BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 35291
	)	
JACK H. TOLCHIN,	)	**BOARD DECISION**
	)	(Precedential)
	)	
From demotion from the position of Psychology Internship Director to the Position of Psychologist-Clinical, Correctional Facility at the California Mens Colony, Department of Corrections at San Luis Obispo	)	**NO. 96-04**
	)	April 1-2, 1996

Appearances: Joseph R. Colton, Attorney, of Beeson, Tayer & Bodine, on behalf of appellant, Jack H. Tolchin; Sally Y. Kim, Attorney, Department of Corrections, on behalf of the respondent, California Men's Colony, San Luis Obispo.

Before: Lorrie Ward, President; Floss Bos, Vice President; Richard Carpenter and Alice Stoner, Members.

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 Jack Tolchin (Tolchin or appellant) from his demotion from the position of Psychology Internship Director to the position of Psychologist-Clinical, Correctional Facility, at the California Men's Colony, Department of Corrections at San Luis Obispo (Department). As reason for his demotion, appellant was charged with falsifying documents to indicate that the orientation of new psychology interns was complete when it was not, failing to take corrective action when he learned that documents had been inappropriately

signed by a Psychology Intern, and failing to intervene during a meeting when two Psychology students received a verbal reprimand when he knew the reprimand was undeserved.

In his Proposed Decision, the ALJ found that a Skelly violation occurred when the Chief Deputy Warden who had been involved in the preparation of appellant's adverse action functioned as the Skelly Officer. In addition, the ALJ found that appellant's prior adverse action could not be considered in determining the appropriate penalty because to consider it would violate the applicable collective bargaining agreement. The ALJ recommended that appellant's demotion be sustained.

The Board rejected the ALJ's Proposed Decision and asked the parties to specifically brief the issue of whether appellant's Skelly rights were violated. The Board did not limit the parties' right to argue other issues.[3]

After a review of the entire record, including the transcripts, exhibits and the written arguments of the parties, the Board finds that appellant's failure to seek clarification of a subordinate's ambiguous remark which was meant to inform appellant that the student intern orientation forms had been inappropriately signed constituted inexcusable neglect of duty. We dismiss as

[3]In his brief before the Board, appellant addressed the Skelly issue. In addition, he challenged the ALJ's recommendation that his demotion should be sustained. The Department's brief addressed only the Skelly issue.

unproven the other charges against appellant. We find that the penalty of a permanent demotion is too harsh given the circumstances of this case and modify the demotion to a 5 days' suspension. In addition, we find that a Skelly violation occurred, but that the remedy for the Skelly violation is subsumed by our order that appellant be suspended and not permanently demoted.

STATEMENT OF FACTS

Appellant is charged with falsifying documents to indicate that the orientation of new psychology interns was complete when it was not, failing to take corrective action when he learned that documents had been inappropriately signed by a Psychology Intern, and failing to intervene during a meeting when two Psychology students received a verbal reprimand when he knew the reprimand was undeserved.[4]

On September 17, 1993, Chief Psychologist Herivergo Sanchez (Sanchez) sent appellant a memorandum with an orientation form attached. Appellant was instructed to submit forms signifying that the current student interns had been properly oriented. Appellant was to return the forms to Sanchez by September 24, 1993. The

[4]In the Notice of Adverse Action, appellant was originally charged with failing to complete the orientation of new psychology students as ordered by his supervisor. This charge was withdrawn by stipulation of the parties. In addition, appellant was originally charged with failing to take corrective action when he learned that orientation documents had been "forged" by a Psychology Intern. During the course of the hearing, the Department amended the Notice of Adverse Action to modify the term "forged" to "inappropriately signed."

orientation form was essentially a check-off list which indicated that the student had been apprised of certain procedures and given various documents. When Sanchez did not receive the completed forms from appellant, he sent appellant another memorandum indicating that he had not received a response to his last memorandum. Sanchez requested that appellant complete the forms in a timely manner and return them to him by October 5, 1993.

