

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the matter of the Appeal by) SPB Case No. 36926
)
 J [REDACTED] K [REDACTED]) **BOARD DECISION**
) (Precedential)
 From dismissal from the position of)
 Correctional Officer at the California) **NO. 97-06**
 Rehabilitation Center, Department of)
 Corrections at Norco.) December 2, 1997

APPEARANCES: Danielle Blocker and Rudy Jansen, Staff Legal Counsel, California Correctional Peace Officers Association, on behalf of appellant, J [REDACTED] K [REDACTED]; Sally Y. Kim and Elizabeth R. Reed, Staff Counsel, Department of Corrections, on behalf of respondent, Department of Corrections.

BEFORE: Lorrie Ward, President; Floss Bos, Vice President; Ron Alvarado, Richard Carpenter and Alice Stoner, Members

The Skelly rule requires that, prior to dismissal from state service, an employee must be provided with "notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based," and must be given "the right to respond, either orally or in writing, to the authority initially imposing discipline."¹

In the present case, appellant argues he was not given a copy of all the material upon which his dismissal was based because he was not given all the transcripts of all the interviews conducted during the investigation and he was not given a sample of a substance collected at the worksite and later identified as semen. He also argues, for the first time in his brief before the Board, that

¹Skelly v. State of California ("Skelly") (1975) 15 Cal.3d 194, 215.

the Skelly officer was not an impartial and non-involved reviewer. Based on the claimed Skelly violations, appellant seeks an award of back pay and revocation of the adverse action.

In this decision, the Board finds that appellant failed to carry his burden of demonstrating that a Skelly violation occurred.

DECISION

After review of the entire record, including the transcripts and written arguments submitted by the parties, the Board adopts that portion of the Administrative Law Judge's (ALJ) proposed decision which sustains the Department's decision to dismiss appellant on grounds that appellant, a Correctional Officer, engaged in a sex act with an inmate.

The Board does not adopt the ALJ's findings and recommendation concerning the ALJ's finding of a Skelly violation and award of back pay. In this decision, the Board addresses the Skelly issue.

Facts

The facts pertinent to the Skelly issue are as follows:

On February 7, 1995, appellant was served a Notice of the Adverse Action of Dismissal based on charges that, on October 6, 1994, appellant entered inmate C's dorm and escorted him to an isolated stairwell where he forced Inmate C to orally copulate him. A number of documents were attached to the Notice of Adverse Action including the Internal Affairs Investigative Report, a transcript of Inmate C's investigative interview and a transcript of appellant's investigative interview. James

Middleton, the Chief Deputy Warden, was one of three wardens who reviewed the Internal Affairs Investigative Report. Based on the report, he recommended appellant's dismissal. Appellant claims that James Middleton also presided over the Skelly hearing held on February 16, 1995, the effective day of appellant's dismissal.

In his brief before the Board, appellant claims that, during the course of the Skelly hearing, appellant requested all additional documentation held by the Department and challenged the impartiality of Chief Deputy Warden Middleton. After appellant filed his appeal and an ALJ was assigned to the case, appellant made numerous discovery requests, including requests for the audio tapes of various interviews of Department personnel and a portion of the semen sample collected by the Department from the prison stairwell. The Department did not comply with appellant's request for a portion of the semen sample. At the time the requests were made, the semen sample was not in the Department's possession but instead in the possession of the Department of Justice. The hearing was postponed to enable appellant to secure a portion of the semen sample but appellant never obtained it. Appellant did, however, receive all the other material he requested in discovery.

Appellant did not challenge the impartiality of the Skelly officer during the proceeding before the ALJ. Nothing in the administrative record indicates that appellant made any claim regarding the impartiality of the Skelly officer until after the Board rejected the ALJ's Proposed Decision.

Discussion

Skelly Issues

a. Were the Notice Requirements met?

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:

At a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefore, 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 discipline.²

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.

In this case, the ALJ found that a Skelly violation occurred prior to the effective date of appellant's dismissal based on the Department's failure to provide appellant with all the

² 15 Cal.3d at 215.

materials upon which his adverse action was based.³

The purpose of the Skelly hearing is to determine only if there are “reasonable grounds to believe that the charges against the appellant are true and support the proposed action.”⁴ In contrast, an appellant’s right to discovery is broader. It includes “the right to inspect any documents in the possession of, or under the control of, the appointing power which are relevant to the adverse action.”⁵

The Board has clarified that the “material upon which the action is based” referred to in the Skelly decision and in the relevant Board rule is not all the material in the possession of the Department at the time the adverse action was taken. It is, rather, all the material relied upon by the individual who made the ultimate decision to take adverse action against this employee.⁶ To hold otherwise would be to blur the distinction between what is minimally required to satisfy appellant’s due process rights, as defined by Skelly, and the broader category of materials that may be discoverable.

