

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by ) SPB Case No. 31077  
 )  
 **RAYMOND J. HOWARD** ) **BOARD DECISION**  
 ) (Precedential)  
 From a seven days' suspension )  
 from the position of Truck Driver ) **NO. 93-07**  
 with the Employment Development )  
 Department at Sacramento ) March 3, 1993

Appearances: Christian L. Raisner, Attorney, representing appellant Raymond J. Howard; Mary Jean Mee, Senior Staff Counsel, Employment Development Department, representing the respondent, Employment Development Department.

Before Carpenter, President; Stoner, Vice-President; Ward and Bos, Members.<sup>1</sup>

**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 the appeal of Raymond J. Howard (appellant) from a seven days' suspension as a Truck Driver with the Employment Development Department (Department) at Sacramento.

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<sup>1</sup> Oral argument took place at the October 6, 1992 Board meeting before Board members Richard Carpenter, Clair Burgener and Lorrie Ward. Prior to rendering a decision in this case, Clair Burgener's term of office expired. With only two Board members remaining who were present at the oral argument, Board staff contacted the parties' representatives and asked whether they had any opposition to having the two current Board members who were not present for the oral argument listen to a tape recording of the oral argument and participate in the decision. No timely opposition was received from the parties. All four Board members participating in this decision have reviewed the transcript of the administrative hearing and the written arguments, and have listened to the oral arguments.

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The seven days' suspension was based on charges that appellant purposefully struck a co-worker on the face with several large rubber bands as the two workers were unloading a stack of chairs from a dolly. The ALJ who heard the matter revoked the suspension upon finding that appellant's actions were a "proportionate response" to his co-worker's prior actions.

At its meeting on June 23, 1992, the Board rejected the proposed decision of the ALJ, and asked the parties to brief the issues of whether the evidence supported the findings of facts, and if so, whether the findings of fact supported the conclusion that discipline was not warranted.

After a review of the entire record, including the transcripts and briefs submitted by the parties, and having listened to oral arguments, the Board modifies the seven days' suspension imposed by the Department to an official reprimand.

#### **FACTUAL SUMMARY**

Appellant has been employed with the Department for over 20 years. During that time, he has received no adverse actions. One of appellant's duties as a Truck Driver includes delivering office furniture to state facilities, as was being done when this incident transpired.

The adverse action was based upon a single event which occurred on January 8, 1992. Appellant and two co-workers, Tom Flynn (Flynn) and Ken Cottini (Cottini), were delivering chairs to

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one of the offices within the Department. The chairs were stacked several together on a dolly, held together by large rubber bands which measured approximately one inch in width and several feet in length, unstretched. The three workers were in the process of unloading the chairs from the dollies and placing them around the office when the incident occurred. The incident was witnessed by a staff member of the Department, Nancy Fairchild (Fairchild), who was supervising the unloading of the chairs.

Flynn had removed the rubber bands from around a group of stacked chairs and asked appellant, more than once, if the appellant would hold the rubber bands for him while he unloaded the chairs. Appellant, who followed the well-known practice of placing the rubber bands around one's neck to leave one's hands free, responded by telling Flynn to put the bands around his neck as he himself had done. After Flynn unsuccessfully attempted to get the appellant to take his rubber bands from his hands, Flynn tossed the rubber bands to the appellant.<sup>2</sup> According to the appellant, the bands hit him on the chin, before falling to the floor. According to Flynn, the bands only hit appellant in the chest, not the face.

What happened after that is not in dispute. Appellant said to Flynn "nobody throws anything in my face", gathered a few rubber bands together, and made a whipping action at Flynn with the bands,

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<sup>2</sup> Flynn and Fairchild both described the toss as a very gentle, underhand toss. Appellant characterized the toss as harsher, more of a "frisbee toss".

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striking him in the face. Flynn suffered a small welt on the cheek as a result of the appellant's actions.

The Department served an adverse action upon the appellant based upon appellant's striking Flynn in the face with the rubber bands. The adverse action charged appellant with violation of Government Code section 19572, subsections (m) discourteous treatment of the public or other employees, and (t) other failure of good behavior either during or outside of duty hours which is of such nature that it causes discredit to the appointing authority or the person's employment. The penalty imposed upon the appellant by the Department was a seven days' suspension. Flynn did not receive any discipline for his participation in the incident.

At the hearing on this matter, the ALJ found the testimony of the appellant to be more credible than that of Flynn, and concluded that Flynn struck appellant in the chin with the rubber bands.<sup>3</sup> However, the ALJ revoked the seven days' suspension imposed by the Department after concluding that "...I cannot say that appellant's reaction was so disproportionate to any blow that he received, so as to constitute an excessive reply."

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<sup>3</sup> It should be noted for the record that there are several references in the Proposed Decision to the wrong witness. The last line on page 3 should read "appellant characterized it" instead of "Flynn characterized it". Line two of the first full paragraph on Page 4 should read "credit appellant" and not "credit Flynn". Finally, the first reference to "Flynn" in the third paragraph on Page 5 should read "appellant reacted in anger."

