, 1995 inspection involved two girders out of 18 to be fabricated. There were 16 more girders to be "spot checked," which would satisfy Crozier's policy.

[3].There was a "hardness" test to be performed sometime after January 6, 1995.

VIII

Suydan, together with Assistant Steel Inspector (specialist) Steven Ellis (Ellis), called on behalf of respondent, each confirmed that Caltrans' policy only required a random spot check of the fabrication process. According to Suydan, Crozier told him to release girders that were not inspected.

Both Ellis and Suydan testified that this procedure of random inspection seriously concerned them. Key fabrication processes of every girder should be inspected. The girders are used to support the road deck that traffic drives over (bridges). Ellis asked for overtime to complete the process. Crozier denied it and indicated that the "inspectors should do the best they could under the circumstances." The inspectors can observe "some processes with some girders, other processes with other girders."

IX

Appellant testified that he made numerous requests to hire more inspectors and had relayed his inspectors' concerns regarding only random spot inspections.

Appellant did not receive notice of any malfeasance with regards to his inspection of the girders for the week of December 29, 1994 through January 6, 1995, until he received the notice of adverse action on or about June 13, 1997.

X

While appellant did not appear at Rockwin after December 29, 1994, testimony that he was not required to be present during each step of the fabrication process is believed. Appellant adhered to the policy of spot checking (corroborated by Suydan and Ellis) despite evidence that the inspectors were seriously concerned with this limited review. There were 16 more girders to be inspected, and a hardness test to be conducted after Suydan's return. Assuming Rockwin expected appellant, the integrity of the random spot check was maintained.[4]

The evidence established that to do a proper job, appellant as well as all inspectors, should inspect each key step of fabrication process. Nonetheless, Caltrans' policy only called for random spot inspections, as such, there is no cause for discipline.

Memorandum to Subordinate to issue lot tags

XI

Appellant admitted that he prepared a memorandum to his subordinate employee Assistant Steel Inspector Gary Hiles (Hiles) suggesting a way to expedite the inspection process on

[4] In view of the finding, it is unnecessary to determine whether Rockwin ceased production and failed to call when production resumed.

the Franklyn Steel Project in October 1995. The memorandum authorized the manufacturer to pick up their own samples of welded hoops and deliver them to the lab, and that the inspector was not required to be present during the testing. This was a draft memorandum.[5]

XII

Appellant testified that he had received a call from Franklyn Steel indicating that they were ready to produce over 60,000 hoops (welding rebars used to reinforce steel). These

[5] The memorandum stated the following:

Memorandum Draft
Date: 10/25/95

To: Gary Hines
From: Department of Transportation
Subject: Handling of Inspection of Welded Hoops

Starting on October 23, 1995, Franklyn Steel has been authorized to pick up their samples of welded hoops and send them to the testing lab. This is because we do not have the manpower to be there picking up samples of the coming 60,000 units they have to produce for Caltrans project in four months. Franklyn Steel will be allowed to send the samples to the lab. The lab will communicate you the dates of testing but you will not be required to be there when the testing is performed. You are required to perform random visits to Franklyn Steel Lab. You will assign a lot number to all the production of hoops of one week. Franklyn will keep a book, showing their weekly production, their own lot number and the number of bars selected and sent to the lab for testing. (Three out of every 150 hoops, per Caltrans Spec.) The testing lab will fax to you the test results, if you are satisfied and the test results are okay, you will give to lot number and tag the hoop, and write in Franklyn book the lot number. If you have any questions, please direct them to Mr. Charles Williams or to me.

H. Morales.

Cc: C. Williams
(emphasis added)

hoops were used in the footings and casings in the base of freeway structures that support a bridge.

XIII

Franklyn Steel explained to appellant that they needed to have the inspections done without delay because they were supplying the material to a contractor who would be penalized up to 20,000.00 dollars each day that they were behind in the completion of the highway. This was an extremely large, new, and unfamiliar project, and appellant had been experiencing a manpower shortage.

Appellant called Crozier in Sacramento and explained to him that the manufacturer is “ready to go and we’re not able to inspect.” Appellant suggested sending some additional inspectors from the Sacramento office, or possibly hiring a consultant. Crozier suggested that appellant “kick around” some ideas, and wait until Ellis returned from another job to work out the problem with him. Ellis was familiar with the fabrication process.

