BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

KIM HENSLEY, Appellant, v. DEPARTMENT OF TRANSPORTATION, Respondent.	)))))))))))	Case No. RULE-97-0091 ORDER ON REMAND

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair; GERALD L. MORGEN, Vice Chair; and LEANA D. LAMB, Member, on remand from Thurston County Superior Court. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on April 3, 2000.

1.2 **Appearances.** Appellant Kim Hensley was represented by James Gray, Attorney at Law. Respondent Department of Transportation was represented by John Calhoun, Employee Relations Manager.

1.3 **Citations Discussed.** WAC 356-05-380; WAC 356-30-130(3); WAC 356-30-130(4).

1.4 **Documents considered.** The Board considered the following documents in this matter:

(a) Order on Petition for Review, received October 5, 1999;
(b) Appellant's Opening Memorandum Pursuant to Remand to Board from Petition for Review, received March 31, 2000;
(c) Department of Transportation's Response to Appellant's Opening Memorandum, received March 24, 2000; and

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(d) Appellant's Reply Memorandum Pursuant to Remand from Petition for Review, received March 13, 2000.

II. BACKGROUND

2.1 Appellant was employed by Respondent Department of Transportation in a seasonal career position as a Maintenance Technician 1 from November 11, 1994 to March 1995 and for a 17-month period from November 3, 1995 to April 15, 1997. Rather than viewing the 17-month temporary appointment as a single period of cyclical employment, Respondent advised Appellant that it would consider the two winters he worked from November 3, 1995 to April 15, 1997 as two seasons of cyclical temporary employment.

2.2 On December 23, 1997, Appellant filed a rule violation appeal before the Personnel Appeals Board. Appellant alleged he worked three consecutive seasons as a seasonal career employee, was hired in October 1997 to work a fourth season, but was informed by letter dated December 1, 1997, that he was not being hired back to work. Appellant contends that under WAC 356-05-385 and WAC 356-30-130(3), he was eligible to be a permanent employee after he was "selected for a fourth consecutive season."

2.3 On April 30, 1998, Respondent filed a Motion to Dismiss for Lack of Standing and Untimeliness. Respondent argued that Appellant lacked standing to bring a rule violation appeal because he had not been rehired by the appointing authority to work a fourth consecutive season. Respondent further argued that Appellant's appeal was untimely because he was notified either on November 14 or 15, 1997 that he would not be rehired and that Appellant filed his appeal more than 30 days later. Appellant argued that he was hired for a fourth season and that his employment was not contingent upon receipt of an appointment letter. Appellant argued that Respondent took a number of steps to rehire him. Appellant argued that his appeal was timely because he was informed of the decision not to rehire him on November 20, 1997 and that he filed his appeal on December 20, 1997.

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2.4 On June 17, 1998, the Personnel Appeals Board issued an order granting Respondent's Motion to Dismiss. The Board concluded as follows:

> There is no dispute that Appellant was contacted by Respondent regarding employment for the 1997-98 winter season and that Respondent began preliminary steps necessary to accomplish Appellant's appointment. While Appellant may have had an expectation of employment, pre-employment contact and preliminary work by persons other than the appointing authority are not a commitment of employment. In addition, Appellant never began employment, did not report for work, and does not appear to have been placed on the payroll for the 1997-98 winter season. Because Appellant was not an employee, he could not have been terminated from a position with Respondent. Furthermore, because Appellant was not an employee, under the circumstances of this appeal, he lacks standing to bring these alleged rule violations to the Board. As a result, Respondent's Motion to Dismiss for Lack of Standing should be granted and the appeal should be dismissed.

2.5 On July 15, 1998, Appellant served the PAB with a Petition for Review of the Order of the Personnel Appeals Board under RCW 41.64.130. The PAB certified the record to the Thurston County Superior Court on August 17, 1998.

2.6 On August 27, 1999, the Thurston County Superior Court issued an Order on Petition for Review which remanded the appeal to the PAB to determine the following:

> [W]hether Appellant became a seasonal career employee under WAC 356-30-130(3) at the time he was selected for a fourth consecutive season or whether he would have only become a seasonal career employee at the time he started work. Once the Personnel Appeals Board has made this determination, it shall hold a hearing on the merits of the cause if appropriate.

2.7 The parties agreed to submit written arguments regarding the issue on remand and to conduct oral argument before the Board on April 3, 2000.

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III. ARGUMENTS OF THE PARTIES

3.1 Appellant argues that a review of WAC 356-30-130(3) shows that it is the operative section for determining when a seasonal employee becomes a seasonal career employee and that the language is mandatory when the following two requirements have been met: (1) the employee must have been selected; and (2) this selection must be for a fourth consecutive season. Appellant asserts that once these two requirements are fulfilled, the employee shall be granted a seasonal career appointment. Appellant argues that he became a seasonal career employee under WAC 356-30-130(3) at the time he was selected for a fourth consecutive season. Appellant further contends that WAC 356-05-380 does not create an additional requirement for the seasonal career employee to start the fourth season. Appellant argues that WAC 356-05-380 refers to the fact that under WAC 356-30-130(3) a seasonal employee cannot become a seasonal career employee until he or she is selected for a fourth consecutive season and that the use of the word "selected" in subsection (3) is used because selection is the point at which seasonal career employment begins.

