BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeals by **P C** From five percent reduction in salary for six months in the position of Correctional Lieutenant at Corcoran State Prison, Department of Corrections and Rehabilitation at Corcoran; and **S W** From two working days suspension from the position of Correctional Sergeant at Corcoran State Prison, Department of Corrections and Rehabilitation at Corcoran	SPB Case No. 05-1287A **BOARD DECISION** (Precedential) **NO. 06-01** October 10, 2006 SPB Case No. 05-1599A

APPEARANCES: Katherine Hart, Attorney, on behalf of appellant, P C; Christopher Howard, Staff Legal Counsel, California Correctional Peace Officers Association, on behalf of appellant, S W; Dennis DeFelice, Staff Counsel, on behalf of respondent, Department of Corrections and Rehabilitation.

BEFORE: William Elkins, President; Patricia Clarey, Anne Sheehan and Maeley Tom, Members.

DECISION

This case is before the State Personnel Board (Board) after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ). P C (C) and S W (W),[1] were initially notified by respondent Corcoran State Prison (CSP), Department of Corrections and Rehabilitation (Department), that they were to be disciplined for failing to properly respond to an inmate medical emergency,

[1] Sometimes hereinafter collectively referred to as "appellants."

which failure contributed to the inmate's death.[2] Based on the recommendation of a *Skelly* officer, however, the CSP Warden withdrew both disciplinary actions. The Department thereafter served appellants with the instant Notices of Adverse Action (NAA), again notifying appellants that they were to be disciplined for failing to properly respond to an inmate medical emergency.[3]

The appellants argued that, because the Department had previously withdrawn the original NAAs as the result of a *Skelly*[4] officer's recommendation, the Department was thereafter estopped from imposing disciplinary action on appellants based on the same operative facts as were contained in the original NAAs.

In this Decision, the Board finds that the Department was authorized to serve the instant NAAs on appellants based on the same set of operative facts that were contained in the earlier NAAs, provided that the instant NAAs were served on appellants within the limitations period set forth in Government Code section 3304. As a result, the Board orders both cases remanded for a hearing on the merits of the allegations contained in the instant NAAs.

ISSUE

Was the Department barred from taking adverse action against appellants based on the same set of operative facts underlying previously served Notices of Adverse Action that had been withdrawn by the Department after a *Skelly* hearing?

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[2] C[redacted] was notified that he would be demoted from the position of Correctional Lieutenant to the position of Correctional Officer, and W[redacted] was notified that she would be dismissed from her position as a Correctional Sergeant.

[3] Those NAAs are the subject of the instant appeals, with C[redacted] receiving a five percent reduction in salary for six months in the position of Correctional Lieutenant, and W[redacted] receiving a suspension for two working days in the position of Correctional Sergeant.

[4] *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 (finding that state civil service employees are entitled to a limited hearing before an impartial decision maker prior to the imposition of discipline.).

BACKGROUND

Employment History

C began state service in May 1994 as a Correctional Officer. In November 1997, he was promoted to the classification of Correctional Sergeant. In March 2001, he was promoted to the classification of Correctional Lieutenant. C has no record of formal disciplinary action.

W began state service in February 1991 as a Correctional Officer. She promoted to the Correctional Sergeant classification in July 2003. W has no history of formal disciplinary action.

FINDINGS OF FACT

On February 28, 2005, CSP served W with a NAA, advising her that the Department intended to dismiss her effective March 8, 2005. The NAA was signed by W's appointing authority, CSP Warden Allen Scribner (Scribner), and alleged the following: (1) On or about Monday, February 2, 2004, W failed to take appropriate action after being notified that Inmate Herrera (Herrera) was being disruptive by yelling and banging on his cell door, that Herrera had covered his cell window with unknown white and reddish substances that made it difficult to see inside the cell, and that a reddish spot was on Herrera's cell floor; (2) W failed to notify the Watch Commander of her observations or of Herrera's disruptive behavior. Although W assumed that the reddish substance she observed was not blood, she made no effort to determine the nature of the substance, and only instructed Lovelady to "keep an eye" on Herrera; and (3) W's failure to properly address Herrera's behavior contributed to Herrera's

death.[5] W filed an appeal of the disciplinary action with the SPB in Case No. 05-0531.

On or about March 1, 2005, CSP served C with a NAA, advising him that the Department intended to demote him to the position of Correctional Officer, effective March 8, 2005. The NAA was signed by Ch's appointing authority, Scribner, and alleged the following: (1) On February 2, 2004, W informed C that Herrera was being disruptive and had covered his cell window with a white filmy material, and that she had observed two red spots that she assumed could be blood; (2) Although C did not personally observe Herrera, he informed W that an emergency cell extraction was not necessary; and (3) C's failure to properly address Herrera's behavior contributed to Herrera's death. C filed an appeal of the disciplinary action with the SPB in Case No. 05-0517.

