

A petition for writ of mandate has been filed in superior court November 2002.

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)

K [REDACTED] . A [REDACTED])

From dismissal from the position of)
Correctional Officer at the California)
State Prison at San Quentin, Department)
of Corrections at San Quentin)

SPB Case No. 00-3959

BOARD DECISION
(Precedential)

NO. 02-07

August 6, 2002

APPEARANCES: Daniel M. Lindsay, Supervising Legal Counsel, California Correctional Peace Officers Association, on behalf of appellant, K [REDACTED] . A [REDACTED]; Steven McNeal, Staff Counsel, Department of Corrections, on behalf of respondent, Department of Department of Corrections.

BEFORE: Ron Alvarado, President; William Elkins, Vice President; Florence Bos and Sean Harrigan, Members.

DECISION

This case is before the State Personnel Board (Board) after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) on Remand following the Board's grant of appellant's petition for rehearing and remand of the case for the judge to address the Skelly¹ issue. In this Decision, the Board adopts the attached ALJ's findings of fact and determination of issues with the exception of those findings regarding the Skelly issue (Paragraph XI). With regard to the Skelly issue, the Board finds that appellant's Skelly rights were violated because the Skelly officer was not a reasonably impartial decision maker. The Board further concludes that, if appellant

¹ Skelly v. State Personnel Board (1975) 15 Cal.3d 194.

were to establish that the individual who made the ultimate decision to take adverse action against appellant reviewed or relied on “comparables documents,” such documents would constitute “materials upon which the adverse action was based” under Skelly v. SPB and Board Rule 52.3. The Department’s failure to provide such documents, if in fact they were reviewed by the ultimate decision maker, would constitute an independent Skelly violation.

BACKGROUND

Factual Summary

The Board adopts the findings of fact set forth in the attached ALJ's Proposed Decision. For purposes of this decision, the Board considers the following additional facts contained in the record of proceedings before the ALJ.

On January 31, 2001, appellant filed a Petition to Compel Discovery and a “Pitchess Motion.”² Among the documents appellant sought in discovery were the following:

Item 1: “Each and every document upon which the adverse action was based including legible copies of the documents in the litigation package provided by Quest Diagnostics Incorporated;³” and

Item 12: “A list of comparable adverse actions that have been taken against officers who have tested positive for THC and officers who have been found in possession of marijuana.”

² Pitchess v. Superior Court (1974) 11 Cal.3d 531. In the latter motion, appellant asserted that the “comparables documents” sought were discoverable notwithstanding any considerations of peace officer confidentiality.

³ A footnote to this request specified certain documents, not relevant here, concerning the drug testing laboratory.

By memorandum dated February 14, 2001, the ALJ notified the parties that he was deferring ruling on appellant's petition to produce the "comparables" memorandum until he could conduct an *in camera* inspection of the document, and directed the Department to produce the "comparables" memorandum, if it existed, for inspection at the hearing scheduled for the next day. The ALJ also directed the Department to determine whether the Skelly hearing officer reviewed the document as part of the Skelly review process. The ALJ repeated these instructions by memorandum dated February 16, 2001. By letter dated February 16, 2001, the Department responded to the ALJ's request by submitting what it considered to be the "comparables" at issue for *in camera* review by the ALJ. Appellant disputes that all of the relevant "comparables" documents were provided to the ALJ.

In addition, appellant sought to subpoena Department Director Steven Cambra, Regional Administrator Roderick Hickman, and Warden Jeanne Woodford to testify about the alleged Skelly violation in this case. By letter dated March 16, 2001, the Department moved to quash those subpoenas.

By memorandum dated March 26, 2001, the ALJ denied appellant's motion to compel and granted the Department's motion to quash the subpoenas.

