

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

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| In the Matter of the Appeal by |) | SPB Case No. 00-1572 |
| RICHARD C. TOBY |) | |
| From dismissal from the position of |) | BOARD DECISION |
| Psychiatric Technician with the Sonoma |) | (Precedential) |
| Developmental Center, Department of |) | |
| Developmental Services |) | NO.: 01-04 |
| |) | November 6-7, 2001 |

APPEARANCES: Charles F. McClamma, Labor Relations Specialist, Department of the Developmental Services, on behalf of the Respondent, Department of Developmental Services; Ken Murch, Consultant, California Association of Psychiatric Technicians, on behalf of Appellant, Richard C. Toby.

BEFORE: William Elkins, Vice President; Florence Bos, Richard Carpenter, and Sean Harrigan, Members.

DECISION

This case is before the State Personnel Board (Board) after the Board granted the Petition for Rehearing filed by Richard C. Toby (appellant), in which he asked the Board to overturn his dismissal. The Board originally adopted the Proposed Decision of the Administrative Law Judge upholding appellant’s dismissal from the Department of Developmental Services (DDS) for dishonestly answering Question 5(b) on the State of California Examination and/or Employment Application, STD 678 (Application).

In this decision, the Board concludes that DDS did not prove, by a preponderance of evidence, that appellant was dishonest when he answered “no” to Question 5(b) and, therefore, revokes appellant’s dismissal. The Board further finds that, for the reasons set forth below, Question 5 on the Application should be revised so as to solicit only whether an applicant has ever been dismissed or terminated from any

position for performance or disciplinary reasons. Furthermore, Question 5 should be clarified to provide that an applicant who received a dismissal that was subsequently withdrawn, whether as part of a settlement agreement or otherwise, need not disclose the dismissal on the Application.

BACKGROUND

Appellant began his state employment on January 30, 1987, working for the Department of Mental Health (DMH) at Napa State Hospital, first as a Psychiatric Technician Trainee and then as a Psychiatric Technician. In 1991, he promoted to the position of Senior Psychiatric Technician and moved to Patton State Hospital, but shortly thereafter voluntarily demoted back to the position of Psychiatric Technician. Appellant was subsequently dismissed from the position of Psychiatric Technician at Patton State Hospital effective September 25, 1995 and filed an appeal from the dismissal with the Board. The appeal was heard before an Administrative Law Judge on March 5, 1996. At the hearing, before any evidence was taken, appellant entered into a stipulation for settlement with DMH, which included the following provisions:

1. Respondent, California Department of Mental Health, hereby withdraws the notice of adverse action of dismissal, previously effective September 25, 1995. That notice and all supporting documents shall be removed from appellant's personnel file.
2. Appellant hereby withdraws his appeal from the notice of adverse action of dismissal. Appellant submits his voluntary resignation from the position of Psychiatric Technician (Forensic Facility) for personal reasons, effective at the end of the shift on March 5, 1996. Respondent hereby accepts appellant's voluntary resignation.
3. Appellant enters into this agreement freely and voluntarily with the advice of his representative.

4. The terms set forth herein shall not be binding upon the parties unless approved by the State Personnel Board.
5. The parties waive the provisions of Government Code section 18671.1.
6. This stipulation for settlement sets forth the full agreement of the parties regarding the matter settled herein.
7. The parties agree to honor the terms of this agreement, insofar as practical, until its approval or rejection by the State Personnel Board.

The Administrative Law Judge prepared a Proposed Decision based on that settlement, recommending approval of the Stipulation for Settlement. The Proposed Decision was adopted by the Board's Executive Officer on March 14, 1996 as the Board's decision in that case.

On January 18, 2000, appellant signed and submitted an official State of California Examination and/or Employment Application ("State Employment Application") for a position with DDS as a Psychiatric Technician at Sonoma Developmental Center. As part of the application, appellant was required to answer Question 5, which states as follows:

5. Have you ever: (If "YES", give details in Item 12 and refer to the Instructions for further details.)
 - A. Been dismissed or fired from a position for any reason?
 - B. Resigned from or quit a position while under investigation or after being informed discipline would be taken against you, or during an appeal from a disciplinary action?
 - C. Been rejected or told you would not receive permanent or continued employment during any type of probationary or trial period on the job?

