BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 30371
	)	
GARY BLAKELEY	)	**BOARD DECISION**
	)	(Precedential)
From dismissal from the position of	)	
Heavy Equipment Mechanic with the	)	**NO. 93-20**
Department of Transportation at	)	
Los Angeles	)	August 3, 1993

Appearances: Richard V. Sanders, Jr., Attorney, Van Bourg, Weinberg, Roger & Rosenfeld, representing appellant; James E. Livesey, Attorney, Department of Transportation, representing respondent, Department of Transportation.

Before Carpenter, President; Stoner, Vice President; and Ward, Member.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in an appeal by Gary Blakeley (Blakeley or appellant), who was dismissed from his position as a Heavy Equipment Mechanic with the Department of Transportation (Department). The dismissal was based on allegations of willful disobedience and the use of profanity and verbal threats towards supervisors and co-workers. The ALJ sustained the dismissal and rejected appellant's claims that his Skelly rights had been violated.

The Board determined to decide the case itself, based upon the record and additional arguments to be submitted orally and/or in writing. After review of the entire record, including transcripts

and briefs submitted by the parties[1], the Board sustains the dismissal but awards back pay based upon its findings that the Department violated appellant's Skelly rights.

FACTUAL SUMMARY

Appellant was appointed a Heavy Equipment Mechanic on February 10, 1989.

Appellant has incurred three prior adverse actions. Effective October 27, 1989, he received an official reprimand for inexcusable absence without leave (AWOL). Effective June 4, 1990, appellant received a 6 days' suspension for inexcusable AWOLs and for several instances of damage to property. At least one of the incidents of property damage was attributable to appellant's anger. Effective August 13, 1990, appellant received a 15 days' suspension for inexcusable AWOLs.

Appellant also received a Letter of Warning on July 26, 1991 for poor attendance, abusive language to co-workers and supervisors, and excessive accidents. The Letter of Warning specifically referred to two of the incidents cited in the adverse action: those allegedly occurring April 15, 1991 and July 15, 1991. The Letter of Warning charged that on April 15, appellant allegedly came into the office, used the P.A. system, demanded he be taken to the doctor's office, and used abusive language toward fellow employees. The letter further charged that on July 15,

[1] Neither party requested oral argument in this case.

appellant allegedly came into the office yelling and using abusive language regarding the fact that a note was taped to his radio that had been turned upside down on his workbench.

> The July 26, 1991, letter warned appellant that: "Use of abusive language towards fellow employees and supervisors is not acceptable." The letter further counselled appellant as follows: "When addressing problems you will talk in a low tone of voice and not use foul language towards anyone...You have been told many times to turn your radio down and be quiet and talk in a normal tone of voice...."

Regarding the accidents, the letter urged appellant: "You need to control your temper."

On August 14, 1991, appellant approached the parts department to retrieve an item he needed. While waiting for the item he needed, appellant exchanged greetings with Gary Spivey (Spivey), a co-worker who was sitting at his desk behind the parts counter. When the co-worker asked appellant how things were going, appellant began discussing his personal problems in some detail. After a time, the co-worker looked down at his desk, shook his head a few times, and went back to his work. Appellant angrily stated in a loud and threatening voice, "Do you have a problem? Because if you do, I'll come over the counter and take care of it!"

On August 15, 1991, appellant reported to work at 7:00 a.m. He approached his co-worker, Ruben Honarchian (Honarchian) and

asked him whether he had checked the heat sensor in the top of the engine of an electronic sign board. Honarchian asked whether appellant wanted to know or whether their boss wanted to know. When appellant stated that he wanted to know, Honarchian told appellant it was none of his business. Appellant was upset and left the area to talk to the supervisor.

Appellant approached his second line supervisor and complained that Honarchian had failed to check the sensor. The supervisor did not consider the sensor issue a critical or safety problem and said he would look into it later.

Angered by his supervisor's unwillingness to immediately address the issue of the sensor, appellant confronted Honarchian in the lunch room yelling at him with abusive language and flailing his arms. Specifically, appellant threatened him by saying: "Let's go in the parking lot you stupid Russian, I swear I'm going to kill you." Honarchian was fearful of his personal safety based on, what he described as, "the madness which I seen in Mr. Blakely's eyes." He again advised appellant if he had a problem, to deal with their supervisor.

