

**BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA**

In the Matter of the Appeal by	)	SPB Case No. 03-1587
<b>RANDALL DODSON</b>	)	<b>BOARD DECISION</b>
	)	(Precedential)
From nonpunitive termination from the	)	<b>NO. 04-02</b>
position of Caltrans Equipment Operator	)	
I with the Department of Transportation	)	June 8, 2004
at Eureka	)	
	)	
	)	

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**APPEARANCES:** J. Felix De La Torre, Esq., Weinberg, Roger & Rosenfeld, on behalf of appellant, Randall Dodson; Daniel Muallem, Department of Transportation, on behalf of respondent, Department of Transportation.

**BEFORE:** Ron Alvarado, Vice President; Sean Harrigan, Maeley Tom, and Anne Sheehan, Members.

**DECISION**

This case is before the State Personnel Board (Board) after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) to consider the appropriate remedy for a Skelly violation in a non-punitive termination case. In this case, the Department of Transportation served a notice of non-punitive termination on appellant after his Class B driver's license was suspended, but did not give appellant the opportunity for a Skelly meeting until after he had regained his license.

In this Decision, the Board finds that the effective date of the non-punitive termination must be extended to the date when appellant was afforded pre-termination due process. The Board further finds that, because appellant met all conditions for continuing employment in his position as of that date, he could not thereafter be non-punitively terminated based upon his prior failure to meet such conditions.

Accordingly, the Board revokes appellant's non-punitive termination and orders him reinstated with full back pay and benefits.

## **BACKGROUND**

### Factual Summary<sup>1</sup>

The parties stipulated to the following facts:

1. The SPB Specifications for the classification of Caltrans Equipment Officer (CEO I) require that an employee assigned to the CEO I classification must have a Class B license to drive a motor vehicle issued by the Department of Motor Vehicles (DMV).
2. Appellant was, on and/ [sic] immediately prior to May 16, 2003, a CEO I.
3. DMV suspended appellant's Class B license prior to May 16, 2003, and, on May 16, 2003, appellant had a suspended Class B license.
4. Respondent terminated its employment relationship with appellant under authority of Government Code section 19585, effective at the close of business on May 16, 2003.
5. Notice of termination under Government Code section 19585 was legally served by respondent on appellant, by notice dated May 7, 2003.
6. Appellant was legally entitled to an opportunity to present his views on the matter of termination of his employment to be effective May 16, 2003, to a

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<sup>1</sup> The Board adopts substantially the ALJ's factual findings as set forth below.

representative of respondent's management, prior to the termination under Government Code section 19585 taking effect.

7. Appellant asked for an opportunity to present his views on the matter of his termination in a timely manner, prior to May 16, 2003.
8. Appellant was not afforded an opportunity to present his views on the matter of his termination prior to such termination being effective on May 16, 2003.
9. Appellant was terminated from respondent's employment by respondent at the close of business on May 16, 2003.
10. Suspension of appellant's Class B license was removed by DMV on or about June 6, 2003, and appellant possessed a valid Class B license on June 24, 2003.
11. Appellant was afforded an opportunity, on June 24, 2003, to present his views on the matter of his termination under Government Code section 19585.
12. Respondent made no change in its termination of appellant, as a result of appellant's presentation of his views to respondent on the matter of his termination.
13. Respondent notified appellant of the decision to make no change in the termination action, by letter to appellant dated June 24, 2003.

In addition to the stipulated facts, appellant testified to the following un rebutted facts: Appellant's suspension of his Class B driver's license was due to his arrest for driving under the influence. After his arrest, appellant started attending Alcoholics

Anonymous meetings, saw a therapist and began attending a class for first offenders driving under the influence.

### Procedural Summary

In her Proposed Decision, the ALJ concluded that appellant's failure to maintain his Class B license constituted a failure to meet a continuing term of employment and thus proper cause for non-punitive termination pursuant to Government Code section 19585. The ALJ further concluded that the Department violated appellant's rights under Skelly and SPB Rule 52.3 by failing to give appellant notice and an opportunity to be heard at least five working days prior to the effective date of the action. As a remedy for the Skelly violation, the ALJ determined that appellant was entitled to back pay from May 16, 2003, the first day he was unlawfully taken off the payroll, through June 24, 2003, the date the Skelly officer issued his decision.

At its meeting on November 4, 2003, the Board rejected the ALJ's Proposed Decision in order to determine appellant's rights in light of the Board's reasoning set forth in E. W.<sup>2</sup>

### **ISSUES**

- 1) Whether, in light of the reasoning set forth in E. W. (1999) SPB Dec. No. 99-09 at pp. 26-29, the effective date of appellant's non-punitive termination must be extended to June 24, 2003, when appellant was granted a Skelly meeting;

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<sup>2</sup> (1999) SPB Dec. No. 99-09.