Appellant answered “no” to each part of the question. At the bottom of the application, appellant signed the following certification:

I certify under penalty of perjury that the information that I have entered on this application is true and complete to the best of my knowledge. I further understand that any false, incomplete, or incorrect statements may result in my disqualification from the examination process or dismissal from employment with the State of California. I authorize the employers and educational institutions identified on this application to release any information they may have concerning my employment or education to the State of California.

Because appellant answered “no” to each part of Question 5 on the application, his past employment was not investigated by Sonoma Developmental Center before he was hired. If appellant had answered “yes” to any part of Question 5, DDS claims it would have investigated the circumstances surrounding his employment at Patton State Hospital and might have still hired appellant, depending on the results of the investigation and the individual circumstances surrounding his resignation. However, because appellant answered “no” to all parts of Question 5, no such investigation took place.

After appellant was hired at Sonoma Developmental Center, the Personnel Office requested appellant’s official personnel file from Patton State Hospital. In appellant’s official personnel file was a letter to appellant dated July 17, 1996, from the Director of Human Resources at Patton State Hospital responding to appellant’s request that certain documents, including two copies of a “Stipulated Agreement,” a “Notice of Personnel Action, Report of Separation, Dismissal,” and a “Notice of Resignation with Fault” be removed from appellant’s official personnel file.

When the Personnel Officer at Sonoma Developmental Center saw this letter, she attempted to contact the Director of Human Resources at Patton State Hospital to

learn more about the circumstances of appellant's resignation in 1996. When the Director of Human Resources at Patton State Hospital failed to return her calls, the Personnel Officer contacted the State Personnel Board Appeals Division in Sacramento and obtained copies of the original Notice of Adverse Action and Stipulation for Settlement in appellant's dismissal case. The Personnel Officer then reviewed appellant's application and verified that appellant had not disclosed the circumstances of his resignation on the employment application and had answered "no" to all parts of Question 5. The Personnel Officer recommended to the administration at Sonoma Developmental Center that appellant be terminated from his position for lying on his employment application. DDS subsequently dismissed appellant from his position at SDC effective May 19, 2000, alleging cause for discipline pursuant to Government Code section 19572, subsections (a) fraud in securing appointment, (f) dishonesty, and (t) other failure of good behavior.

At the hearing on the dismissal, appellant testified that he did not intentionally falsify his application by answering "no" to Question 5(b). He testified that he recalled that the employment application had been changed from previous years, when a similar question asked whether an applicant had ever been discharged or resigned under "unfavorable circumstances".¹ Although he was confident that he could have answered "no" to Question 2(e), as he was no longer discharged and did not believe he resigned

¹ Question 2(e) on the former application asked: "Were you ever discharged, rejected during probation, or have you ever been requested to resign or resigned under unfavorable circumstances from any employment? (You may omit any incident occurring over 7 years ago except a disciplinary or punitive dismissal, or a probationary period rejection from California State Civil Service.) If "Yes", give details in #10."

under “unfavorable circumstances,” he was unsure of how to answer Question 5(b) in light of the stipulated settlement agreement.

After giving the matter some thought, appellant answered “no” to Question 5(b). Appellant gave several reasons for his decision. First, he did not believe that the resignation was given “during an appeal from a disciplinary action.” In his view, the fact that he resigned several months after he had been dismissed demonstrated that the two events, the dismissal and the resignation, were separate. In addition, because paragraph 1 of the stipulated settlement agreement provided that the dismissal action was withdrawn, and it was not until paragraph 2 that appellant tendered his resignation, in his opinion, the appeal was “no longer pending” when he gave his resignation.

Finally, appellant claims to have relied upon the advice of his former attorney and his stepfather, a Nursing Coordinator and former supervisor at DDS, in coming to the decision that he could legitimately answer “no” to Question 5(b). Appellant testified that, at the prior dismissal hearing where the settlement was reached, his attorney had told him that “the dismissal would go away,” and “that I would voluntarily resign and could reapply- I could walk out of that meeting and reapply at Patton State Hospital or any other State Facility.” In addition, his stepfather, who was formerly a supervisor at DDS, reviewed the situation with him and told him that he could honestly answer “no” to both Questions 5(a) and 5(b) under the circumstances of his stipulated settlement agreement.² Thus, appellant contends he did not intend to be dishonest when he completed the employment application, but held a good faith belief that he could legitimately answer “no” to all of Question 5.

