

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 34626
)
GARY SHARP) **BOARD DECISION**
) (Precedential)
)
From dismissal from the position) **NO. 95-14**
of Mailing Machine Operator II)
with the Department of Motor)
Vehicles at Sacramento)

In the Matter of the Appeal by) SPB Case No. 34652
)
FRANKIE J. JOHNSON)
)
From dismissal from the position)
of Mailing Machine Operator I)
with the Department of Motor)
Vehicles at Sacramento) October 3, 1995

Appearances: Harry Gibbons, Attorney, California State Employees Association on behalf of appellant, Gary Sharp; Richard Burton, Attorney on behalf of appellant, Frankie J. Johnson; Roger Sato, Attorney, Department of Motor Vehicles on behalf of respondent, Department of Motor Vehicles at Sacramento.

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 attached Proposed Decision of the Administrative Law Judge (ALJ) in the appeals of Gary Sharp (Sharp) and Frankie J. Johnson (Johnson) from their respective positions as Mailing Machine Operator II and Mailing Machine Operator I with the Department of Motor Vehicles at Sacramento (Department). In his Proposed Decision, the ALJ found that both men should be dismissed.

(Sharp-Johnson continued - Page 2)

After a review of the entire record, including the transcript, exhibits, and the written and oral arguments of the parties, the Board agrees that the appellants must be dismissed.

We disagree, however, with the ALJ's discussion regarding Government Code § 19572, subdivision (h) intemperance, and the ALJ's determination that a Skelly violation occurred. We adopt the attached ALJ's Proposed Decision to the extent it is consistent with the discussion below.

ISSUES

1. What is the meaning of "intemperance" as that term is used as a cause for discipline under Government Code § 19572, subdivision (h) intemperance?
2. Was there a Skelly violation?

DISCUSSION

Intemperance

On November 23, 1993, while at work at the Department's Mass Mailing Unit, appellants Sharp and Johnson engaged in a series of childish and disruptive confrontations. In his Proposed Decision, the ALJ found that appellants' conduct demonstrated a lack of restraint which he found to constitute intemperance. We rejected the ALJ's Proposed Decision in part to examine whether "intemperance" as used in Government Code § 19572, subdivision (h), could be construed to include all excessive behavior or whether

(Sharp-Johnson continued - Page 3)

"intemperance" as used in the statute refers solely to conduct arising out of the use of alcohol.

The fundamental rule in construing a statute is to "'ascertain the intent of the legislature so as to effectuate the purpose of the law.'" [California Teachers Assn v. San Diego Community College Dist. (1981) 28 Cal.3d 692, 698 (citations omitted)]. Intemperance has been listed as a cause for discipline since the first State Civil Service Act was enacted in 1913. [Civil Service Act, Ch. 590, June 16, 1913.] Intemperance has never been defined in the civil service laws or rules. In fact, the issue of whether intemperance may be defined as any excessive behavior has never been directly addressed. Each time intemperance as a cause for discipline has been reviewed in this state's courts of appeal, however, the employee has been charged with alcohol related offenses. [See e.g. Black v. Personnel Board (1955) 136 Cal. App. 2d 904; Perry v. Chatters (1953) 121 Cal. App.2d 813; Skelly v. State of California (1973) 15 Cal.3d 194].

Although intemperance has never been defined in the Civil Service Act or Government Code, conduct identified as habitual intemperance was cited as a ground for divorce as early as 1870, [Act of March 12, 1870, ch. CLXXXVIII, 1870 Cal. Laws], and defined in 1872. The legislature defined "habitual intemperance" as:

that degree of intemperance from the use of intoxicating liquor which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish

(Sharp-Johnson continued - Page 4)

upon an innocent party. [Civil Code § 106 (repealed 1969)].

Thus, as early as 1872, intemperance was defined in the law as conduct arising out of the use of intoxicating liquor. Consequently, we think it only reasonable that when the legislature specified intemperance as a cause for discipline in 1913, the legislature meant intemperance due to the use of alcohol rather than any excessive behavior or lack of restraint.

This interpretation is supported by the court's analysis in Blake v. State Personnel Board (1972) 25 Cal. App. 3d 541. In Blake, although intemperance was not the specific issue involved, the court of appeal explained that intemperance referred to on-duty or off-duty drinking "which impaired the employee's ability to discharge his duties", while drunkenness on duty [Government Code § 19572, subdivision (g)] referred to being actually drunk while on-duty. [Id. at 551-552].

