Filed 8/20/04

**CERTIFIED FOR PARTIAL PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

| | |
|---|---|
| ROBERT ROE,<br>Plaintiff and Respondent,<br>v.<br>STATE PERSONNEL BOARD,<br>Defendant,<br><br>DEPARTMENT OF JUSTICE, Real Party in Interest and Appellant. | A098067<br><br>(Alameda County<br>Super. Ct. No. 820295-2) |
| ROBERT ROE,<br>Plaintiff and Appellant,<br>v.<br>STATE PERSONNEL BOARD,<br>Defendant,<br><br>DEPARTMENT OF JUSTICE, Real Party in Interest and Respondent. | A098624 |

BY THE COURT:

The opinion filed July 22, 2004, is ordered modified as follows:

In part IV, footnote 13, commencing on page 20, is modified by inserting as the fourth sentence the following:

Moreover, Roe is not entitled to reinstatement pending the Board's determination because, as *Kirkpatrick* recognizes, the remedy for the *Skelly* violation is damages, not reinstatement. (*Kirkpatrick,* at pp. 945-946; see also *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 209; *Williams v. City of Los Angeles* (1990) 220 Cal.App.3d. 1212, 1217.)

As so modified, footnote 13 now reads:

[13] Roe cites *Kirkpatrick v. Civil Service Com.* (1978) 77 Cal.App.3d 940, 945, which holds that under *Barber* and *Skelly* "if [the Personnel Board] hearing shows that there were good grounds for dismissal, the employee is not entitled to reinstatement." Roe concludes that he is entitled to reinstatement because the Board has not concluded that there were good grounds for his dismissal. However, nothing in the case requires reinstatement rather than remand where, following a *Skelly* violation, the Personnel Board has conducted a full hearing but not yet made a determination on the merits of the dismissal. Moreover, Roe is not entitled to reinstatement pending the Board's determination because, as *Kirkpatrick* recognizes, the remedy for the *Skelly* violation is damages, not reinstatement. (*Kirkpatrick,* at pp. 945-946; see also *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 209; *Williams v. City of Los Angeles* (1990) 220 Cal.App.3d. 1212, 1217.) None of the other cases cited by Roe are on point. (See *Santillano v. State Personnel Bd.* (1981) 117 Cal.App.3d 620 [employee could not be terminated through procedures for probationary employees; no discussion of *Skelly*]; *California School Employees Assn. v. Personnel Commission* (1970) 3 Cal.3d 139 [district's personnel commission lacked jurisdiction to dismiss petitioner; pre-*Skelly*]; *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 221 [denying reinstatement where procedurally invalid nonreappointment deemed harmless; no discussion of *Skelly*].)

This modification makes no change in the judgment.

Appellant Roe's petition for rehearing is denied.

Respondent Department of Justice's request for depublication is denied.

Date_____ _____P.J.