² While DDS originally charged appellant with failing to answer 5(a) honestly, this charge was dropped prior to the hearing.

DDS, on the other hand, argues that appellant was well aware that he had an obligation to answer “yes” to Question 5(b), because he resigned from his position “during an appeal hearing from a disciplinary action,” and the resignation was given, in part, in exchange for DDS’s withdrawal of the dismissal action. DDS argues that the question could not be clearer and that appellant was simply trying to hide his dismissal from DMH from the hiring officials at DDS.

Procedural History

A hearing on the appeal from dismissal was held before an ALJ on September 5, 2000. Thereafter, the ALJ issued his Proposed Decision sustaining appellant’s dismissal, which was adopted by the Board as its decision in this case at its meeting on December 7 and 8, 2000. The Board granted appellant’s Petition for Rehearing on February 21, 2001.

ISSUES

1. Whether cause for discipline was established by a preponderance of the evidence?
2. Whether Question 5 of the State’s Employment Application should be revised and, if so, how?

DISCUSSION

Cause for Discipline

To prove cause for discipline for fraud in securing appointment and for dishonesty, DDS must prove, by a preponderance of the evidence, that appellant made

an intentional misrepresentation of known facts when he answered “no” to Question 5(b) on the employment application.³

In a prior precedential decision, Ming Liu, this Board determined that there was a preponderance of evidence that Liu deliberately omitted from his employment application reference to a prior state position and that he was dishonest when he answered “no” to Question 5’s predecessor, Question 2(e), in order to hide a rejection action from a prospective employer.⁴ The Board found that Liu’s deliberate misrepresentations on his employment application constituted fraud in securing appointment, as well as dishonesty, and sustained his dismissal.

Recently, in a non-precedential decision, Carla Eggman-Garrett,⁵ this Board revoked a rejection during probation, finding that the department did not prove by a preponderance of evidence that an applicant was intentionally trying to mislead officials when she answered “no” to Question 5(b). Eggman-Garrett had been dismissed from state service, but settled the dismissal action at her Skelly meeting, agreeing to resign from state service and not reapply to the department in exchange for the department’s withdrawal of the dismissal action. The stipulated agreement was approved by the Board as its decision in the case. Eggman-Garrett later answered “no” to Question 5(b) on the state’s employment application when applying for a position. In determining whether Eggman-Garrett acted dishonestly in answering “no” to 5(b), the Board noted the unique circumstances involved. In that case, both her own representative, as well

³ See M. S. (1994) SPB Dec. No. 94-19, at p. 20.

⁴ Ming Liu (1997) SPB Dec. No. 97-02.

⁵ May 1-2, 2001, SPB Case No. 00-0008.

as the department's representative, had told her at the Skelly meeting that the settlement made the adverse action "go away," as if it had never existed, and that she did not "resign under adverse action." Thus, she believed she could honestly answer "no" to Question 5(b).

We find the facts of the instant case similar to those in Eggman-Garrett. DDS bears the burden of proving by a preponderance of the evidence that appellant intended to mislead DDS when he answered "no" to Question 5(b), and that he knew that he should be answering "yes" under the circumstances. While the ALJ found appellant not to be a credible witness and while the credibility determinations of ALJ's are generally not disturbed unless unsupported by the record,⁶ an ALJ's credibility determinations are not conclusively binding on the Board.⁷

The only evidence in the record as to appellant's subjective interpretation of the question, is his unimpeached testimony that he relied upon misinformation given to him by others in determining that he could legitimately answer "no" to Question 5(b). Absent any evidence in the record to contradict appellant's testimony or to support a finding of intentional deceit, we can not find cause for discipline for dishonesty or fraud in securing appointment.

State Employment Application

Under current law, the Board may refuse to examine, or after examination, may refuse to declare as eligible or withhold from appointment any applicants who have been dismissed from state civil service or who have resigned "not in good standing" or

⁶ Linda Mayberry (1994) SPB Dec. No. 94-25, at p. 7.