- 2) If so, as of June 24, 2003, was appellant subject to non-punitive termination under Government Code section 19585 for failure to meet a requirement for continuing employment; and
- 3) If the non-punitive termination is revoked, for what period of time would appellant be entitled to receive back pay.

## **DISCUSSION**

Government Code section 19585 allows an appointing power to terminate, demote or transfer an employee who fails to meet a requirement for continuing employment. Such a “non-punitive” action is considered non-disciplinary in nature.

In Skelly v. State Personnel Board,<sup>3</sup> the California Supreme Court articulated the procedural due process requirements that an appointing power must meet before depriving a state civil service employee of his or her job. At a minimum, those rights include notice of the proposed action and the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing the discipline.<sup>4</sup>

By rule, the Board has clarified that the Skelly rights apply not only to disciplinary actions but also to non-punitive terminations under Government Code section 19585.<sup>5</sup> Implementing Skelly, SPB Rule 52.3 requires the appointing power to serve written notice of a proposed adverse action, rejection during probationary period, or non-

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<sup>3</sup> (1975) 15 Cal.3d 194.

<sup>4</sup> Id., at p. 215.

<sup>5</sup> 2 Cal. Code Reg. § 52.3, subd. (a).

punitive termination, demotion or transfer under Government Code section 19585 within five days of the effective date of the action.<sup>6</sup> That notice must include:

- (1) the reasons for such action,
- (2) a copy of the charges for adverse action,
- (3) a copy of all materials upon which the action is based,
- (4) notice of the employee's right to be represented in proceedings under this section,
- (5) notice of the employee's right to respond to the person specified in subsection (b).<sup>7</sup>

#### Effective Date of Non-Punitive Termination

Due process requires that appellant be given an opportunity to respond to the proposed charges prior to the effective date of the action. In its precedential decision E ■ ■ ■ W ■ ■ ■ ,<sup>8</sup> the Board addressed the due process implications of amending a notice of adverse action. Because due process requires that an employee be given notice of, and an opportunity to respond to, all the charges upon which the action is based before the discipline can become effective,<sup>9</sup> we held in W ■ ■ ■ that, if a notice of adverse action is amended to include additional substantive charges, the effective date of the action must also be extended in order to provide the notice period required by Skelly

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<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Supra, SPB Dec. No. 99-09

<sup>9</sup> Id., at pp. 28-29.

and Rule 52.3.<sup>10</sup> This rule flows from judicial analysis under Skelly, in which the courts have stated repeatedly that a termination action is invalid until the employee has received all process to which he is due.<sup>11</sup>

We find the same principles applicable here. In this case, the Department failed to afford appellant his Skelly rights prior to the effective date of the action. Appellant timely requested the opportunity to respond to the appointing power prior to the effective date of the action, May 16, 2003. The Department failed to provide him the opportunity to respond to the charges prior to the effective date of the action. Instead, not until June 24, 2003 was appellant given the right to respond to the charges. Accordingly, the employment action was not valid until appellant's due process rights were satisfied. Therefore, pursuant to W [REDACTED], the effective date of the action must be moved to June 24, 2003, the date appellant was afforded his due process rights.

#### Validity of Non-Punitive Termination

It is undisputed that, as of May 16, 2003, appellant did not possess a valid Class B driver's license because that license had been suspended. It is also undisputed that possession of a valid Class B driver's license is a requirement for continuing employment as a Caltrans Equipment Operator. But for the Skelly issue raised in this case, there is no question that the Department would have been authorized to utilize the

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<sup>10</sup> Id., at p. 30.

<sup>11</sup> See, e.g., Barber v. State Personnel Board (1976) 18 Cal.3d 395, 403 (prior to the time the employee was afforded the opportunity to present his arguments to the authority initially imposing the discipline, the discipline imposed was invalid); Keely v. State Personnel Board (1975), 53 Cal.App.3d 88, 98 (discipline was constitutionally valid on date employee was accorded a full evidentiary hearing); Kristal v. State Personnel Board (1975), 50 Cal.App.3d 230, 240 (discharge was premature prior to employee receiving notice and opportunity to respond).

procedure set forth in Government Code section 19585 to non-punitively terminate appellant as of May 16, 2003.

The Board has recognized that the purpose of section 19585 was to make it easier for a department to remove an employee who, solely because of a lack of a license or other necessary professional qualifications, could not work because he or she no longer met the requirements for continuing employment as specified by the Board:

Clearly, the Legislature intended that a department should not be saddled with an employee that the department cannot assign to work as it sees fit because the employee does not meet the job specifications.<sup>12</sup>

Section 19585 gives the department the discretion to determine whether to demote, transfer, or terminate such an employee.<sup>13</sup>

In this case, although the Department attempted to invoke section 19585 as of May 16, 2003, the action did not become effective until June 24, 2003, when appellant was afforded due process under Skelly. By that time appellant had regained his Class B driver's license and met all of the requirements for continuing employment as a Caltrans Equipment Operator. Therefore, because appellant met all of the requirements for continuing employment as of the effective date of the termination, the Department could not separate him from employment under Government Code section 19585 as of that date.<sup>14</sup>

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<sup>12</sup> J. F. [REDACTED] (1997) SPB Dec. No. 97-03, p. 7.