3.2 Respondent argues that seasonal career employment begins when the employee starts work on a fourth consecutive season of cyclical employment. Respondent contends that WAC 356-05-380 provides that seasonal career employees are employees who have repeatedly returned to state employment in the same agency and are granted a seasonal career appointment at the start of their fourth employment as provided in WAC 356-30-130(3). Respondent argues that the word selected as used in WAC 356-30-130(3) should be interpreted to mean that the individual was appointed for a fourth consecutive season of cyclical temporary employment and that all appointments must be made by the appointing authority. Respondent argues that in this case, Appellant was neither selected nor appointed by the appointing authority.

IV. DISCUSSION

4.1 The issue remanded to us by the Thurston County Superior Court is whether Appellant became a seasonal career employee under WAC 356-30-130(3) at the time he was *selected* for a fourth consecutive season or whether he would have only become a seasonal career employee at the time he *started* work.

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4.2 Appellant relies heavily on WAC 356-30-130(3) in support of his argument that he became a seasonal career employee at the time he was selected to work a fourth consecutive season.

4.3 Subsection (3) of WAC 356-30-130, the merit system rule governing seasonal career employment, provides:

> An initial appointment into seasonal career employment shall be from a register or list; <u>except</u> that employees selected for a fourth consecutive season of cyclical temporary employment, as provided in the definition of seasonal career employment, shall be granted a seasonal career appointment provided they pass a qualifying examination for the classification in which they are employed.

Emphasis added.

4.4 Respondent, on the other hand, relies on the definition of a seasonal career employee to support its argument that a temporary cyclical employee is required to start a fourth consecutive season in order to become a seasonal career employee.

4.5 WAC 356-05-380 defines seasonal career employees as:

> Incumbents who have been appointed into seasonal career positions with the mutual expectation of continued employment or employees who have repeatedly returned to state employment in the same agency and are granted a seasonal career appointment at the <u>start</u> of their fourth season of consecutive employment as provided in WAC 356-30-130(3).

Emphasis added.

4.6 To understand the intent of WAC 356-30-130(3), we must read it in conjunction with WAC 356-30-130(4) which states:

> Upon completion of the probationary period of 1040, 1560, or 2080 accumulated scheduled hours (if serving a six-month, nine-month, or twelve-month probationary period), employees in seasonal career employment shall assume the rights of a permanent

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> employee. Past service that later entitles employees to seasonal career employment will count toward permanent status at the beginning of the fourth qualifying season.

Emphasis added.

4.7 WAC 356-30-130(3) requires employers to make an initial appointment into a seasonal career appointment from a register or list of eligibles. The rule also requires employers to grant a seasonal career appointment to an individual who has already served three prior consecutive seasons of cyclical temporary employment when that person is selected for a fourth consecutive season. The merit system rules are otherwise silent on an employing agency's prerogative to make temporary appointments for cyclical employment. Read together, subsections (3) and (4) simply modify the probationary period requirement for a temporary cyclical employee who has already served three consecutive seasons of cyclical employment. The rule does not require that an individual be appointed for a fourth consecutive season simply because he or she has served three prior seasons.

4.8 WAC 356-30-130(4) itself is clear that an individual selected for a seasonal career appointment attains permanent status at the beginning of the fourth qualifying season. Further, the definition of a seasonal career employee in WAC 356-05-380 supports the language in WAC 356-30-130(4) in that a temporary seasonal career employee is granted a seasonal career appointment at the start, or beginning, of his or her fourth season of consecutive cyclical temporary employment. Based on the foregoing analysis of the applicable rules, we conclude that merely being selected does not qualify a temporary employee to become a seasonal career employee with the rights of a permanent employee.

4.9 Under the undisputed facts of this case, Appellant had served three consecutive seasons of cyclical temporary employment. However, he was not eligible to become a seasonal career employee until he began working a fourth qualifying season. Appellant did not start work for a fourth qualifying season and, therefore, did not become a seasonal career employee.

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4.10 Our decision here modifies the Board order dated June 17, 1998, to the extent that the prior decision dismissed Appellant's appeal based on his lack of standing to bring forward an appeal. On remand, we have decided the appeal as a matter of law because no genuine issues of material fact exist. Therefore, Appellant's appeal should be denied because no violation of the merit system rules occurred, and further proceedings on the merits of the appeal are not necessary.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Kim Hensley is denied.

DATED this _____ day of _____, 2000.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Vice Chair

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Leana D. Lamb, Member

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