⁷ Karen Johnson (1992) SPB Dec. No. 92-02, at p. 4.

“in order to avoid dismissal,” as well as applicants who have been dismissed from other employment for reasons that would constitute cause for dismissal from state civil service.⁸ Over the years, the Application has been used by state departments as both an eligibility and screening tool for applicants for state civil service examinations, as well as a hiring tool for applicants already eligible for appointment.

A prior version of the Application contained Question 2 (e), which required the applicant to disclose whether he or she had ever been discharged, rejected during probation, requested to resign or resigned under “unfavorable circumstances.” Over the years, the Board has reviewed a number of appeals by employees who had been

⁸ Government Code section 18935 provides as follows:

- The board may refuse to examine or, after examination, may refuse to declare as an eligible or may withhold or withdraw from certification, prior to appointment, anyone who comes under any of the following categories:
- (a) Lacks any of the requirements established by the board for the examination or position for which he or she applies.
 - (b) At the time of examination has permanent status in a position of equal or higher class than the examination or position for which he or she applies.
 - (c) Is physically or mentally so disabled as to be rendered unfit to perform the duties of the position to which he or she seeks appointment.
 - (d) Is addicted to the use of intoxicating beverages to excess.
 - (e) Is addicted to the use of controlled substances.
 - (f) Has been convicted of a felony, or convicted of a misdemeanor involving moral turpitude.
 - (g) Has been guilty of infamous or notoriously disgraceful conduct.
 - (h) Has been dismissed from any position for any cause which would be a cause for dismissal from the state service.
 - (i) Has resigned from any position not in good standing or in order to avoid dismissal.
 - (j) Has intentionally attempted to practice any deception or fraud in his or her application, in his or her examination, or in securing his or her eligibility.
 - (k) Has waived appointment three times after certification from the same employment list.
 - (l) Has failed to reply within a reasonable time, as specified by the board, to communications concerning his or her availability for employment.
 - (m) Has made himself or herself unavailable for employment by requesting that his or her name be withheld from certification.
 - (n) Is, in accordance with board rule, found to be unsuited or not qualified for employment.
 - (o) Has engaged in unlawful reprisal or retaliation in violation of Article 3 (commencing with Section 8547) of Chapter 6.5 of Division 1, as determined by the board or the court.

dismissed for fraud in securing appointment⁹ based upon their failure to disclose on the State Employment Application a resignation, rejection or dismissal from a prior state position. One of the most frequently litigated issues was whether a resignation that occurred as part of a settlement of a prior disciplinary action taken by another state appointing power constituted a resignation under “unfavorable circumstances.” The courts reached different conclusions on this issue, with at least one superior court determining that an employee who withdrew her appeal from dismissal in exchange for withdrawal of the dismissal and \$10,000 was not dismissed under “unfavorable circumstances” for purposes of disclosure on Question 2(e).¹⁰ The Board ultimately decided to revise the Application in 1997 to eliminate the ambiguous “unfavorable circumstances” language and replaced Question 2(e) with Question 5.¹¹

Question 5 is both broader and more specific than was Question 2(e). Through Question 5, the Application still requires the applicant to disclose prior dismissals and rejections during probation. Additionally, instead of asking an applicant whether he or she ever resigned “under unfavorable circumstances,” the Application now asks, more specifically, whether the applicant ever resigned while “under investigation,” “after being informed discipline would be taken,” or during an “appeal from a disciplinary action.”

As demonstrated in Eggman-Garrett and this appeal, both departments and appellants are sometimes confused as to the effect of a

⁹ Government Code section 19572, subdivision (a).

¹⁰ Kristine Silva v. State Personnel Board (1995) Sacramento Superior Court Case No. 95AS05463 (affirmed on appeal in an unpublished decision).