The draft memorandum was appellant’s effort at “kicking around” an idea. It was never implemented, and was only a draft.

XIV

Appellant met with Ellis and Franklyn Steel in

November 1995, and the problem was resolved. Ellis, called on behalf of respondent, testified that appellant did not impose the draft memorandum. In fact, Ellis was never given the memorandum. During the November meeting, appellant discussed Franklyn Steel's concerns and deferred to Ellis' expertise.

XV

Appellant's testimony that the memorandum was only a draft, and that the proposals in the memorandum were never implemented, is credited. There is simply no wrongdoing in preparing a draft and "kicking around" an idea. The evidence fails to support cause for discipline.

Elysian Viaduct Welds

XVI

Appellant admitted that 90 percent of the welds of column casings that had been approved by an inspector under his supervision (Councilman) at the Elysian Viaduct were rejected.

Elysian Viaduct is a project that had been going on for several years following the Northridge Earthquake. According to the testimony of Inspector William Stokoe (Stokoe) of the Valley Industrial x-ray and Inspection Service, it will currently cost in the "hundreds of thousands of dollars" to fix the weldings. Stokoe is a certified welding inspector hired by Caltrans to evaluate the current condition of the Elysian Viaduct weldings.

Appellant testified that he had limited welding experience and had explained this to Crozier upon hiring. According to appellant, Crozier told him that appellant can rely upon the expertise of his inspectors.

Appellant admitted that the improper welds were visibly apparent. He testified that he conducted no random checks of Councilman's inspections, and trusted that Councilman was doing his job. The project was approximately six miles from the METS office. Appellant testified that it was not until well over a year after Councilman was first assigned the project, September 29, 1996, that another inspector, Suydan, covering Councilman while on vacation, discovered "the most horrible welds in his career." Suydan immediately notified appellant. Appellant immediately contacted his supervisor, Chief of Structural Materials, Philip Stolarski (Stolarski). Appellant inspected the project for the very first time after Suydan notified him.

XVII

According to appellant, Caltrans Structures Representative, Ted Hon (Hon) was responsible for the entire project. The project could not be approved without Hon's authorization. If there was any problem with the welding, Hon was to contact appellant. Appellant testified that he received no calls of

complaints regarding welding on the project. He testified that he had seen Councilman in the office often, spoke with him about the project, and was never informed of any difficulty. He assumed everything was going well and had approved Councilman's requests for overtime, and even a promotion.

XVIII

Hon testified that he too was not notified of any problem at the site. He testified that he relied upon his own inspectors to assure that Councilman was doing his job.[6] However, the responsibility for welding inspections fell under METS, which was supervised by appellant and delegated to Councilman. Although Hon approved the project, the inspectors under his direction rely upon METS to do the appropriate welding inspections. Hon admitted that the improper welds were visibly apparent, however.

Hon testified that his inspectors told him that they spoke with Councilman because they rarely saw him at the site.

[6] Hon had 11 inspectors under his supervision.

According to Hon, Councilman explained that he would come after hours because he did not want to disturb the work.

Appellant admitted that he knew that it was his responsibility to assure that welding was inspected on the project, and that the structures Representative, Hon, “relies on the specialist [METS].”

XIX

Councilman was rejected on probation from the position of Associate Steel Inspector for his failure to inspect the Elysian Viaduct Project. He continues to work for Caltrans as an Assistant Steel Inspector, the position he held when assigned the project. Neither Hon, nor any of his inspectors, was disciplined.

XX

Appellant testified that he had been experiencing a serious shortage of inspectors, with a substantially increased workload, following the Northridge Earthquake. He had informed his supervisor on numerous occasions of this shortage. Appellant testified that he spent a good share of his day on the phone and “putting out fires.” He testified that he was told to limit his own field inspections and that he should “manage” the office. He testified that on occasion he would go to worksites with his inspectors to introduce them to a new project. He had performed

no random checks of the work of those inspectors, however.

XXI

Appellant's failure to conduct random checks of Councilman's work cannot be excused. Clearly appellant knew of the significant impact spot checks can have on the performance by contractors. There is no reason he should neglect this essential function while performing his duty as a supervisor. Nor is his responsibility to assure that inspections are conducted, diminished by the failure of others. Appellant admitted that it is he, not Hon, who is responsible to assure the welding is inspected.