On October 5, 1993, appellant checked with his assistant, Psychology Intern Donna Redmayne (Redmayne), to determine the orientation status of student interns Glen Miller (Miller) and Laurie Sacks (Sacks). The orientation forms included signature lines where the interns were required to sign that they had received the appropriate information. Redmayne told appellant that the student interns had not yet signed the forms. Appellant signed the blank orientation forms above the signature line labeled "Internship Director".[5] Appellant then gave the forms to Redmayne telling her to get them signed if "you have to sign them yourself."

By the end of the day when Redmayne was still unable to locate the students, she signed the students' names to the forms herself and submitted them to Sanchez' office. Later that evening, she called Miller at home and told him that she had signed his name.

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[5]The ALJ found that appellant signed the forms after Redmayne had signed for the student interns. A review of the transcript indicates, however, that appellant signed the orientation forms before the student interns' signatures were filled in.

She asked Miller to inform Sacks that she had signed her name also. The next day, Redmayne told appellant that she "got them done, but if anybody ever asks me, I'm going to tell them the truth." To which appellant replied, "Of course."

The next weekend included Columbus Day, a Monday holiday. Miller and Sacks usually worked Mondays and Tuesdays at the facility. Their immediate supervisor did not think it was worthwhile for Miller and Sacks to make the trip to the facility for only one day. At their immediate supervisor's suggestion, Miller and Sacks took the Tuesday after the Monday holiday off. Both interns failed, however, to complete the necessary paperwork to request a day off. The failure to complete the necessary paperwork caused confusion since the interns were not on duty when expected.

When Sanchez found that the interns had failed to appear as expected, he called a meeting with appellant and the two interns to go over the procedures. Sanchez testified that during the meeting, he did most of the talking because he wanted to clarify the procedure.

Either before or after the meeting with Sanchez, Redmayne personally went over each item on the orientation list with both Miller and Sacks. Redmayne was concerned about signing the interns' names and wanted to be certain that the affirmations she made on their behalf were true. Some of the documents listed on

the orientation form, including an employee handbook, had not yet been duplicated for distribution. There was mixed testimony about whose responsibility it was to provide the handbook to the interns. Later that day, Miller complained to Dr. Amy Phoenix (Phoenix) that he should not have been held accountable for knowing the procedures for requesting time off. Miller disclosed to Phoenix that Redmayne had signed both his and Sacks' names to the orientation forms.

An investigation followed concerning Redmayne's action in signing the orientation forms. It is unclear when appellant became aware that Redmayne had signed the student interns' signatures to the orientation forms. It is undisputed, however, that when appellant found that Redmayne had signed the forms herself he did not take any action. Appellant reasoned that both interns knew that Redmayne had signed for them and did not see any reason for further action. In any event, appellant was aware that an investigation was already underway.

Appellant presented both testimonial and documentary evidence that it was common practice at the facility to sign documents for absent colleagues by signing the individual's name and then initialing the signature to indicate that someone other than the signator had signed the document. Appellant testified that he did not remember telling Redmayne to sign the documents herself but indicated that, if he had made that statement, he would have meant

for her to sign and initial the documents, not to simply sign the interns' names.

Skelly Issue

In December 1993, in contemplation of this adverse action, appellant's supervisor, Sanchez, briefed Chief Deputy Warden L. Clarke (Clarke) about the allegations against appellant. Clarke recommended that Sanchez refer the matter to Captain Hickson for an internal affairs investigation. The investigation commenced on December 20, 1993. Clarke subsequently reviewed the Internal Affairs Investigation Report and responded to the warden's request for her recommendation for the appropriate action against appellant. She recommended that appellant be demoted. The warden followed that recommendation and demoted appellant.

