BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 27504
	)	
KAREN A. JOHNSON	)	**BOARD DECISION**
	)	(Precedential)
From dismissal from the position	)	
of Psychiatric Technician at	)	**NO. 92-02**
Lanterman Developmental Center,	)	
Department of Developmental	)	January 7, 1992
Services, at Pomona	)	

Appearances: Loren McMaster, attorney, representing appellant, Karen A. Johnson; Linda Y. Chang, Staff Counsel, representing respondent, Department of Developmental Services.

Before Stoner, Vice-President; Burgener, Carpenter and Ward, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected a Proposed Decision of an Administrative Law Judge (ALJ) in an appeal by Karen A. Johnson (appellant or Johnson), a Psychiatric Technician who had been dismissed from her position with the Department of Developmental Services (Department) at the Lanterman Developmental Center (Lanterman). In sustaining the dismissal, the ALJ found that appellant had engaged in two incidents of patient abuse. The ALJ also rejected appellant's claim that her Skelly rights had been violated.

The Board determined to decide the case itself, based upon the record and additional arguments submitted both in writing and orally. After review of the entire record, including the transcript and briefs submitted by the parties, and after having

listened to oral argument presented on September 3, 1991, the Board rejects the Proposed Decision of the ALJ for the reasons that follow.

STATEMENT OF FACTS

Johnson was appointed a Psychiatric Trainee on July 5, 1989 and became a Psychiatric Technician at Lanterman on November 16, 1989.

The incidents alleged to have justify the adverse action of dismissal occurred in December 1989.

The Milk Incident

The Department's witness Gary Long, a Psychiatric Trainee, testified as follows with respect to an incident he witnessed in the cafeteria on his fourth day of employment at Lanterman, December 4, 1989. Long stated that he observed a client get up and ask for milk. As the client was reaching for the milk, appellant grabbed the milk, threw it in the client's face, and remarked, "Ask and you shall receive." Appellant then pulled the client from the nape of the neck by the collar of his shirt backwards into his chair.

Appellant testified that she was working with a different client in the cafeteria on December 4, 1989 at the time and that she was teaching that client not to take milk from his neighbor but to ask for milk and she would give him some. Appellant stated that when she gave a milkshake to this client, he snatched it from her,

drank it fast and spilled it all over himself. Appellant denied throwing the milk at the client and further denied pulling him backwards into his chair.

The Shaking Incident

Long also testified that on December 8, 1991, he observed a pica[1] client pick something up off the floor and put it in his mouth. He stated that appellant started shaking the client by the neck and back and yelling at him to spit it out.

Appellant testified that this pica client would eat anything, bite anything, and would take chunks out of the staff. She stated that she always approached him with care and would never approach him from the back because he would bite. Appellant's supervisor corroborated appellant's description of this client's behavior.

Long's Departure and Department's Investigation of His Allegations

After working six days at Lanterman, Long did not return. He eventually telephoned the institution and informed an employee there that he quit. His supervisor, Audry Peterson, called him at home after she learned he had quit. Long stated he was very distressed about some of the things he had observed while working, and stated he would not return unless two people who worked there were fired. He declined to give their names.

[1]The testimony described the pica client as one who would eat anything and bite anything or anyone.

Long subsequently spoke with the institution's Special Investigator, Ray Hawkins. Hawkins testified that he prepared an investigative report. His investigation revealed nothing to corroborate Long's allegations. Appellant was not provided with a copy of Hawkins' investigative report either before or at her Skelly hearing.

ISSUES

(1) Is the adverse action warranted based upon the evidence adduced at the hearing?

(2) Were appellant's Skelly rights violated when she was not provided with a copy of the Special Investigator's report prior to or at her Skelly hearing?