Leroy Vevea (Vevea), appellant's immediate supervisor, overheard the outburst in the lunch room. He described appellant as "pretty distraught," "flailing his arms about," "kind of wild," "very agitated," "boisterous," "really wound up tight." Vevea approached appellant, eased him outside the lunchroom, and told him

to go off in a corner somewhere, sit down and cool off. Appellant, however, angrily left the work site on his motorcycle, drove around for a few hours, and did not return to work. He was marked absent without leave for the day.

The next day, August 16, appellant was placed on unpaid administrative leave. On or about August 28, he was served with a Notice of Adverse Action of dismissal, effective August 16. He was charged with violation of Government Code section 19572, subdivisions (m) discourteous treatment of the public or other employees and (o) willful disobedience.

Appellant was not accorded a Skelly hearing until September 11. On September 17, 1991, appellant was notified that the adverse action of dismissal would not be modified.

ISSUES

The following issues are before us for determination:

1. What is the propriety of the Department's including as a basis for the adverse action, incidents that were the subject of a prior Letter of Warning?[2]

2. Whether the Department proved the charges by a preponderance of the evidence and, if so, whether the penalty is appropriate?

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[2] Originally, the Board rejected the Proposed Decision of the ALJ to address the Skelly issues noted below. In reviewing the transcript and exhibits, however, the Board found it necessary to modify some of the findings of fact of the ALJ and to address the additional issues noted here.

3. Whether the appellant received timely and adequate notice and an opportunity to be heard under Title 2 of the California Code of Regulations, section 52.3 and the case of Skelly v. State Personnel Board (1975) 15 Cal.3d 194?

a. Were appellant's Skelly rights violated by virtue of the fact that the Skelly review officer did not have the authority to modify or revoke the adverse action, but only to make a recommendation as to the final disposition?

b. Did the circumstances justify delaying the Skelly hearing until after the effective date of the dismissal action, pursuant to Government Code section 19574.5?

DISCUSSION

Effect of Letter of Warning

Preliminarily, we note that both the July 26, 1991 Letter of Warning served on appellant, as well as the Notice of Adverse Action, purport to be based, in part, on two particular incidents that allegedly occurred on April 15, 1991 (the PA incident) and on July 15, 1991 (the radio incident). The ALJ took evidence on these incidents, and made findings of fact and conclusions of law regarding them. Incidents that form the basis for informal discipline imposed on the employee, cannot then be used as the basis for formal adverse action, except for the limited purpose of showing that the employee has been warned or progressively disciplined with respect to a prior misconduct.

Thus, in the instant case, it was appropriate for the Department to introduce the Letter of Warning into evidence and to place on the record the fact that appellant had received a Letter of Warning for incidents of discourteous treatment. The incidents themselves, however, cannot be used to establish the causes of discipline alleged in the current adverse action, i.e., willful disobedience and discourteous treatment.

The Evidence Supports Dismissal

Notwithstanding the above, the Board agrees with the ALJ that the dismissal should be sustained. Appellant's outbursts of anger and threatening behavior exhibited towards co-worker Spivey on August 14 and co-worker Honarchian on August 15 clearly constitute discourteous treatment of other employees within the meaning of Government Code section 19572 (m). Appellant's behavior, threats, and show of temper scared his co-workers. Appellant's failure to sit down and calm himself when directed to do so by his supervisor on August 15, and his abrupt departure from and failure to return to the workplace constituted willful disobedience [(Government Code, section 19572 (o)].

We find the penalty of dismissal appropriate under all the circumstances. In assessing penalty, our overriding consideration is "the extent to which the employee's conduct resulted in, or if repeated is likely to result in [h]arm to the public service." Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 218. Threats

of physical violence at the work site must be taken seriously by the employer--the harm to the public service is obvious.