¹¹ In 1998, the Office of Administrative Law issued a Formal Determination (1998 OAL Determination No. 29) finding that Question 2(e) and its interpretation, as issued by the State Personnel Board, were invalid because Question 2(e) was not adopted pursuant to the Administrative Procedures Act.

withdrawn disciplinary or rejection action on an applicant's obligation of disclosure in response to Question 5. Some applicants, like appellant, who tendered their resignation as part of a settlement in exchange for withdrawal of a disciplinary or rejection action, have been led by representatives or others to believe that the withdrawn action "no longer exists" for any purpose, and thus do not read Question 5 as requiring an affirmative response. Other applicants, in the same situation, may believe they have an obligation to respond affirmatively to Question 5 and may, consequently, disclose a withdrawn action and explain the circumstances behind the withdrawal of the action on the application; these applicants may be disadvantaged in the examination or hiring process. The Application should not put an employee in the position of having to guess at whether he or she is obligated to disclose some negative aspect of his or her employment history, under pain of dismissal if that employee is ever determined to have guessed wrong. Neither should it advantage some applicants while disadvantaging others, depending upon each applicant's interpretation of the questions asked.

Moreover, applicants who resign from state employment in exchange for the withdrawal of a rejection or disciplinary action should be able to obtain the "benefit of the bargain" they believed they were receiving when they settled the prior action. A state employee who enters into a settlement agreement with a state employer may resign and forfeit his or her right to contest the charges through the appeal process, in exchange for the employer's withdrawal of the action. In exchange for the employee's resigning and foregoing his or her right to fight the action, the employer receives the benefit of not having to prosecute the action in a hearing. Allowing state employers the power to withdraw previously-issued disciplinary actions and/or rejections during

probation to avoid having to prosecute their actions, but nevertheless requiring employees who gave up their right to challenge the actions to have to inform prospective employers about the withdrawn actions on the Application, strips employees of a good part of the benefit of their bargain. This Board believes that once a disciplinary and/or rejection action has been withdrawn, an applicant for future state employment should not have to disclose the action on the Application.¹² The applicant should be able to get his or her “foot in the door” when seeking future state employment and should be able to list “resignation” as a reason for leaving a prior state position. Accordingly, we believe Question 5 should be clarified so that applicants who have received disciplinary actions and/or rejections during probation that have been subsequently withdrawn do not have to disclose receipt of such actions on the Application.

This leaves us with the issue of specifically how Question 5 should be worded. Under Government Code section 18935, an employee whose dismissal from state service is final would be subject to disqualification from taking state examinations and ineligible for appointment.¹³ The Board does not interpret section 18935, however, to subject to disqualification from state service a former state employee whose dismissal was overturned or withdrawn, whether the withdrawal was unilaterally withdrawn by the

¹² We note that the Application also requires applicants to list all prior positions held. Nothing in this decision should be construed as relieving applicants from that obligation.

¹³ Title 2 California Code of Regulations section 211 provides that an employee who is dismissed from state employment as a result of disciplinary proceedings shall not thereafter be permitted to take a civil service examination or be certified for appointment to any position in the state civil service without the consent of the Board's Executive Officer. After withhold or upon request, the Executive Officer will determine whether to refuse to examine or certify as eligible for appointment, any person for any of the reasons set forth in Government Code section 18935. Persons denied permission to compete in examinations or be certified as eligible for appointment under this rule may appeal to the Board in writing within 30 days of notification.

prior state employer or withdrawn as part of a bargained for exchange in settlement of a disputed action. Similarly, although Question 5 currently solicits information from applicants concerning receipt of rejections during probation as well as resignations tendered while “under investigation,” “after being informed disciplinary action would be taken” or “during appeal from a disciplinary (non-dismissal) action,” such events would not necessarily trigger initial disqualification of an applicant from appointment or from the examination process under section 18935. A more appropriate inquiry in the examination process would seek disclosure only of those dismissal or termination actions that have not been withdrawn and would specifically relieve the applicant from disclosing withdrawn actions. Thus, a more appropriate inquiry might be:

Have you ever been dismissed or terminated from any position for performance reasons or for other disciplinary reasons? [Applicants whose dismissals or terminations were overturned, withdrawn (unilaterally or as part of a settlement) or revoked need not answer “yes.”]

If the applicant were to answer “yes” to the above question, the applicant could still explain the circumstances of the dismissal or termination.