Procedural Summary

At its meeting on September 6-7, 2001, the Board adopted the ALJ's Proposed Decision sustaining the dismissal of appellant from state service for testing positive for marijuana metabolites during a random drug test. On November 20, 2001, the Board granted appellant's petition for rehearing and remanded the case for further findings on appellant's claim that her Skelly rights had been violated. On remand, the ALJ

resubmitted his original findings of fact and Proposed Decision, as supplemented with his analysis of the Skelly issue. In that analysis, the ALJ reiterated his March 26, 2001 determination that the “comparables” memorandum and accompanying route slip did not constitute materials upon which the adverse action was based and were not required to be disclosed as part of the Skelly process, and the witness subpoenas were quashed. At its meeting on December 18, 2001, the Board rejected the ALJ's Proposed Decision in order to decide the case itself.

ISSUES

1. Was the Skelly officer a reasonably impartial decision maker?
2. Were the “comparables” documents “materials upon which the adverse action is based” that should have been provided pursuant to Skelly v. SPB and 2 Cal. Code Reg. § 52.3?

DISCUSSION

Skelly Officer⁴

In Skelly v. State Personnel Board,⁵ the California Supreme Court set forth the requirements an 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 therefor, a copy of the charges and materials upon which the

⁴ While appellant did not raise this issue on rehearing, the Board asked the parties for their positions on this issue at oral argument.

⁵ (1975) 15 Cal.3d 194.

action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.⁶

Pursuant to Skelly, the Board has further defined, by Rule 52.3,⁷ the due process

requirements as follows:

(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 to the person specified in subsection (b)....

(b) 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. ...

In describing the necessary attributes of a Skelly officer, the California Supreme Court has held that an employee has the right to respond "before a reasonably impartial, noninvolved reviewer." Williams v. County of Los Angeles (1978) 22 Cal.3d 731, 737. Likewise, the Board has repeatedly held that the Skelly officer must be an impartial person who has not participated in either the investigation of the underlying

⁶ Id., at p. 215; see also SPB Rule 52.3(b) (notice shall be given to the employee at least five working days before the effective date of the adverse action and shall include, *inter alia*, a copy of all materials upon which the action is based).

⁷ Board Rule 52.3, 2 Cal. Code Reg. § 52.3.

misconduct or in recommending the penalty to be imposed.⁸ The appellant has the burden of proving a Skelly violation.⁹

In this case, the ALJ quashed appellant's efforts to subpoena individuals whom appellant believed had knowledge concerning the person or persons who participated in the decision to take adverse action against appellant. On its face, however, the Notice of Adverse Action reveals that it was signed by A.P. Kane, on behalf of Warden J.S. Woodford. A.P. Kane also acted as the Skelly officer and signed the written notice of the "Skelly Hearing Results," in his capacity as Warden (or acting Warden) at San Quentin State Prison. While the record is unclear concerning the extent of Warden Kane's participation in the decision to take adverse action, the fact that he signed the notice of adverse action and then acted as the Skelly officer violates the impartiality standard set forth in Skelly.¹⁰

Comparables Documents

Due process also requires that appellant be provided with all "materials upon which the adverse action is based" at the time the notice of adverse action is served.¹¹

⁸ Anthony G. Gough, (1993) SPB Dec. No. 93-26, at p. 4 (the due process contemplated by Skelly includes "the right to a hearing before an impartial officer, one who has not been directly involved with the investigation of the matters which led to the taking of adverse action."); J. T. (1996) SPB Dec. No. 96-04 (individual who participated in the decision to refer a matter to investigation, personally reviewed the results of the investigation and then recommended a specific penalty to the warden disqualified as a Skelly officer). See also Gray v. City of Gustine (1990) 224 Cal. App. 3d 621, 631-32 (city manager who terminated appellant was "embroiled in the controversy" and did not constitute a neutral fact-finder). But see Titus v. Civil Service Commission (1982) 130 Cal. App.3d 357, 363 (Skelly officer was far enough removed from the investigation and general supervision of appellant to qualify as reasonably impartial and uninvolved reviewer).

⁹ G. S. -F. J. (1995) SPB Dec. No. 95-14.

¹⁰ In J. K. (1997) SPB Dec. No. 97-06, we found that the appellant had failed to meet his burden of proving a Skelly violation despite the fact that one of three wardens who recommended the appellant's dismissal also presided over the Skelly hearing. To the extent J. K. is inconsistent with this decision, it is hereby disapproved.