In Skelly v. State Personnel Board (1975) 15 Cal.3d 194, the California Supreme Court found that, prior to taking disciplinary action against an employee, an employer must provide certain preremoval safeguards. Id. at 215. One of these safeguards is the right to respond, either orally or in writing, to the authority initially imposing discipline. Id. Under current practice, the employee delegated to act as the authority imposing discipline is referred to as the Skelly Officer.

In the present case, Warden W. Duncan was designated as the Skelly Officer. Appellant's Skelly hearing was scheduled, however, on May 13, 1994, a day Warden Duncan was not at the institution.

In his place, Clarke functioned as the Skelly Officer. On May 17, 1994, Clarke issued her decision to allow the adverse action to stand as originally written.

ISSUES

1. Did the Department prove by a preponderance of evidence all the charges against appellant?

2. Does a provision of a Memorandum of Understanding supersede Government Code § 19582?

3. Was there a Skelly violation and, if so, is there a remedy?

DISCUSSION

Charge C: Falsifying Documents

Under Charge C, appellant is charged with falsifying documents by signing orientation forms indicating that two psychology students had been properly oriented, when, in fact, they had not. During the hearing, Charge B, the charge that appellant failed to follow his supervisor's instruction to properly orient the students, was withdrawn. Appellant argues that Charge C should be dismissed as well because withdrawing the charge that appellant failed to follow his supervisor's instruction to properly orient

the student interns necessarily means that appellant properly oriented the student interns.[6]

Even if we assume, however, that the list of orientation items had been properly covered by appellant, the charge that appellant falsified the orientation form could still be based on appellant signing the form with knowledge that the student interns' signatures were falsified. The ALJ found that appellant participated in the falsification of the documents by instructing or encouraging Redmayne to sign the students' names and then compounding the matter by signing the form himself after Redmayne signed for the student interns. We disagree.

Dishonesty entails an intentional misrepresentation of known facts. M[redacted] S[redacted] (1994) SPB Dec. 94-19, p.20. The Department failed to prove, by a preponderance of evidence, that appellant intentionally misrepresented a known fact. First, the Department

[6]Given that, at the time Charge B was withdrawn, appellant's attorney was cross examining Sanchez to demonstrate through Sanchez that appellant had covered all or many of the orientation items on the checklist, we assume that withdrawing Charge B removes the issue of whether appellant's orientation of the interns was complete. In any event, the Department failed to prove by a preponderance of evidence that the students' orientation was not complete. The Department failed to demonstrate that the issues and topics listed on the orientation forms had not been covered by appellant in his discussions with the student interns. Although there was some evidence that some documents, including the new Employee Orientation Handbook, had not yet been photocopied and distributed, there was also evidence that appellant had earlier instructed the interns to pick up these documents themselves. On these facts, we decline to find that appellant failed to orient the student interns properly.

failed to prove that when appellant told Redmayne to get the documents signed or sign them herself, he meant that Redmayne should forge the student interns' signatures. Appellant presented credible evidence that employees routinely signed documents for absent colleagues. Second, appellant signed the forms before Redmayne set off to find the interns. There is nothing in the record to establish that appellant saw the signatures and realized Redmayne had improperly signed the students names. We do not believe that Redmayne's later comment that she "got them done, but if anybody ever asks me, I'm going to tell them the truth" was a comment that necessarily created in appellant the knowledge that Redmayne had inappropriately signed the student interns' names to the orientation forms. Consequently, we do not find that the Department proved, by a preponderance of evidence, that appellant signed the orientation forms with knowledge that the student interns had not signed for themselves.

Since we do not find that appellant failed to orient the students properly or that appellant knew that Redmayne had inappropriately signed the students' signatures, we cannot find that appellant intentionally falsified the orientation form. Thus, the charge of dishonesty is dismissed.