Failure to monitor seismic retrofitting on two projects

XXII

The only evidence respondent presented on this allegation was Ellis' brief testimony that on October 25, 1996, he went to view two projects, the 7th Street overcrossing, and the Santa Monica Viaduct. He testified that the jobs were initially to be inspected by Councilman and Hiles, and that appellant was their supervisor.

According to Ellis, he saw materials on the 7th Street overcrossing project that needed repairs, problems with brackets, undercuttings with the torch, and that the weldings were not in conformance.

XXIII

There was no testimony of what, if anything, was viewed at the Santa Monica Viaduct project. There was no evidence to indicate that the remaining project had been approved by Councilman, Hiles, or appellant, or that these problems did not first occur on October 25, 1996 or within a reasonable timeframe and accordingly were inspected by Ellis. The evidence fails to support cause for discipline.

* * * * *

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

Respondent established by a preponderance of the evidence that appellant failed to properly monitor the work of a subordinate inspector at the Elysian Viaduct project.[7] His failure to properly monitor the work was costly and potentially catastrophic. As a supervisor, appellant was responsible for the vigilant oversight of his staff, as well as "putting out fires." In mitigation, however, appellant was working for

[7] Respondent established that appellant violated Government Code section 19572 (b) incompetency see Dennis Melton (1995) SPB Dec. No. 95-10 (c) inefficiency see Robert Boobar (1993) SPB Dec. No. 93-21 (d) inexcusable neglect of duty see Gubser v. Department of Employment 271 Cal.App.2d 240, 242, and (t) other failure of good behavior causing discredit to the department. There is no evidence to support a finding of (f) dishonesty.

Caltrans less than six months when Los Angeles was stricken with the Northridge Earthquake. His laboratory was short handed and clearly overwhelmed. In further mitigation, appellant misplaced his trust in an employee whom his supervisor indicated he could rely on for his inspection skills.

Appellant critically failed as a supervisor, nonetheless, his failure is not wholly independent. There was a "checks and balances" system that should have been in full force as well. Had Hon's inspectors reported Councilman's visible failure, had Hon not relied solely upon his inspectors' representations, the matter could have been averted. Certainly, there is some shared culpability.

The factors to consider in determining an appropriate penalty are the harm to the public service, the circumstances surrounding the misconduct, and the likelihood of recurrence. Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 208.

While the harm is obvious, and appellant clearly indicated an inability to supervise, there are significant mitigating factors.[8] Under the circumstances, the appropriate penalty is not dismissal but demotion from the position of Senior Materials and Research Engineer to the position of Associate Materials and Research Engineer effective July 22, 1997.

[8] Additionally, respondent failed to establish as cause for discipline the inspection at Rockwin, the preparation of a draft memorandum, or the monitoring of the two retrofitting projects.

Skelly Issue

Appellant argued that his due process rights were violated since he did not receive photos or a report on the Elysian Viaduct project upon service of the notice of adverse action.

The California Supreme Court case of Skelly v. State Personnel Board (1973) 15 Cal.3d 914 (Skelly) set forth certain procedures that a public employer must follow to satisfy an employee's procedural due process rights:

> At a minimum, these pre-removal safeguards must include notice of the proposed action, the reasons therefrom, a copy of the charges and materials upon which the action was based...(emphasis added).

To establish a Skelly violation, appellant must provide evidence of who made the decision to terminate appellant and what evidence the decision relied upon. Gary Sharp-Franke Johnson (1995) SPB Dec. No. 95-24, 7. Stolarski testified that James E. Roberts (Roberts), Director Engineering Services Center, approved appellant's adverse action and was responsible for "signing off." Stolarski testified that he showed the report and photos to Roberts. There was no evidence however, that Roberts relied upon those documents to terminate appellant. Accordingly, appellant did not establish a Skelly violation.

* * * * *

WHEREFORE IT IS DETERMINED that the dismissal taken by respondent against Hernando Morales effective July 22, 1997, is hereby modified to a demotion from the position of Senior Materials and Research Engineer to the position of Associate Materials and Research Engineer effective July 22, 1997. Said matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing upon written request of either party in the event the parties are unable to agree as to the salary, benefits, and interest, 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: January 12, 1997.

_____
Susan G. Kleinman
Administrative Law Judge
State Personnel Board