BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 27303
	)	
TIMOTHY WELCH	)	**BOARD DECISION**
	)	(Precedential)
From 1-step reduction in salary for	)	
1 year as a Correctional Officer,	)	**NO. 92-03**
California Rehabilitation Center,	)	
Department of Corrections at Norco.	)	January 7, 1992

Appearances: Ina A. Arnold, Senior Hearing Representative, California Correctional Peace Officers Association, representing appellant Timothy Welch; Melvin R. Segal, Deputy Attorney General, Office of the Attorney General, representing respondent, Department of Corrections.

Before Chavez, President; Stoner, Vice-President; Burgener, Ward and Carpenter, 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 an appeal by Timothy Welch (appellant or Welch), a Correctional Officer employed by the Department of Corrections (Department) at the California Rehabilitation Center, of a 1-step reduction in salary for 1 year.

In sustaining the pay reduction, the ALJ found that the appellant had made an inappropriate racial reference to co-workers, had engaged in a transaction with an inmate, and had lied in an investigatory interview when he denied he was ordered to submit a doctor's off-work order to substantiate his use of sick leave. The ALJ denied appellant's claims of procedural error. Appellant had argued that the adverse action was invalid because it was served

after its effective date, and that the Department's amendment of the adverse action at the time of hearing was improper.

The Board determined to decide the case itself based upon the record and additional arguments to be submitted in writing. After review of the entire record, including the transcripts and briefs submitted by the parties, the Board affirms in part and reverses in part the decision of the ALJ.

FACTUAL SUMMARY

Appellant was appointed a Correctional Officer December 30, 1985. The Department imposed discipline consisting of a 1-step reduction in pay for 1 year based upon allegations that the appellant made racial remarks, engaged in a transaction with an inmate, and failed to provide a doctor's verification for requested sick leave on two occasions. The Department amended its Notice of Adverse Action, at the hearing, over the objection of the appellant, to allege that appellant untruthfully denied at his investigative interview that he was required to provide the doctors' off-work orders.

The Inappropriate Racial Remark

On January 23, 1989, appellant was eating with a co-worker in the personnel kitchen. The co-worker testified that appellant indicated that he was upset because he was being harassed about his hair being too long and commented that he was going to get a fake note from his doctor, "...just like the rest of those f--king

niggers...." The co-worker, who had not worked with appellant before, reported the racial slur to her supervisor. The appellant denies that he ate with this co-worker and further denies that he made the remarks attributed by her to him.

The Pizza Incident

On February 13, 1989, Correctional Officer Carl Fuller (Fuller) observed that appellant had called a number of times requesting that a particular inmate report to appellant at his post in Dorm 105. Believing the number of calls for this inmate to be unusual, Fuller became suspicious and obtained permission to search the inmate after the inmate had returned from Dorm 105 where appellant was stationed. Fuller found a piece of pizza wrapped in aluminum foil in the inmate's pocket. The inmate told Fuller he had obtained the pizza from Dorm 105 but refused to give Fuller any further information.

Fuller informed Lieutenant George Giurbino that he had discovered the pizza on the inmate. Pizza had not been on the menu at the institution canteen. Giurbino walked by appellant's post and observed appellant eating a cup of soup. Giurbino observed, adjacent to appellant, on the top of a trash can, some bundled up aluminum foil containing a piece of pizza that was similar to the one discovered on the inmate. The soup that appellant was eating appeared to Giurbino to be the same type of soup being served in the institution canteen. Upon questioning, the inmate told

Giurbino that appellant had given him the pizza in exchange for a cup of soup.

Failure to Provide Doctor's Off-Work Order on Two Occasions

Appellant was absent on May 2 and May 6, 1989. When he called in sick for those days, appellant claimed he had the stomach flu on May 2 and was shaken up after a car accident on May 6. The Department's witnesses testified that on both occasions when appellant called in sick, he was requested to bring in a doctor's off-work order. Appellant contends that he was not asked to bring in off-work orders when he called in sick and that he did not even know he had been docked for those days until he received the adverse action. The Department charged appellant with insubordination for his failure to bring in the doctors' off-work orders after being requested to do so.

At the investigatory interview, appellant denied that he had been requested to bring in the doctor's off-work orders. At the hearing, over appellant's objection, the Department successfully moved to amend its Notice of Adverse Action to charge appellant with dishonesty at the investigatory interview.

Service of Adverse Action

The Department first mailed the Notice of Adverse Action to appellant on December 6 and 27, but the envelopes were returned undelivered. The Department personally served appellant on January 5, 1990. The Notice of Adverse Action had an effective

date of January 1, 1990: the salary reduction would first be reflected in appellant's February 1 paycheck. A Skelly hearing was held on January 25, 1990.

ISSUES

This case raises the following issues for the Board's consideration:

(1) Does the record support the allegations that the appellant:

(a) made an inappropriate racial remark;

(b) engaged in an illegal transaction with an inmate;

(c) was insubordinate in failing to provide doctors' off-work orders after being requested to do so;

(d) was dishonest at the investigatory interview?

(2) Were appellant's procedural due process rights violated based on:

(a) the Department's failure to serve appellant and give him a Skelly hearing five days before the effective date of the adverse action;

(b) the ALJ's granting of the motion to amend the Notice of Adverse Action at the hearing to allege dishonesty at the interview.

DISCUSSION

The Inappropriate Racial Remark

We find that the record evidence supports the allegation that the appellant made an inappropriate racial remark to one of his co

workers. The ALJ apparently found that the co-worker's testimony regarding the incident was credible and that appellant's testimony that he never made the remark was not believable. We have no reason to reject the credibility determinations of the ALJ regarding this incident.