The Board has consistently held that appellant has the burden of proving a Skelly violation.⁷ At hearing, appellant failed to demonstrate that the individual who made the decision to terminate appellant relied on any material other than the material provided in

³ The ALJ found that this Skelly violation was cured when the Department provided the missing material to appellant during discovery. In its discussion below, the Board finds that no Skelly violation occurred and, therefore, does not reach the question whether a Skelly violation can be cured by merely providing the missing information without also providing the employee an opportunity for another Skelly hearing.

⁴ A. S. (1994) SPB Dec. 94-16, at p.11, quoting Cleveland Bd of Education v. Loudermill (1985) 470 U.S. 532, 545.

⁵ Government Code § 19574.1

⁶ S. S. (1995) SPB Dec. No. 95-14.

⁷ Id.

the Skelly package. Absent appellant's proof to the contrary, the Board finds that appellant was given all the Skelly material to which he was entitled.

In response to appellant's motion to dismiss based on a purported Skelly violation, the Board notes that, even if a Skelly violation had occurred, the remedy for such a violation is an award of back pay,⁸ not dismissal of the adverse action. Appellant's motion to dismiss was properly denied by the ALJ.

b. Did appellant prove a Skelly Violation on grounds that the Skelly Officer was inappropriate?

The California Supreme Court has found that an employee facing termination has a right to a review of the charges against him by a "reasonably impartial, noninvolved reviewer."⁹ In Jack Tolchin, the Board held that the appellant need not "provide concrete evidence of the Skelly officer's partiality, bias or prejudice."¹⁰ In Tolchin, the Board found a Skelly violation based on facts presented at hearing demonstrating that, prior to serving as the Skelly officer, a top level manager had been intimately involved in the initiation and review of the investigation and the recommendation that the appellant be dismissed.¹¹

In his brief before the Board, appellant argues for the first time that appellant's Skelly rights were violated because the individual later designated as Skelly officer also signed the recommendation that adverse action be taken against him. As noted above,

⁸ Barber v. State Personnel Board (1976) 18 Cal.3d 395

⁹ Williams v. County of Los Angeles (1978) 22 Cal.3d 731, 737; A [REDACTED] G [REDACTED] (1993) SPB Dec. No. 93-26 at p.4.

¹⁰ SPB Dec. 96-04 at p.16.

¹¹ Id.

appellant has the burden of proving a Skelly violation.¹² Here, appellant did not call Chief Deputy Middleton as a witness and did not provide any evidence as to his role in recommending adverse action against appellant. There was no showing at the hearing that Middleton participated in the investigation. Although appellant claims to have raised the issue of Middleton's impartiality at the Skelly hearing, there is no evidence in the record to support that claim. We find that appellant has failed to carry his burden of proving a Skelly violation based on the Department's choice of Middleton as the Skelly officer.

Discovery

In his brief before the Board, appellant lists a number of motions he made in order to secure discovery from the Department. In so doing, appellant attempts to merge his complaints about the Department's alleged delay in responding to discovery requests with his claims of a Skelly violation. Except insofar as an item provided through discovery may help prove a Skelly violation, discovery disputes have no relevance to the Skelly rule or to Skelly damages. As noted above, the Skelly materials include only those items upon which the individual decisionmaker relied in determining to take adverse action against appellant.

In addition, if appellant is claiming that he was denied discovery of information important to his defense, appellant's recourse is not to wait until the hearing is complete and then raise these discovery issues as if they comprised a Skelly violation. Appellant's recourse is set out in Government Code § 19574.2, which governs the

¹² S. [REDACTED] and J. [REDACTED] (1995) SPB Dec. No. 95-14.

discovery process and provides a statutory remedy for claimed discovery violations.¹³

CONCLUSION

The Board hereby adopts the portion of the ALJ's Proposed Decision which finds that appellant engaged in a sex act with an inmate and determines that appellant's dismissal should be sustained. The Board does not, however, adopt the ALJ's discussion of the Skelly issues.

The Board finds that appellant failed to carry his burden of proving a Skelly violation.

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 adverse action of dismissal of J [REDACTED] K [REDACTED] from his position of Correctional Officer at the California Rehabilitation Center, Department of Corrections at Norco is sustained;

2. The Proposed Decision of the Administrative Law Judge is adopted to the extent it is consistent with this decision;

3. This decision is certified for publication as a Precedential Decision.
(Government Code § 19582.5).

¹³ R [REDACTED] K [REDACTED] (1994) SPB Dec. No. 94-11 at p. 3.

STATE PERSONNEL BOARD

Lorrie Ward, President
Floss Bos, Vice President
Ron Alvarado, Member
Richard Carpenter, Member
Alice Stoner, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing
Decision and Order at its meeting on December 2, 1997.

Walter Vaughn
Acting Executive Officer
State Personnel Board

[K 2.dec]