Appellants timely requested and received *Skelly* hearings regarding their respective disciplinary actions. Acting Warden Leah Ann Chrones (Chrones) served as the *Skelly* officer for both appellants. After the *Skelly* hearings, Chrones recommended that both NAAs be withdrawn in their entirety.

As appellants' appointing authority, Scribner accepted Chrones' recommendation that the disciplinary actions be withdrawn. By memorandum dated April 14, 2005, Scribner advised the Department's Director, Jeannie Woodford (Woodford), of his decision to withdraw the disciplinary actions "in their entirety." By memorandum dated April 18, 2005, Scribner notified appellants that the disciplinary actions had been

[5] Herrera had removed a dialysis shunt from his chest and bled to death in his cell.

"withdrawn in their entirety." In "withdrawing the actions in their entirety," Scribner intended that the disciplinary actions taken against appellants were to be "revoked,"[6] and that no further disciplinary action would be taken against them based on the alleged misconduct.[7]

In late April or early May 2005, the Department notified the SPB that it was withdrawing W's disciplinary action in Case No. 05-0531, and C's disciplinary action in Case No. 05-0517.

On June 8, 2005, the Department served a "2nd Amended Notice of Adverse Action" (2nd Amended NAA) on W, advising her that the Department intended to suspend her for two working days from her position as a Correctional Sergeant. The 2nd Amended NAA was signed by Department Chief Deputy Director John Dovey (Dovey), and contained substantially the same allegations as did the original NAA, except the allegation that W's conduct contributed to the inmate's death. W filed an appeal of the disciplinary action with the SPB in Case No. 05-1599.

On June 8, 2005, the Department served an "Amended Notice of Adverse Action" (Amended NAA) on C, advising him that the Department intended to reduce his salary five percent for six months. The Amended NAA was signed by Dovey, and contained substantially the same allegations as did the original NAA, except for the allegation that C's conduct contributed to the inmate's death. C filed an appeal of the disciplinary action with the SPB in Case No. 05-1287

[6] Notably, an adverse action that never becomes effective cannot be revoked; it can, however, be withdrawn before it becomes effective.

[7] As appellants' appointing authority, Scribner did not need Woodford's approval to withdraw or revoke the disciplinary actions, though he did need Woodford's approval to dismiss any employee under his control.

The Department asserts that, in accordance with the provisions of Government Code section 19575.5, it was authorized to serve amended or supplemental NAAs on appellants, irrespective of the fact that the original NAAs had been withdrawn by the Department.

Appellants maintain that authorizing the Department to impose discipline on them based on essentially the same set of operative facts that were contained in prior NAAs that had been revoked as the result of a *Skelly* hearing, would be tantamount to disciplining appellants twice for the same misconduct. Appellants further contend that the well-established legal doctrines of collateral estoppel and/or res judicata preclude the Department from serving new or amended NAAs on appellants after a prior NAA, containing substantially the same allegations as the new or amended NAA, has been revoked by the *Skelly* Officer or the appointing power.

PRINCIPLES OF LAW

The California Supreme Court has determined that, prior to imposing discipline on a state civil service employee, the employer shall provide the employee with the following pre-discipline safeguards: 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.[8] The Court also found, however, that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive

[8] *Skelly*, 15 Cal. 3d at 215. *See also* Government Code section 19574(a); Title 2, California Code of Regulations, section 52.3.

action.[9] Instead, pre-discipline due process only requires that an employee have the right to present his or her side of the controversy before a reasonably impartial and non-involved reviewer "who possesses authority to recommend a final disposition of the matter."[10]

The parties cite no case law, statute, or regulation that directly addresses the issue of whether an adverse action that has been withdrawn can thereafter be amended and re-served on the employee. This is a case of first impression for the Board.

Government Code section 19575.5 governs the ability of state departments to amend NAAs that have been served on employees, and provides that:

> At any time before an employee's appeal is submitted to the board or its authorized representative for decision, the appointing power may with the consent of the board or its authorized representative serve on the employee and file with the board an amended or supplemental notice of adverse action. If the amended or supplemental notice presents new causes or allegations the employee shall be afforded a reasonable opportunity to prepare his defense thereto, but he shall not be entitled to file a further answer unless the board or its authorized representative so orders. Any new causes or allegations shall be deemed controverted and any objections to the amended or supplemental causes or allegations may be made orally at the hearing or investigation and shall be noted in the record.[11]

In its precedential decision in *E[redacted] W[redacted]*,[12] the Board examined the interplay between the post-discipline NAA amendment process permitted by Section 19575.5 and

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[9] *Id*.