¹¹ Skelly v. State Personnel Board, *supra*, at p. 215; Board Rule 52.3, 2. Cal. Code Reg. § 52.3.

The Board has clarified that the “material upon which the action is based” referred to in Skelly and Board Rule 53.2 is not all the material in the possession of the Department at the time the adverse action is taken. It is, rather, all the material relied upon by the individual who makes the ultimate decision to take adverse action against an employee.¹²

In determining whether an appellant has met his or her burden of establishing what materials were “relied upon” by the ultimate decision maker, the Board will not delve into the decision maker’s subjective thought processes to evaluate what materials actually convinced the decision maker to take the adverse action.¹³ It is sufficient that appellant established that the documents were actually provided to the decision maker in connection with the adverse action.¹⁴ Moreover, in appropriate cases, the Board will conclude that a Skelly violation has occurred when a notice of adverse action is not accompanied by documentation that an appointing power must necessarily have relied upon when deciding to take adverse action, even though the ultimate decision maker may not have personally reviewed that documentation.¹⁵

Appellant contends that a set of documents discussing and comparing the penalties imposed by the Department on other employees who received adverse actions (the “comparables documents”) were reviewed by the ultimate decision maker and should have been included among the materials provided with the notice of adverse

¹² L. G. (1997) SPB Dec. No. 97-04; S. J. *supra*: S. G. a (1998) SPB Dec. No. 98-03.

¹³ H. M. (1998) SPB Dec. No. 98-07, at p. 4.

¹⁴ *Id.*

¹⁵ D. J. (1996) SPB Dec. No. 96-01, at p. 17; C. C. (1999) SPB Dec. No. 99-03, at pp. 14-15.

action. The Department contends that, because such documents have no bearing on the decision to take adverse action, but only on the level of penalty to be imposed, they are not part of the materials that it was obligated to provide under Skelly. Moreover, the Department contends that, because the Skelly officer did not review those documents, they were not required to be provided. We disagree. As discussed below, assuming appellant were to establish that the decision maker actually was provided with such documents in connection with making the initial decision to impose discipline, they would constitute “materials upon which the adverse action is based” that must be provided to appellant prior to the effective date of the adverse action.

The Board has addressed the question of what constitutes “materials upon which the action is based” in several precedential decisions. In K [REDACTED] J [REDACTED],¹⁶ the Board held that an investigative report that was reviewed by the decision maker in connection with the adverse action was part of the materials on which the adverse action was based, even though, the department contended, the report merely summarized the allegations and contained no conclusions regarding the alleged conduct of the appellant nor recommendations regarding the propriety of adverse action. Moreover, the Board found, the fact that the investigation did not corroborate the allegations was relevant to the appellant’s ability to convince the Skelly officer to modify or revoke the adverse action.

¹⁶ (1992) SPB Dec. No. 92-02.

In H [REDACTED] M [REDACTED],¹⁷ the Board held that, where the individual who approved the taking of adverse action and was responsible for “signing off” on the action was provided with certain documents prior to approving the action, such documents constituted “materials upon which the action was based,” regardless of whether the decision maker actually relied on those documents in making the decision to take adverse action. Furthermore, in J [REDACTED] and C [REDACTED], the Board found that documents that the decision maker must necessarily have relied upon, or that were reviewed by one who had effectively been delegated decision-making authority, were materials upon which the action was based.

In contrast, in L [REDACTED] G [REDACTED],¹⁸ G [REDACTED] S [REDACTED] F [REDACTED] J [REDACTED],¹⁹ and J [REDACTED] K [REDACTED],²⁰ the appellants failed to meet their burden of establishing that the materials in question were actually provided to the individual who made the ultimate decision to take adverse action. In R [REDACTED] K [REDACTED],²¹ the Board held that documents unrelated to the charged misconduct were not materials that had to be disclosed under Skelly.

Due process requires that appellant be given all documents relied upon or provided to the ultimate decision maker in deciding to impose disciplinary action. Such documents are not limited to those dealing only with the underlying incident of misconduct. Although the underlying incident of misconduct may form the basis for

¹⁷ Supra, SPB Dec. No. 98-07.

