

MICHAEL BAYLISS  
v.  
SAN DIEGO STATE UNIVERSITY

Appeal from Dismissal

Case No. 12-1657A

**BOARD DECISION AND ORDER**

(Precedential)

No. 13-02

October 24, 2013

**APPEARANCES:** Hubert Lloyd, Labor Relations Representative, CSUEU, CSEA/SEIU Local 2579, appeared on behalf of Appellant, Michael Bayliss; Marc D. Mootchnik, Attorney, appeared on behalf of Respondent, San Diego State University.

**BEFORE:** Patricia Clarey, President; Richard Costigan, and Lauri Shanahan, Members.<sup>1</sup>

**DECISION**

This case is before the State Personnel Board (SPB or the Board) after the Board rejected the Proposed Decision of the Presiding Administrative Law Judge (PALJ) in the matter of the appeal of Michael Bayliss (Appellant) from dismissal from the position of Administrative Support Coordinator with San Diego State University (Respondent). The PALJ granted Appellant's Motion to Dismiss the disciplinary action on the ground that Respondent lacked the authority to amend the effective date of the discipline.

The Board rejected the PALJ's Proposed Decision. While not limiting the issues the parties could address, the Board specifically requested the parties to brief the issue

<sup>1</sup> Vice President Kimiko Burton and Member Maeley Tom did not participate in this Decision.

of whether Respondent had the right to change the effective date of Appellant's dismissal.

After hearing oral argument and reviewing the entire record in this matter, including the transcripts, exhibits, and the written and oral arguments of the parties, the Board finds that Respondent did not improperly amend the disciplinary action when it extended the effective date by seven days. Accordingly, the Board remands this matter to the Chief ALJ for further proceedings consistent with this Decision.

#### **FACTUAL SUMMARY**

Respondent dismissed Appellant from his position as Administrative Support Coordinator based upon allegations that he used Respondent's computer resources to view and download sexually explicit material. On October 22, 2012, Respondent served Appellant with a "Notice of Dismissal" (Notice), terminating him from employment, but did not specify an effective date. On November 16, 2012, Appellant appealed the dismissal to the SPB. After affording Appellant the opportunity to respond to the Notice at a *Skelly*<sup>2</sup> meeting on November 20, 2012, on January 2, 2013, Respondent served Appellant with a final Notice dismissing him effective January 2, 2013. Two days later, on January 4, 2013, Respondent served Appellant with another final Notice dated January 3, 2013, dismissing him effective January 9, 2013.

Appellant moved to dismiss the action on the grounds that Respondent: (1) failed to provide an effective date of dismissal in its original Notice of Dismissal; and (2)

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<sup>2</sup> *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 217-18.

improperly amended the Final Notice of Dismissal to change the effective date. The ALJ granted Appellant's motion on the second ground, finding that Respondent was not entitled to amend the Notice of termination by changing the effective date, pursuant to *Brown v. State Personnel Board* (1985) 166 Cal.App.3d 1151, and *Brooks v. State Personnel Board* (1990) 222 Cal.App.3d 1068.

### **DISCUSSION**

Discipline of California State University (CSU) employees is governed by the Education Code. Education Code section 89535 specifies the permissible causes for dismissal, demotion, or suspension of a CSU employee. Education Code section 89538, subdivision (a), sets forth the disciplinary procedure, as follows:

Notice of dismissal, demotion, or suspension for cause of an employee shall be in writing, signed by the chancellor or his or her designee and be served on the employee. The notice shall set forth a statement of causes, the events or transactions upon which the causes are based, the nature of the penalty and the effective date, and a statement of the employee's right to answer within 30 days and request a hearing before the State Personnel Board.

Education Code section 89539 provides, in relevant part:

(a) (1) Any employee dismissed, suspended, or demoted for cause may request a hearing by the State Personnel Board by filing a request, in writing, with the board within 30 days of being served with the notice.

(2) The request may be on any one or more of the following grounds:

(A) The required procedure was not followed.

(B) There is no ground for dismissal, suspension, or demotion.

(C) The penalty is excessive, unreasonable, or discriminatory.

(D) The employee did not do the acts or omissions alleged as the events or transactions upon which the causes are based.

(E) The acts or omissions alleged as the events or transactions upon which the causes are based were justified.

(b) The State Personnel Board shall hold a hearing, following the same procedure as in state civil service proceedings, and shall render a decision affirming, modifying, or revoking the action taken. In a hearing, the burden of proof shall be on the party taking the dismissal action.

Unlike the Civil Service Act (Gov. Code, § 19575.5), the Education Code does not specifically authorize the amendment of a disciplinary action. The effect of this absence of authority was addressed in *Brown v. State Personnel Board, supra*, and *Brooks v. State Personnel Board, supra*. In *Brown*, CSU dismissed a professor based upon allegations that he had engaged in unprofessional conduct based upon a “series and pattern” of sexual harassment of female students, consisting of five separate alleged acts of harassment. After the employee appealed his dismissal to the Board, the Board found two of the alleged acts were not supported by the evidence, but sustained the dismissal based upon the three remaining acts.