DISCUSSION

The Charges

Although entitled to some weight, the ALJ's factual findings, even demeanor-based credibility determinations, are not conclusively binding on the Board. (Universal Camera v. NLRB (1951) 340 U.S. 474, 495-496; McPherson v. Public Employment Relations Bd. (1987) 189 Cal.App.3d 293, 304.) In this case, the ALJ found the uncorroborated testimony of Long, the state's sole witness, credible and the testimony of appellant not believable. While we agree with the ALJ that Long had no real motive to testify falsely, and find that he believed in the truth of his testimony,

his testimony must be viewed in light of the whole record and all of the circumstances surrounding his stay at Lanterman.

The ALJ's factual findings with respect to the two incidents alleged to have justified the adverse action of dismissal, in their entirety, are as follows:

> On December 4, 1989, appellant was assigned to the Dining Room, when she grabbed a glass [sic] milk and threw the milk in the client's face. Appellant yelled, "ask and you shall receive." The client had asked for the milk.
>
> On December 8, 1989, appellant again grabbed the same client and shouted for him to spit out an object.

We note that Long's testimony on direct examination regarding these two incidents consisted of less than four pages in the transcript; one of those pages consisted entirely of respondent's representative refreshing Long's recollection of the client's name by allowing him to read the notice of adverse action.

With respect to the "milk incident," we note that Long's testimony was not entirely inconsistent with that of appellant. Certainly the statement "ask and you shall receive" would be in keeping with appellant's version of the incident wherein she testified that she was trying to get a client to refrain from taking milk from his neighbor and to verbalize his desire for milk. More than one witness, and Long himself, testified that it was common and entirely proper for staff to attempt to get clients to verbalize their requests. Witness testimony also established that staff instructions to clients were often, of necessity, given in a

loud tone of voice. Given Long's short tenure at Lanterman, he may well have been unaccustomed to the noise levels and the practical use of the verbalization technique.

The testimony does not establish how far away Long was from appellant and the client when he witnessed the "milk incident", nor does it establish how quickly the incident occurred.[2] It is certainly conceivable that Long could have believed he saw appellant throw the milk at the client, when in fact the milk may have spilled as a result of the combination of appellant's giving of the milk to the client and the client quickly "snatching" it from appellant and spilling it all over himself. Long also testified that appellant pulled this client backwards into his chair. Appellant denies she did so. The Department put on no evidence as to its policy regarding whether physical contact with the clients is ever proper and, if so, under what circumstances. The preponderance of the evidence does not establish that appellant was guilty of patient abuse with respect to the milk incident.

[2]Notably, Long first testified the client involved in the incident was named Chris; after being shown the Notice of Adverse Action, he recalled the client involved was named Glen. Appellant testified that the only milk incident she recalled involved a client named Michael.

With respect to the "shaking incident," the undisputed testimony established that the client involved in this incident[3], Joel S., is a pica. A pica client will typically pick things up and put them in his mouth. Long testified that when Joel S. picked something up from the floor and put it in his mouth, appellant started shaking him by the neck and the back and yelling at him to spit it out.

The appellant denied having any altercation with Joel S. on December 8. In fact, she testified that she did not even work with Long that day, nor did she work with Joel S.'s group. She testified that if one got too close to Joel S., he would bite. She further testified that she was standoffish towards Joel S. and that when she approached him, she always did so with care. The supervisor testified that Joel S. would react to someone approaching him from behind and grabbing his neck with pushing, attacking, biting or kicking.

Even assuming appellant did approach Joel S. on December 8 to get him to disgorge an item he had put in his mouth, the evidence did not establish the proper means of dealing with a pica client who has put something in his mouth. Even if appellant did not act properly in her reaction to the pica client having put

[3]In her proposed decision, the ALJ identified the client involved in the shaking incident as the same client who was involved in the milk incident. Long testified that each incident involved a different client.

something in his mouth, the evidence did not establish appellant was ever counselled as to the proper way to handle this particular client when he put something inappropriate in his mouth. At the time of the alleged incident, appellant had been at Lanterman only five months; she had been in the position of Psychiatric Technician less than one month. Neither did the evidence establish that Long had been employed at Lanterman long enough to be familiar with what was or was not a proper way to handle the situation faced by appellant nor that he had been instructed in this regard. The preponderance of the evidence did not establish that appellant was guilty of patient abuse towards Joel S. on December 8, 1989.