Skelly also dictates that in assessing penalty, we consider the circumstances surrounding the misconduct and the likelihood of recurrence. Appellant admitted he was upset over the Honarchian incident. He explained that he had personal problems during August 1991, including a break-up with his girlfriend, the recent death of his grandmother, and the possible loss of the home in which he was living. We do not find appellant's explanation of personal problems sufficient to excuse or justify the anger and threats directed at his co-workers.

The losses of temper detailed here were not isolated incidents. Appellant had been warned both formally and informally to keep his temper under control and to refrain from raising his voice when addressing problems at the workplace. One of the prior adverse actions referenced property damage attributable to loss of temper. The adverse action and warning letter were intended to emphasize to appellant the need to control his temper at the work site. He did not heed the warnings. We find the likelihood of recurrence great.

Furthermore, we note that appellant had only been employed since February 10, 1989, when he received the instant adverse action. He had incurred three prior formal adverse actions and at

least one Letter of Warning in the previous three years. The dismissal is warranted.

The Skelly Issues

Authority of the Skelly Review Officer

The appellant argued at the hearing that his Skelly rights were violated because the Skelly review officer did not have the authority to modify or revoke the adverse action; he had authority only to recommend modification or revocation to the District Directorate. The ALJ rejected appellant's argument based solely on a letter from the Assistant Executive Officer of the SPB which was sent to the appellant prior to the hearing. That letter purported to state the Board's position as follows: the Department's provision for a Skelly review officer with authority limited to recommending modification or revocation of an adverse action is consistent with SPB Rule 52.3(b).[3] The letter of the Assistant Executive Officer of the Board accurately sets forth the Board's current position in this matter.

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[3] The Board's rules are contained in Title 2 of the California Code of Regulations. Rule 52.3(b) dealing with the authority of the Skelly officer provides only that:

> The person whom the employee is to respond to in subsection (a)(5) shall be above the organizational level of the employee's supervisor who initiated the action unless that person is the employee's appointing power in which case the appointing power may respond to the employee or designate another person to respond.

Appellant cites Arnett v. Kennedy (1974) 416 U.S. 134, Skelly v. State Personnel Board (1975) 15 Cal.App.3d 194, Coburn v. California State Personnel Board (1978) 83 Cal.App.3d 801, and Thurston v. Dekle (5th Cir. 1976) 531 F.2d 1264 in support of his position that due process requires that an employee be permitted to respond orally at a pre-termination hearing (Skelly hearing) to the official charged with the responsibility of making the termination decision. The authority cited is not persuasive.

Skelly quotes a plurality opinion in the United States Supreme Court case of Arnett as follows:

> ...He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. Upon request, he is entitled to an opportunity to appear personally before the official having the authority to make or recommend the final decision. (Emphasis added). (15 Cal.3d at 214).

While Thurston, supra, does contain the statement that an effective rebuttal must give the employee the right to respond orally before the official charged with the responsibility of making the decision, in making that statement the Thurston court misreads Arnett, upon which it relies, to incorporate such a requirement. Furthermore, the specific issue of the nature of the authority of the reviewing officer was not before the court in Thurston. Similarly, the court in Coburn merely quoted the statement made in Thurston that misread Arnett. The issue before the court in Coburn was whether notice of two and one-half hours prior to the effective date of an adverse action constituted

adequate notice. Thus, the language regarding the authority of the reviewer was dicta in that case as well.

We find the authority in Titus v. Civil Service Commission (1982) 130 Cal.App.3d 357 and Coleman v. Regents of University of California (1979) 93 Cal.App.3d 521, 526 more persuasive. The court in Titus, supra, specifically addresses the issue of who can be a Skelly officer. Citing Coleman, which correctly cites Skelly and Arnett, the court in Titus concludes that due process mandates that an employee have the right to present his side of the controversy before a reasonably impartial and non-involved reviewer "who possesses authority to recommend a final disposition of the matter." (Emphasis added). (130 Cal.App.3d at 363).

In the instant case, there was no dispute that the Skelly officer had the authority to recommend final disposition. Appellant's due process rights were not violated by virtue of the nature of the authority vested in the Skelly officer.