On appeal, the Third District Court of Appeal determined that two of the three remaining incidents were too remote in time to serve as grounds for discipline, leaving a single act as the sole basis for discipline. Because the notice of dismissal alleged a “series and pattern of sexual harassment” as the basis for discipline, rather than a single event, the court held the charges upon which the disciplinary action was taken were not established, and that they could not be amended at that late date. (*Brown*, 166 Cal.App.3d at p. 1163.) As explained by the court:

The discipline of an employee of the California State University and Colleges must be predicated upon a “statement of causes [*and*] the events or transactions upon which the causes are based ...” (Ed. Code, § 89538.) The causes for discipline are set forth in Education Code section 89535 and include unprofessional conduct. The university initiates the disciplinary proceedings by giving a notice (the charging document) to the employee alleging the causes and events upon which discipline is based and takes the disciplinary “action” (Ed. Code, §§ 89538, 89539). The action constitutes the university’s judgment that the conduct, i.e., the alleged “events or transactions,” meets CSUS’s criteria of the alleged *cause* of discipline, e.g., unprofessional conduct, and that the respondent has engaged in it. Neither section 89539 nor any other provision of law [fn] permits the amendment of the charging document after CSUS has taken its disciplinary action.[fn]

(*Id.* at p. 1164, emphasis in original.)

Since Education Code section 89539, subdivision (a)(2)(D), specifies as a ground for appeal “that the employee did not do the *acts or omissions alleged* as the events or transactions upon which the causes are based,” the court concluded that the Board had no authority to alter the charging document or take action upon a charge not made. (*Ibid.*, at pp. 1164-1165 and fn. 3, emphasis supplied by court.) In a footnote, the court noted that significant due process problems would arise if an amendment were permitted in the absence of a procedure that permits the employee to prepare for and contest the amended charge, finding that “[a]ny significant amendment of the events alleged to constitute the cause alters not only what must be proved but may alter the criteria by which the cause is to be measured.” (*Ibid.*, at p. 1164, note 5, emphasis added.) The court further stated that it implied no opinion on whether the single instance of harassment could constitute a ground for discipline. (*Ibid.*) Instead, it

dismissed the case because the charging document did not put the employee on notice that the single instance of harassment could result in discipline. (*Ibid.*)

The court's decision in *Brown* was followed by *Brooks v. State Personnel Board*, in which CSU dismissed an employee based upon six specific charges, including failure to timely complete his work, disclosure of confidential information, improper use of a state vehicle, and giving false testimony at a deposition. One week before the SPB hearing, CSU sought to amend the charging document by adding new allegations of misconduct consisting of additional instances of failure to complete his work and dishonesty during the deposition. The SPB ALJ allowed the amendment and the Board sustained the dismissal. Relying on *Brown*, the First District Court of Appeal held that CSU did not have the authority to amend the notice of dismissal after the dismissal became effective. (*Brooks, supra*, 222 Cal.App.3d at pp. 1072-1074.)<sup>3</sup>

The decisions in both *Brown* and *Brooks* arose in the context of substantive amendments to the notice of dismissal that changed the nature of the allegations upon which the disciplinary action was based by either adding (*Brooks*) or deleting (*Brown*) substantive charges. Both courts based their decisions on the theory that the disciplinary action set forth in the notice represented CSU's judgment that the conduct alleged in the notice of dismissal met the criteria for discipline, thereby precluding a

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<sup>3</sup> A similar result was reached by the Fourth District Court of Appeal in two unpublished decisions holding that the Board lacked authority to sustain a disciplinary action after some of the allegations were dismissed, finding that to do so would effectively amend the action in violation of *Brown* and *Brooks*. (*Elliott v. California State Personnel Board* (July 12, 2004, D043030) 2004 WL 155147; *Elliott v. California State Personnel Board* (June 23, 2006, D048097) 2006 WL 1725670.)

subsequent amendment of the charging document. (*Brown, supra*, 166 Cal.App.3d at p. 1164; *Brooks, supra*, 222 Cal.App.3d at p. 1074.) Thus, the court in *Brown* viewed the issue as one of due process concerning the employee's right to notice of the charges upon which the action was based, as follows:

In the absence of a procedure which permits a respondent to prepare for and contest an amended charge a serious constitutional problem arises. Due process requires that the respondent be given "notice ... of the standards by which his conduct is to be measured" [citations] and "fair notice as to the reach of the [disciplinary] procedure." [Citations.] That requires that the respondent be given adequate notice both of the claimed legal standard and the events which are alleged to contravene it and an opportunity to challenge them.