Charge D: Failing to Take Corrective Action

Appellant was also charged with failing to take corrective action when he learned that the orientation forms had been

inappropriately signed by a Psychology Intern. This Board has previously defined inexcusable neglect of duty to include "an intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty". [See R[redacted] H[redacted] (1994) SPB Dec. No. 94-07, p. 6 citing Gubser v. Dept. of Employment (1969) 271 Cal.App.2d 240, 242]. We find that appellant inexcusably neglected his duty as a supervisor when he failed to question Redmayne concerning the meaning of her statement that she "got it done but, if anybody ever asks me, I'm going to tell them the truth." Appellant's failure to follow up shielded him from the knowledge that corrective action was necessary. Appellant violated his duty as a supervisor when he failed to resolve the ambiguity in Redmayne's statement.

Appellant's conduct also constitutes a violation of Government Code § 19572, subdivision (t), other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment. Appellant's on duty misconduct of failing to follow up on Redmayne's ambiguous remark reflects upon his employment and would, if known to the public, bring discredit to his employment.

We do not find, however, that appellant inexcusably failed to take action when he actually learned of Redmayne's actions. Appellant learned about Redmayne's actions in the context of an

ongoing investigation. Taking action against Redmayne at that point would have been redundant.

Charge E: Failing to Intervene

During Unwarranted Verbal Reprimand

Appellant was also charged with failing to provide pertinent information at a meeting during which two Psychology student interns received a verbal reprimand from Dr. Sanchez for taking time off without completing the necessary paperwork. The pertinent information appellant was charged with withholding was that the students' supervisor had approved the students' time off. In the context of the meeting, appellant's interjection that the supervisor had approved the time off would be irrelevant to the issue of whether the students completed the necessary paperwork. Sanchez testified that during the meeting he did not ask questions about whether the students did not know the procedure; instead, he went over the procedure so that the students would know in the future how to proceed. Like the students, appellant simply listened to Sanchez' instructions. Appellant's conduct at this meeting does not constitute any cause for discipline.[7]

[7]Appellant was also charged with inefficiency. Generally, inefficiency is charged when an employee continuously fails to achieve a set level of productivity or fails to produce an intended result with a minimum of waste, expense or unnecessary effort. (R[redacted] B[redacted] (1993) SPB Dec. No. 93-21, 10-11). The Department failed to allege any facts which could be construed as inefficiency.

PENALTY

When performing its constitutional responsibility to review disciplinary actions [Cal. Const. Art. VII, section 3(a)], the Board is charged with rendering a decision which is "just and proper". (Government Code § 19582). To render a decision that is "just and proper," the Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board considers are those specifically identified by the Court in Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194 as follows:

> ...[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. (Id. at 217-218.)

As discussed above, appellant inexcusably neglected his duty as Director of the Internship Program when he failed to follow up on his assistant's ambiguous comment that she got the job done but would not lie about it. We think the harm to the public service is evident when a supervisor of appellant's stature relies on the ambiguity in such a statement to shield himself from information that would have mandated he take action.

In assessing penalty, we consider that this is appellant's second adverse action. On September 30, 1990, appellant received a five percent reduction in salary for twelve months for engaging

in paid therapy sessions with the fiance of an inmate housed at the California Men's Colony (CMC), and for failing to notify the Warden as required by the California Department of Corrections (CDC) Rules and Regulations. In his Proposed Decision, the ALJ found that appellant's prior adverse action could not be used as a factor in assessing an appropriate penalty because the Memorandum of Understanding (MOU) between the Governor and the recognized employee organization provided that non-dismissal adverse actions can only be retained in an employee's official personnel file for up to three years, after which time the adverse action must be removed.

Government Code § 19582 (d) provides, however, that "In arriving at a decision . . . the board . . . may consider . . . any prior proceedings under this article [Article 1, Disciplinary Actions]." No time limit is provided in this statute.

According to Government Code § 3517.6, only certain provisions of the Government Code are superseded by MOUs. Government Code section 19582 is not listed as one of the provisions that can be superseded. Thus, the Board may continue to consider the fact of the prior adverse action in assessing penalty, notwithstanding its removal from appellant's official personnel file.