While the uncorroborated testimony of one witness may, in some cases, constitute substantial evidence to support the allegations contained in an adverse action, the testimony of Long in this case is insufficient, in light of the whole record, to establish a basis for discipline. Long's testimony must be evaluated in light of the fact that his experience with the developmentally disabled was limited and his evaluative capabilities undeveloped. He had been at Lanterman as a trainee only six days when he quit without notice and never returned. The record evidence established that Long appeared to be uncomfortable at Lanterman. He himself testified that he felt that clients were "beyond positive reinforcement". With respect to the incidents themselves, while Long may have believed what he observed was improper, Long's testimony was

sufficiently lacking in detail to call into question the accuracy of his perceptions.

Significantly, the Department did not put any witnesses to establish what constitutes proper procedures with regard to the physical contact with clients and, specifically, contact with a pica client. Neither did the Department put on any evidence to indicate that it had had any problems with appellant's performance prior to receiving Long's report. The Department failed to establish, by a preponderence of evidence, that the discipline imposed was warranted.

Skelly Violation

In Skelly v. State Personnel Board (1975) 15 Cal.3d 194, the California Supreme Court set forth the procedures an employer must follow to comply with an employee's 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.

Pursuant to Skelly, the SPB enacted SPB Rule 52.3[4] which requires that:

> (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

[4]The SPB Rules are set forth in Title 2 of the California Code of Regulations.

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 Department directed its Senior Special Investigator Ray Hawkins to investigate the allegations of Long against appellant. Hawkins performed the investigation and prepared a report which was given to the executive director of the Department before the Notice of Adverse Action was issued. The report did not contain any conclusions as to whether or not the alleged abuse occurred. Neither appellant nor her representative were aware of the existence of the report until it was referred to at the SPB hearing.

The Department argues that the report merely summarized the allegations and contained no conclusions regarding the alleged conduct of appellant nor recommendations regarding the propriety of adverse action. Thus, the Department contends, the adverse action was not "based" on the report and appellant was therefore not entitled to see it. We disagree. The report was reviewed by the executive director in connection with the adverse action. The fact that the investigation did not corroborate Long's allegations was relevant to the appellant's ability to convince the Skelly officer to modify or revoke the adverse action. Appellant was entitled to

receive the report along with the other documents that were provided to her prior to the Skelly hearing. Although we find that appellant's Skelly rights were violated, the remedy for that violation is subsumed in the remedy awarded pursuant to the revocation of the dismissal.

CONCLUSION

The Board takes allegations of patient abuse very seriously. In this case, however, the preponderance of the evidence in the record simply does not support the conclusion that appellant engaged in patient abuse. For all of the foregoing reasons, we overturn the dismissal and order appellant reinstated with back pay and benefits as provided by law.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code section 19584, it is hereby ORDERED that:

1. The above-referenced adverse action of dismissal taken against Karen A. Johnson is revoked.

2. The Department of Developmental Services and its representatives shall reinstate appellant Karen A. Johnson to her position of Psychiatric Technician as a probationary employee in the same position she would have been in had she not been wrongfully terminated.

3. The Department of Developmental Services shall pay to Karen A. Johnson all back pay and benefits that would have accrued to her had she not been wrongfully terminated.

4. This matter is hereby referred to the 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. (Government Code section 19584).

5. This opinion is certified for publication as a Precedential Decision (Government Code section 19582.5).

STATE PERSONNEL BOARD*

Alice Stoner, Vice-President
Clair Burgener, Member
Lorrie Ward, Member
Richard Carpenter, Member

*President Richard Chavez did not participate in this decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on January 7, 1992.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board