The Pizza Incident

The record evidence also supports the allegation that appellant engaged in an illegal transaction with an inmate. The hearsay statement of the inmate, that appellant requested him to get appellant some soup and gave the inmate some pizza in exchange, is corroborated by strong circumstantial evidence. Giurbino observed pizza of the same type found on the inmate in appellant's trash and also observed appellant eating soup of the same type being served that day in the canteen. Neither appellant nor his girlfriend, who testified at the hearing that she packs appellant's lunch, testified that appellant had soup packed in his lunch that particular day. The charges are supported by the evidence.

Failure to Provide Doctors' Off-Work Orders

We agree with the ALJ that appellant's failure to provide a doctor's off-work order for each of his absences (on May 3 and May 7) does not constitute insubordination. The Department cannot compel appellant to see a doctor, but can only deny authorized leave when an employee refuses to provide proof that use of sick leave was justified, under circumstances where a request

for such proof is warranted. The Department did not charge appellant with being absent without leave.

Late Service of Adverse Action

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.

Pursuant to Skelly, the SPB enacted SPB Rule 52.3[1] which requires that:

> (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... (emphasis added).

As noted above, service was effected in this case on January 5, 1990, four days after the effective date of the adverse action of January 1, 1990. Furthermore, appellant did not have his

[1]The SPB Rules are set forth in Title 2 of the California Code of Regulations.

Skelly meeting until January 25, 1990. Despite the fact that the deductions were not reflected on appellant's paycheck until February 1, 1990, appellant's pay was reduced for work he performed January 1, 1990. Thus, the Department violated appellant's procedural due process rights by its failure to effect proper service and provide a Skelly hearing five days prior to the effective date of the adverse action.

Notwithstanding the Department's due process violation, appellant did have an opportunity, albeit delayed, to respond to the charges on January 25, 1990, before the pay reduction was actually reflected in his paycheck. The Skelly violation was thus cured on that date and appellant was not prejudiced by the violation. (Kristal v. State Personnel Board (1975) 50 Cal.App.3d 230, 241) The only conceivable remedy for the delay would be to delay the pay reduction one month. Yet, since the Board has upheld the 1-step pay reduction for 1 year, and since the one year has long ago elapsed, to order the Department to refund the one-month pay reduction and then impose an additional month's reduction at this point in time would be to impose an administrative burden to serve no purpose. We decline to do so.

Amendment of Adverse Action at Hearing/Dishonesty at Investigatory Interview

In the Notice of Adverse Action, the Department charged appellant with insubordination on the theory that appellant's failure to provide a doctor's off-work order to substantiate his

use of sick leave, after being told to do so by a supervisor, constituted insubordination. At the hearing, the ALJ dismissed the charge of insubordination based on her view that an employee can not be disciplined for insubordination for failure to provide a doctor's off-work order, but can only be denied authorized leave for failure to provide a doctor's off-work order. The ALJ further opined that, in such a case, an employee could be disciplined for being absent without leave or for dishonesty if the Department believed the employee was not being truthful about his or her use of sick leave. In this case, however, appellant contended that he was never requested to provide a doctor's off-work order. The Department moved to amend the Notice of Adverse Action to charge that appellant lied during the investigatory interview when he contended he was never requested to provide a doctor's off-work order. The appellant's representative objected at the hearing to the amendment, contending that the amendment was substantial and that appellant was never given an opportunity to rebut the dishonesty charge at the Skelly hearing. The ALJ allowed the amendment.

We find the ALJ erred in allowing the amendment at the hearing. Although appellant had been charged with failure to provide the doctor's off-work orders, he had not previously been charged with dishonesty. The Board recently adopted, as a Precedential Decision, the ALJ's Proposed Decision in the case of

Leah Korman (December 3, 1991) SPB Case Nos. 29827 and 30245. In that case, the ALJ stated:

> If appellant is not told what acts were being punished, she is hampered in her inability to prepare a defense. ...The right to be notified of the charges is a critical element in due process of law... (*Id.* at p.4)

While appellant may have been prepared to defend the original charge against him with evidence to support his theory that he had no knowledge of the request for the doctors' off-work orders and therefore could not be charged with insubordination for failure to comply, he may not have been prepared to defend against a charge of dishonesty. Since dishonesty is a separate and serious charge, and since appellant was entitled to notice that he was being charged with dishonesty, the granting of the motion to amend the Notice of Adverse Action at hearing, over appellant's objection, was improper. As appellant's procedural due process right to notice was violated with respect to the charge of dishonesty, we decline to rule upon that charge.

CONCLUSION

We agree with the ALJ that a preponderence of the evidence supports the allegations that appellant made an inappropriate racial remark. Such remarks are not only discourteous, but are also dangerous when made within our correctional institutions where racial tensions run high. Likewise, we find that the record supports the allegation that appellant engaged in an illegal transaction with an inmate. Staff are strictly prohibited from

engaging in any type of transaction with inmates for security reasons. The Department was right to treat appellant's racial remark and transaction with the inmate as serious breaches of conduct. The 1-step reduction in salary for 1 year is justified based on this conduct alone.

ORDER

1. Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that the 1-step reduction in pay for 1 year taken against TIMOTHY WELCH is sustained.

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

STATE PERSONNEL BOARD

Richard Chavez, President
Alice Stoner, Vice-President
Clair Burgener, Member
Lorrie Ward, Member
Richard Carpenter, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on January 7, 1992.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board