A 5 days' suspension should suffice to put appellant on notice that high ranking supervisory employees cannot shield themselves from information necessary to competently supervise.

Skelly Issue

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.

In specifically describing the 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; Anthony G. Gough (1993) SPB Dec. No. 93-26, p.4. (Skelly Officer should be impartial person who had not been directly involved with the investigation of the matters which led to the taking of adverse action).[8] We think that this description disqualifies as a Skelly Officer an individual who has 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.

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[8]See also 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); Gray v. City of Gustine (1990) 224 Cal. App. 3d 621, 631-32 (a city manager who terminated appellant was "embroiled in the controversy" and did not constitute a neutral fact-finder); But see, Linney v. Turpen (1996) 96 D.A.R. 1403, 1404 (fact that employer unilaterally chose hearing officer does not create due process violation).

Citing Burrell v. City of Los Angeles (1989) 209 Cal. App.3d 568, the Department argues that to prove a Skelly violation, the appellant must provide concrete evidence of the Skelly Officer's partiality, bias or prejudice. We disagree.

Burrell is distinguishable. Burrell involved a provision of the Los Angeles City Charter which provides that, if the Board of Civil Service Commissioners agrees that all the charges against an employee have been substantiated, it may not reduce the penalty unless the city department consents to the reduction. Id. at 584. The respondent employees argued that the procedure violated the due process requirement of a "fair and impartial decisionmaker" by permitting the same official who instituted and investigated the disciplinary proceedings, and recommended a particular penalty, to have the final say on the severity of the penalty which is ultimately imposed.

The court found the city charter provision constitutional, noting that the employee was accorded the right to have a reviewing body determine whether there was sufficient evidence to uphold the charges of misconduct. The court also found that the fact that the Board could only give an advisory opinion to the city department as to reduction in penalty did not render the process violative of due process.

The instant situation is distinguishable from that in Burrell. First, the Skelly officer reviews both the substance of the charges as well as the proposed penalty. Second, while in Burrell, different persons were responsible for imposing the discipline (departmental officials) and reviewing the sufficiency of the grounds for the discipline imposed by those officials (members of the Board), in the instant case the very same individual who was intimately involved in imposing the discipline and recommended the level of penalty also served the overlapping function as the Skelly Officer. [See Applebaum v. Board of Directors (1980) 104 Cal.App.3d 648 (Court found lack of procedural fairness where nearly one-half of the members of panel reviewing a decision to suspend a physician's staff privileges were also members of the committee which had made the original suspension decision)].

We find that the Department violated the Skelly rule when Clarke acted as the Skelly Officer.

CONCLUSION

We find that appellant's conduct of failing to follow up on his subordinate's ambiguous comment constitutes both inexcusable neglect of duty and other failure of good behavior pursuant to Government Code § 19572, subdivisions (d) and (t). We do not find that appellant was dishonest. We modify appellant's demotion to a 5 days' suspension. As discussed above, we find that Clarke should not have acted as the Skelly Officer but note that there is no

remedy for a Skelly violation when an employee is merely suspended. [Karen Johnson (1992) SPB Dec. 92-02 (Skelly violation subsumed in remedy when appellant is returned to former status)].

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 demotion of Jack Tolchin from the position of Psychology Internship Director to the position of Psychologist-Clinical, Correctional Facility, at the California Men's Colony, Department of Corrections at San Luis Obispo is hereby modified to a 5 days' suspension;

2. The Department shall pay to Jack Tolchin all back pay and benefits that would have accrued to him had he not been improperly demoted but merely suspended for 5 days;

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).

(Tolchin **continued - Page 19)**

THE STATE PERSONNEL BOARD*

Lorrie Ward, President

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

*Member Ron Alvarado was not present when this decision was adopted.

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on April 1-2, 1996.

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C. Lance Barnett, Ph.D.
Executive Officer
State Personnel Board