Timing of the Skelly Hearing

Appellant further contended at the hearing that his Skelly rights were violated because he was not accorded the opportunity for a Skelly hearing prior to the effective date of the adverse action. We agree.

SPB Rule 52.3 (a) provides, in pertinent part, that the notice of the proposed adverse action, "shall be given to the employee at least five working days prior to the effective date of the proposed

action." In the instant case, appellant's last day of work was August 15, 1991. He was placed on unpaid administrative leave as of August 16, 1991, the same day as the effective date of his dismissal. The adverse action appears to have been served on or about August 28, 1991. Appellant was not accorded his Skelly hearing until September 11, 1991, and was not informed of the results of the hearing until September 17, 1991. Thus, the Department violated the express provisions of Rule 52.3(a) by failing to give appellant notice and an opportunity to be heard five working days prior to the effective date of the adverse action.

The ALJ found that the Department's failure to comply with Rule 52.3 was excused for the following reason:

> ...However, no denial of due process is found under these circumstances because appellant by his temperament and actions had created an unsafe situation for himself and others. Skelly is not applicable to such a situation. Under an emergency or dangerous situation, it is permissible to afford appellant a hearing after his dismissal, which was done in this case, shortly after his dismissal. (Proposed Decision, p.6)

We disagree. The ALJ cited no authority for her conclusion in this regard. The notice placing appellant on unpaid administrative leave, however, cited Government Code section 19574.5 as authority to send appellant home and take him off the payroll prior to his receiving the Notice of Adverse Action.

Government Code section 19574.5 provides:

> Pending investigation by the appointing power of accusations against an employee involving misappropriation of public funds or property, drug addiction, mistreatment of persons in a state institution, immorality, or acts which would constitute a felony or a misdemeanor involving moral turpitude, the appointing power may order the employee on leave of absence for not to exceed 15 days. The leave may be terminated by the appointing power by giving 48 hours' notice in writing to the employee.
>
> If adverse action is not taken on or before the date such a leave is terminated, the leave shall be with pay.
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> If adverse action is taken on or before the date such leave is terminated, the adverse action may be taken retroactive to any date on or after the date the employee went on leave. Notwithstanding the provisions of Section 19574, the adverse action, under such circumstances, shall be valid if written notice is served upon the employee and filed with the board not later than 15 calendar days after the employee is notified of the adverse action.

The facts of the instant case simply do not meet the criteria set forth in section 19574.5. (See also Warren v. State Personnel Board (1979) 94 Cal.App.3d 95).

Since appellant's due process rights were violated, he is entitled to back pay from August 16, 1991, the first day he was unlawfully taken off the payroll, through September 17, 1991, the date the Skelly decision issued. (See Barber v. State Personnel Board (1976) 18 Cal.3d 395).

CONCLUSION

The dismissal of appellant is justified based on his threatening, abusive and discourteous conduct towards his

supervisors and co-workers and willful disobedience of his supervisor's order.

Appellant's Skelly rights were not violated by virtue of the fact that the Skelly review officer had authority only to recommend final disposition of the action, rather than full authority to dispose of the action. Appellant's due process rights were violated, however, based on the Department's improper reliance on Government Code section 19574.5 and consequent failure to give appellant notice of the adverse action and an opportunity to be heard prior to the effective date of the action. While the dismissal is sustained, appellant is entitled to back pay as set forth above.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code sections 19582 and 19584, and Barber v. State Personnel Board (1976) 18 Cal.3d 395, it is hereby ORDERED that:

1. The above-referenced adverse action of dismissal taken against Gary Blakeley is sustained.

2. The Department of Transportation shall pay to Gary Blakeley all back pay and benefits that would have accrued to him had his procedural due process rights not been violated, commencing August 16, 1991 through September 17, 1991.

3. 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.

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

STATE PERSONNEL BOARD*

Richard Carpenter, President
Alice Stoner, Vice President
Lorrie Ward, Member

*Member Floss Bos was not present and therefore did not participate in this decision. Member Alfred R. Villalobos was not a member of this Board when the case was originally considered and did not participate in this decision.

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on August 3, 1993.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board