<sup>13</sup> See G. [REDACTED], L. [REDACTED] (1992) SPB Dec. No. 92-10 and R. [REDACTED], N. [REDACTED] (1998) SPB Dec. No. 98-10 (appointing power has no statutory obligation to justify its decision to terminate an employee, rather than reassign him, so long as the statutory prerequisites for a non-punitive termination are satisfied.)

<sup>14</sup> In contrast, the Board has held that an employee may be non-punitively terminated under Government Code section 19585 for failure to possess a required license on the effective date of the action, even if the employee's current job duties do not require use of that license or the employer has the ability to assign the employee to work that does not require use of the license. (See, e.g., L. [REDACTED], supra and N. [REDACTED], supra.)



## Remedy

Ordinarily, the remedy for a Skelly violation is not to revoke the action but to provide the employee with back pay for the period of the deprivation of due process.<sup>15</sup> In order for a non-punitive termination to be valid, however, an employee must fail to meet a continuing requirement for employment as of the effective date of the termination. In this case, because of the Skelly violation, the conditions for non-punitive termination were no longer valid as of the effective date of the termination. Therefore, appellant is entitled to reinstatement to his position. In addition, appellant is entitled to back pay for the period of time he was wrongfully terminated.<sup>16</sup> The Department does not dispute that appellant was entitled to back pay for the period between May 16, 2003, when he was terminated, and June 24, 2003, when he was afforded his Skelly rights. Because we have ordered the non-punitive termination revoked, however, he is also entitled to back pay for the period from June 24, 2003 to the date he is reinstated pursuant to this decision.

We have also considered the issue of whether any back pay should be awarded for the period when appellant's Class B driver's license was revoked. Pursuant to Government Code section 19584, when the Board revokes a disciplinary or other action,<sup>17</sup> the employee is not entitled to back pay for any period of time when the employee was not ready, willing and able to perform the duties of his or her position.

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<sup>15</sup> Barber v. State Personnel Board, supra; Kristal v. State Personnel Board, supra

<sup>16</sup> M. S. (2000) SPB Dec. No. 00-02.

<sup>17</sup> By statute, the remedies afforded by Government Code section 19584 for disciplinary actions apply also to non-punitive terminations (Gov. Code, § 19585, subdiv. (i)) and medical actions (Gov. Code § 19253.5, subdiv. (g)).

An award of back pay for a Skelly violation, however, is in the nature of damages for the deprivation of due process, and is not subject to offset under section 19584.<sup>18</sup> Indeed, the Department acknowledged as much when it conceded that appellant is entitled to back pay for the period between May 16, 2003 and June 24, 2003. Therefore, the Department is not entitled to any offset against the award of back pay.

### **CONCLUSION**

The non-punitive process set forth in Government Code section 19585 provides a means for appointing powers to remove workers from positions in which they can no longer legally perform the required duties. Pre-termination due process principles, however, protect all state civil service employees from wrongful deprivation of their property interests in their employment, and such deprivation is invalid until pre-termination due process has been satisfied. Because appellant regained the legal qualification necessary to perform his position before the action became effective, he could not thereafter be non-punitively terminated under that section.

### **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 non-punitive termination of Randall Dodson from the position of Caltrans Equipment Operator is revoked;

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<sup>18</sup> See Jesse Brown (2001) SPB Dec. No. 01-02, at pp. 7-8 (employees who are not able to work due to illness or injury will, nonetheless, be entitled to backpay for that period of time during which they were deprived their due process rights, notwithstanding the "ready, able and willing" limitation set forth in Government Code § 19584).

2. The Department shall immediately reinstate Randall Dodson to the position of Caltrans Equipment Operator;
3. The Department shall pay to Randall Dodson all back pay and benefits, if any, that would have accrued to him had he not been terminated, from May 16, 2003 until the date he is reinstated, plus interest at the rate of seven (7) percent per annum.
4. 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.
5. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

**STATE PERSONNEL BOARD<sup>19</sup>**

Ron Alvarado, Vice President  
Sean Harrigan, Member  
Maeley Tom, Member  
Anne Sheehan, 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 June 8, 2004.

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Laura Aguilera  
Interim Executive Officer  
State Personnel Board

[Dodson-dec]

<sup>19</sup> President Elkins did not participate in this decision.