(*Brown, supra*, at p. 1164, fn. 5)

The court in *Brooks* further concluded that the *Brown* holding with respect to the amendment of notices of dismissal was a binding precedent that applied not only to amendments after the submission of a matter to the Board but also to amendments after the effective date but prior to submission of the matter to the Board, noting "the complete void of any statutory authority for *any* person or entity to amend the charging document." (*Brooks, supra*, at pp. 1073-1074, emphasis by court.)

In this case, however, there is no amendment of the substantive allegations upon which the disciplinary action is based, but only a change in the effective date to allow the employee more time to respond to the charges. Thus, the factual and theoretical underpinnings for the *Brown* and *Brooks* decisions do not apply here. Instead, allowing Respondent to change the effective date of the disciplinary action by extending it by

seven days, with no substantive amendment, does not implicate the due process concerns raised by the courts in *Brown* and *Brooks*. Therefore, it does not constitute an impermissible amendment of the disciplinary action.

The foregoing analysis is consistent with the Board's analysis of due process issues arising under Government Code section 19575.5, which, unlike the Education Code, expressly authorizes the Board or its authorized representative to permit an appointing power to amend a notice of adverse action served on a state civil service employee. In order to comply with the due process requirements of *Skelly v. State Personnel Board, supra*, where an amendment includes new charges, defined as a new alleged incident of wrongdoing against the employee upon which the disciplinary action is based, the effective date must be modified and the employee be granted an opportunity at least five days prior to the new effective date to respond to the new charges at a *Skelly* meeting. (*E.W.* (1999) SPB Dec. No. 99-09, pp. 29-30.) The following types of changes, however, do not constitute "new charges," and, therefore, do not require a new *Skelly* meeting or a change in the effective date: (1) the addition of new legal causes for discipline that were not included in the original notice of adverse action; (2) new factual details that pertain to the charges that were included in the original notice of adverse action but do not, in themselves, constitute new charges; and (3) technical changes. (*Ibid.*, at pp. 30-31.) Thus, even where the governing statute permits amendments, a change in the effective date does not constitute a new charge so as to implicate due process concerns. Similarly, although no amendments are



permitted under the Education Code, a change in the effective date does not constitute a new charge because it does not add new factual allegations of wrongdoing upon which the disciplinary action is based.

#### Appellant's Additional Arguments

Appellant argues that, after terminating him on January 2, 2013, Respondent effectively reinstated him on January 4, 2013, by serving him with a new Notice dated January 3, 2013, with an effective termination date of January 9, 2013. Appellant contends that this new Notice did not comply with the requirements of the Education Code because it failed to provide sufficient notice and an opportunity to respond at a *Skelly* meeting.<sup>4</sup> Respondent asserts that Appellant was not actually terminated on January 2, 2013, due to an error by its human resources department in failing to remove Appellant from the payroll at that time. Thus, it issued a new Notice with an effective date of termination of January 9, 2013, in order to allow sufficient time for Appellant's final pay to issue.

We agree with Respondent that the January 3, 2013, Notice served on January 4, 2013, did not amount to a reinstatement or an improper notice of termination. Appellant's employment was never terminated and he remained on Respondent's payroll continuously through January 9, 2013. He received all the pre-deprivation due process to which he was entitled prior to the effective date of his dismissal.

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<sup>4</sup> Appellant also argues that the Notice of Dismissal dated October 22, 2012, was improper because it did not include the effective date of the action. This argument is rejected. We find nothing in Education Code section 89538 that precludes Respondent from issuing a notice of dismissal followed by a final letter specifying the effective date of the dismissal.

Accordingly, the Board concludes that Respondent lawfully extended the effective date of Appellant's dismissal.

### **CONCLUSION**

The Board fully recognizes that, unlike with state civil service employees, there is no statutory basis for permitting CSU to amend the substantive charges upon which it has elected to take disciplinary action. This case does not, however, involve any substantive amendment of the charges found objectionable by the courts in *Brown* and *Brooks, supra*. Consistent with the due process principles relied upon in those decisions and by the Board, we conclude that Respondent was not precluded from simply extending the effective date of Appellant's dismissal without amending the factual or legal bases for the charges upon which the action was based.

### **ORDER**

1. Based upon the entire record in this matter, the foregoing findings of fact, and conclusions of law, it is hereby ORDERED that this matter is remanded to the Chief Administrative Law Judge with instructions to assign this matter to a hearing on the merits of Appellant's appeal from dismissal.

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

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**STATE PERSONNEL BOARD**

Patricia Clarey, President  
Richard Costigan, Member  
Lauri Shanahan, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing  
Board Decision and Order at its meeting on October 24, 2013.

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SUZANNE M. AMBROSE  
Executive Officer