Just because this Board concludes, however, that applicants should not have to disclose on their employment applications dismissals and rejection actions that they were previously required to disclose does not mean that those actions no longer “exist” in their work history records or that employers may not discover their existence. A state employee’s work history, as officially maintained by the State Controller’s Office, includes a historical record of any formal disciplinary actions and rejections during probation, even if the actions are subsequently withdrawn.¹⁴ Similarly, when a disciplinary action and/or rejection during probation is appealed to the Board, but later

¹⁴ The records in the State Controller’s Office do not include records of official or formal reprimands.

overturned or withdrawn, the original action is not removed from the Board's files but, instead, the documentation reflecting the revocation or withdrawal is simply added to the file to reflect the entire history of events. Furthermore, department officials who are contacted and questioned regarding a former employee's work history are expected to answer accurately questions concerning the employee's work history, even if that means discussing an action that has been subsequently withdrawn.¹⁵

Moreover, an employee who is asked specific questions concerning his or her employment history is expected to tell the truth, even if it means having to inform a prospective employer about an action that was subsequently withdrawn. Although requiring applicants to disclose the existence of withdrawn actions to prospective employers when specifically questioned may seem to defeat the point of excluding the disclosure of such information from the employment application, we believe there is a difference. In a specific case, an employer may have a reason for asking about prior actions, such as to clarify the applicant's employment history or to determine suitability for a particular position. Moreover, the applicant who is faced with such a question already has one "foot in the door" and, thus, an opportunity to explain to the prospective employer the circumstances surrounding the prior action.

Thus, although this decision provides that applicants only need to disclose on the Application dismissals and terminations that were never withdrawn, state employers may still inquire into an employee's work history and other employment actions, either through background investigations, interviews, reference checks, or an examination of

¹⁵ We reaffirm our prior decision in Pamela Martin, SPB Dec. No. 91-03, where we held that the "merit system recognizes that State agencies and State applicants should be protected from persons with questionable work histories" and will not approve settlement agreements that prevent department officials from disclosing information concerning an employee's work history.

records at the State Controller's Office or this Board. While the Board hopes that prospective employers do not automatically eliminate applicants solely because of the existence of a negative employment action on their work history, employers are, nonetheless, encouraged to conduct a thorough investigation of applicants to assess their suitability for employment.¹⁶

CONCLUSION

We find that DDS has not proven by a preponderance of evidence that appellant committed dishonesty or fraud in securing his appointment under the circumstances. In addition, we conclude that Question 5 on the State Employment Application should be revised so that it only seeks information that might disqualify a prospective employee from taking examinations or being certified for appointment under Government Code section 18935. Moreover, Question 5 should be modified so that it no longer unfairly deprives employees of the benefit they should have derived when their prior employers withdrew their dismissal actions as part of a settlement agreement. The Board will hereafter revise the application to solicit information only about prior dismissal and termination actions that have not been overturned, withdrawn (unilaterally or as part of a settlement) or revoked and, in the interim, will not uphold discipline against employees who answer "no" to any part of Question 5 under similar circumstances.

¹⁶ Indeed, DDS admits that it relied upon appellant's negative answers to Question 5 to assume that his work history was clean and did not conduct any investigation into his employment history.

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 dismissal taken against appellant, Richard C. Toby, is revoked.
2. The Department of Developmental Services shall reinstate Richard C. Toby to the position of Psychiatric Technician and pursuant to Government Code § 19584, pay him all back salary, interest and benefits, if any, that he would have otherwise accrued had he not been dismissed from his position.
3. This matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the back salary, interest and benefits due appellant under Government Code § 19584.
4. Question 5 on the state's Examination and/or Employment Application (STD 678) is revised to provide the following:

Have you ever been dismissed or terminated from any position for performance or other disciplinary reasons? (Applicants whose dismissals or terminations were overturned, withdrawn [unilaterally or as part of a settlement] or revoked need not answer "yes".)

If "YES" to Question 5, give details in Item 12 and refer to the Instructions for further details.
5. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD¹⁷

William Elkins, Vice President
Florence Bos, Member
Richard Carpenter, Member
Sean Harrigan, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on November 6-7, 2001.

Walter Vaughn
Executive Officer
State Personnel Board

[Toby.dec]

¹⁷ President Ron Alvarado did not participate in this decision.