[10] *Titus v. Civil Service Commission* (1982) 130 Cal.App.3d 357, 363

[11] *See also E[redacted] W[redacted]* (1999) SPB Dec. No. 99-09 (reconciling *Skelly* pre-discipline notice requirements with Section 19575.5 post-discipline amendment provisions by requiring the department,.).

[12] (1999) SPB Dec. No. 99-09.

Skelly's pre-discipline notice requirements. In that Decision, the Board directed that, in those cases where the department seeks to add additional allegations against the employee to a disciplinary action, the department must: serve an amended NAA on the employee; provide a new effective date for the disciplinary action; provide the employee with a new *Skelly* hearing regarding the new allegations; and, if applicable, pay any back pay owed to the employee as a result of the change in the effective date of the disciplinary action.

ANALYSIS

The Board rejects appellants' argument that the Department's imposition of discipline on them, after having withdrawn the original disciplinary actions after the *Skelly* hearing, results in appellants being disciplined twice for the same misconduct. The record clearly established that the original disciplinary actions contemplated against appellants – whereby C[redacted] was to be demoted and W[redacted] was to be dismissed – never actually became effective. Appellants' protestations notwithstanding, neither the threat of proposed disciplinary action nor the stigma or emotional distress that accompanies such proposed action, can reasonably be construed as the equivalent of the actual imposition of discipline. Appellant's arguments to the contrary are, therefore, dismissed.

For the same reason, we must reject appellants' contentions that the doctrine of res judicata precludes the Department from imposing disciplinary action on appellants based on essentially the same allegations as were contained in prior NAAs that had been withdrawn/revoked as the result of a Skelly hearing.

An action may be barred by res judicata when an earlier lawsuit involved the same claim as the present action, provided a final judgment was reached on the merits and involved the same parties.[13] Thus, res judicata applies only to actual controversies that have been, or reasonably should have been, fully adjudicated. Because no allegation contained in an NAA becomes final and effective until after the completion of the Skelly hearing, no triable issue actually arises until after the Skelly hearing has been completed, and the disciplinary action has become effective (in whole or in part), thereby creating triable issues for review by the Board.

Here, at the conclusion of the Skelly hearing, the Department withdrew the original NAAs in their entirety, and no part of the disciplinary actions ever became effective. Because the Department's complete withdrawal of the disciplinary actions left no actual triable issue for review by the Board, res judicata principles are inapplicable here.[14]

The Department's contention that it was authorized, pursuant to Government Code section 19575.5, to serve amended NAAs on appellants is also, however, without merit. As the Department had withdrawn the original NAAs, there was, technically, no NAA to amend or supplement. Accordingly, the Board finds the provisions of Section 19575.5 to be inapplicable to this case.

The Board is aware of no legal prohibition, however, precluding the Department from serving <u>new</u> NAAs on appellants, irrespective of the fact that the new NAAs

[13] Code Civ. Proc. § 1908 *et seq*.

[14] The Board further notes that a Skelly hearing does not utilize the type of due process procedures (e.g., the right to examine and cross examine witnesses, and to introduce and admit evidence) generally associated with the types of judicial and quasi-judicial proceedings to which res judicata principles will ordinarily apply.

contained essentially the same allegations as were contained in the original NAAs. Any such new NAA must, however, have been served on appellants within the applicable limitations period.[15]

CONCLUSION

The first adverse actions served on appellants never became effective, as the Department accepted the *Skelly* officer's recommendation that the actions be withdrawn. Therefore, the Department was authorized to serve entirely new adverse actions on appellants, based on the same set of facts that were contained in the original NAAs, so long as the new NAAs were timely served on appellants. Since the record does not appear to clearly reflect whether the instant NAAs were timely served on appellants, remand is appropriate to address that issue.

ORDER

The matter is remanded back to the Chief ALJ, or designee, with instructions to determine whether the instant NAAs were served on appellants within the limitations period set forth in Government Code section 3304(d) and, if so, to conduct a hearing on the merits in SPB Case Nos. 05-1287 and 05-1599. During the course of that hearing, the Department shall bear the burden of proving, by a preponderance of the evidence, the allegations contained in the instant NAAs served on C[redacted] and on W[redacted].

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

[15] Because appellants are peace officers, the Department is required to have notified appellants of its intent to impose the new disciplinary actions on them within the limitations period set forth in Government Code section 3304(d).

STATE PERSONNEL BOARD[16]

William Elkins, President
Patricia Clarey, Member
Anne Sheehan, Member
Maeley Tom, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on October 10, 2006.

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Floyd Shimomura
Executive Officer
State Personnel Board

[16] Vice-President Sean Harrigan did not participate in this Decision.