¹⁸ (1997) SPB Dec. No. 97-04.

¹⁹ Supra, SPB Dec. No. 95-04.

²⁰ Supra, SPB Dec. No. 97-06.

²¹ (1994) SPB Dec. No. 94-11.

taking disciplinary action, the action itself it reflected in the penalty imposed.²² While Skelly does not necessarily require an appointing power to consider the discipline it has imposed in other cases, if an appointing power chooses to utilize documents reflecting such discipline in its decision-making process, they necessarily become part of the materials upon which the adverse action is based and must be provided prior to the effective date of the discipline. If, as appellant contends, the decision maker reviewed, relied upon, or merely received as part of a package, a comparison of penalties imposed against other employees in determining the level of penalty to be imposed in this case, such documents may be highly relevant to appellant's ability to convince the Skelly officer to modify or revoke the adverse action.

Furthermore, while evidence of the penalty imposed in other cases is generally inadmissible to establish the proper penalty in a given case, absent a showing of a clear pattern that demonstrates that a particular case is outside the scope of the usual agency discretion,²³ the admissibility of such evidence on appeal from the action is irrelevant to the due process rights afforded by Skelly. Instead, due process requires that an employee facing discipline be provided with all documents provided to the appointing power's decision maker at the time the decision to take disciplinary action was made in order to enable the employee to respond adequately to the proposed action. Therefore, if the documents were provided to the decision maker for any

²² See Government Code section 19570, defining "adverse action" as dismissal, demotion, suspension, or other disciplinary action.

²³ T. G. (1992) SPB Dec. No. 92-18.

purpose in making the decision to impose discipline, those documents are part of the Skelly materials that must be produced.

In this case, the ALJ quashed subpoenas directed at witnesses whom appellant sought to have testify concerning the “comparables” documents. After conducting an *in camera* review of the documents, however, the ALJ found that, as part of its internal review process, the Department’s Personnel Office prepared a “comparables” memorandum in which a personnel analyst reviewed other adverse actions taken by the Department for similar offenses. The ALJ further found that the purpose of this review was to determine whether the penalty imposed by the institution in this case was consistent with other penalties imposed by the Department in cases involving similar offenses. While appellant submitted testimony from a hearing before the Public Employment Relations Board (PERB) of a former Regional Administrator for the Department describing the Department’s general practice of reviewing such “comparables” documents prior to making a decision to take adverse action, it was unable to present any evidence as to who participated in the decision to take adverse action against appellant in this case and what that person or persons reviewed or relied upon in making that decision. In the absence of such evidence, we are unable to find an independent Skelly violation based upon the failure to provide all materials upon which the adverse action was based. But for our conclusion that an independent Skelly violation exists based upon the Department’s failure to provide a reasonably impartial Skelly officer, we would overrule the ALJ's March 26, 2001 order and remand this matter to the ALJ with directions to take additional evidence concerning the identity of the decision maker(s) and the materials provided to that person or persons.

CONCLUSION

Pretermination due process requires strict adherence to the notice requirements that enable an employee facing discipline to respond adequately to the disciplinary action prior to the imposition of discipline. Both the right to predisciplinary review by an impartial person and the right to all materials upon which the action is based are at the heart of the due process principle. Consistent with Barber v. State Personnel Board,²⁴ appellant is entitled to back pay from the date of her dismissal to the date of this decision as a remedy for the violation of her due process rights.

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 dismissal of K [REDACTED] A [REDACTED] from the position of Correctional Officer is sustained;
2. As a remedy for the Skelly violation, the Department shall pay to appellant all back pay, benefits, and interest, if any, that would have accrued to her had her Skelly rights not been violated, from the effective date her dismissal until the date of this decision.
3. This matter is hereby referred to the Chief 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.

²⁴ (1976) 18 Cal.3d 395.

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

STATE PERSONNEL BOARD

Ron Alvarado, President
William Elkins, Vice President
Florence Bos, Member
Sean Harrigan, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on August 6, 2002.

Walter Vaughn
Executive Officer
State Personnel Board

[A-██-dec]