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The Board rejected the Proposed Decision of the ALJ and asked the parties to brief the following issues for consideration.

### **ISSUES**

- a) Whether the evidence supports the findings of fact?
- b) If so, do the findings of fact support the conclusion that no discipline is warranted?

### **DISCUSSION**

#### The Evidence Supports The Findings Of Fact

The facts are not subject to a great deal of dispute between the four witnesses, with a few notable exceptions. Those exceptions, which are noted above, include how hard Flynn tossed the rubber bands to the appellant, and where the rubber bands struck the appellant on his body. Faced with these conflicts in testimony, the ALJ found appellant's testimony to be more believable than that of Flynn's, citing Flynn's inconsistent testimony and argumentative demeanor as reasons to disbelieve Flynn. The ALJ determined that Flynn tossed the bands at the appellant, although without great force, striking the appellant in the chin. Furthermore, the ALJ concluded that Flynn did not have a good reason for doing what he did, and that appellant had reason to believe that the rubber bands were being "thrown" at him.

After reviewing the record in this matter, the Board finds substantial evidence to support the ALJ's factual findings. The appellant testified that the rubber bands struck him in the chin.

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This testimony coincides with the statement that all parties agree appellant made, which was "nobody throws anything in my face". In addition, assuming appellant is testifying honestly, he was in the best position to know where the rubber bands struck him. The Board finds no evidence in the record to contradict the credibility determinations made by the ALJ who was present to observe the witnesses and who found the appellant's testimony to be more credible than Flynn's. Accordingly, we concur with the factual findings made by the ALJ.

The Findings Of Fact Support The Imposition of Discipline

The ALJ revoked the seven days' suspension after finding that appellant's response was not an excessive reply to Flynn's earlier action. The Board disagrees with this conclusion. The facts in the record reveal that appellant flung the rubber bands at Flynn in response to provocation from him. While the circumstances of being provoked might serve to mitigate the severity of the penalty imposed upon the appellant, we do not believe that the provocation in this case could ever justify the appellant's conduct. Even if Flynn had flung the rubber bands at the appellant in a rough manner (which was not found to be the case), appellant would still not have been justified in taking similar action back at Flynn. Rather, what appellant should have done, particularly as the senior employee on the job, was to tell Flynn that his behavior was unacceptable and to report the action to his supervisor. Flinging

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the rubber bands back at Flynn served no useful purpose; on the contrary, it only served to injure Flynn and could have potentially injured him more seriously, i.e. if the bands had hit Flynn in the eye. Finally, Flynn's actions could have escalated the situation into a violent confrontation.<sup>4</sup>

The Board finds that appellant's behavior constitutes discourtesy to other employees, as well as failure of good behavior during working hours which causes discredit upon the appointing authority, and that these violations of the law merit the imposition of formal discipline.

As to the severity of the discipline to impose, the Board is charged with imposing penalties which are, in its judgment, "just and proper". Government Code section 19582. In Skelly v. State Personnel Board (1975) 15 Cal.3d 194, the California Supreme Court set forth several factors to consider when assessing a proper penalty to impose upon a state employee:

"[W]e note that the overriding consideration in these cases 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. (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. Skelly v. State Personnel Board (1975) 15 Cal.3d. 194, 217-218.

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<sup>4</sup> A person is always legally permitted to use "reasonable" force to defend oneself from intentional harm from another person. However, the facts of this case reveal that appellant was not defending himself, but was retaliating for what he considered to be unwarranted and intentional physical contact.

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While the Department imposed a seven days' suspension for appellant's conduct, the Board finds considerable justification for modifying the penalty to an official reprimand based upon an analysis of the Skelly factors. Although only to a slight degree, actual harm to the public service was created by the co-workers "fighting" on duty in view of other state employees. Clearly the men were not able to work as productively as they could have otherwise had their attentions been on their duties and not on who struck whom first. Moreover, as previously stated, there was potential for even greater harm to the public service had appellant's conduct resulted in serious injury or escalated the situation into a more serious confrontation.

However, balanced against the above considerations is the fact that the appellant has worked for the Department for over 20 years without any prior adverse actions. His long tenure without prior misconduct renders recurrence unlikely. Furthermore, while we do not in any way condone appellant's behavior, we do consider the totality of the circumstances as somewhat mitigating. Although appellant wrongfully struck Flynn in the face with the rubber bands, he did so as an instantaneous reaction to being struck in the face first without any rational reason. While the potential for more serious consequences justifies formal discipline, it does not appear that Flynn suffered any serious physical effects from being struck, other than a temporary red mark on his face. Taking



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these circumstances as a whole, the Board finds that an official reprimand is an adequate penalty.

**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, it is hereby ORDERED that:

1. The adverse action of a suspension without pay for seven days is modified to an official reprimand.

2. The Employment Development Department shall pay to appellant all back pay and benefits that would have accrued to him had he not been suspended; and

3. This matter is hereby referred to an 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 pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD\*

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

\*There is one vacancy on the Board.

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

GLORIA HARMON  
Gloria Harmon, Executive Officer  
State Personnel Board