Consequently, we find that the legislature did not intend to include all types of behavior demonstrating a lack of restraint in the application of Government Code § 19572, subdivision (h) intemperance.¹ We find that intemperance refers to the use of intoxicating liquor which causes a person to be unable to properly attend to his or her job duties as well as to excessive conduct

¹Such behavior, in most cases, would be chargeable, however, under Government Code § 19572 subdivision (m) discourtesy or (t) other failure of good behavior. In some cases other subdivisions of section 19572 may be chargeable as cause for discipline as well.

(Sharp-Johnson continued - Page 5)

arising out of the use of intoxicating liquor.² We therefore dismiss intemperance as a cause for discipline in the instant case as there was no evidence that appellants' conduct arose out of the use of alcohol.

Skelly Violation

In his Proposed Decision, the ALJ found that a Skelly violation occurred when the Department failed to provide appellant Sharp with a copy of his supervisor's original notes describing the series of incidents which occurred on November 23, 1993. We disagree.

In the California Supreme Court case of Skelly v. State of California (Skelly) (1973) 15 Cal.3d 194, the court set forth certain procedures that a public employer must follow to satisfy 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. [Id. at 215 (Emphasis added)].

Pursuant to Skelly, the SPB enacted Rule 52.3 which provides 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

²We do not decide whether a finding of intemperance may be based on conduct related to the misuse of drugs.

(Sharp-Johnson continued - Page 6)

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.)

Appellant Sharp testified without contradiction that he had not been given his supervisor's original notes as part of his Skelly package. In addition, appellant's supervisor, Chase, testified that the notes partially formed the basis for his recommendation that Sharp and Johnson be terminated or at least separated from each other.

The requirement that an employee be given a copy of all materials upon which the action is based does not, however, refer to every document that has anything to do with the case. The only materials that must be provided are the materials relied upon by the individual who made the decision to take adverse action.

As noted above, a Skelly violation is a violation based on a failure to provide due process at the pretermination stage of the

(Sharp-Johnson continued - Page 7)

disciplinary process.³ The Board has found due process requires only that appellant be given copies of the materials actually relied on by the individual who made the decision to take adverse action. [Karen Johnson SPB Dec. 92-02 (Skelly violation occurred when Department failed to provide investigator's report executive director reviewed in determining to take adverse action)]. Given that the party asserting a claim for relief has the burden of proving each fact essential to his claim, [Evidence Code § 500], appellant carries the burden of proving that a Skelly violation occurred.

Appellant did not prove that a Skelly violation occurred. He did not provide any evidence of who made the decision to terminate appellant, nor did he provide evidence of what materials the decisionmaker relied on in making the decision to terminate appellant. Consequently, we find that appellant did not carry his burden of proving a Skelly violation.

³The Department asserts that Chase later revised his memorandum and the revised copy was placed in appellants' Skelly package. The Skelly package was not placed in evidence, however, and the record does not otherwise disclose whether appellant received a revised copy of Chase's original notes. We cannot base a determination that no Skelly violation occurred on an assertion unsupported by the record. The record also reflects that while Chase recommended dismissal, he was not, himself, the decision maker. The Notice of Adverse Action was signed by Don Morishita, Personnel Officer. We do not know if Mr. Morishita actually made the decision to terminate appellants. Mr. Morishita was not called to testify.

OTHER ISSUES

Appellants both argue that the penalty of dismissal is too harsh. In assessing the propriety of the imposed discipline, the Board considers a number of factors it deems relevant with particular attention to those factors specifically identified by the Court in Skelly 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).

By their actions, appellants have already demonstrated a likelihood of recurrence. As noted in the ALJ's attached Proposed Decision, both appellants have been subject to prior adverse action for similar behavior with each other. Despite the intervention of Department personnel, both appellants contributed to the escalation of misconduct between them. The harm to the public service is obvious when individuals cannot control themselves in the work place. We sustain the dismissal of both appellants for the reasons set out in the ALJ's Proposed Decision.

CONCLUSION

Although we have dismissed the charge of intemperance, we sustain the ALJ's findings that appellants' conduct constitutes

(Sharp-Johnson continued - Page 9)

discourtesy, willful disobedience and other failure of good behavior pursuant to Government Code § 19572 subdivisions, (m), (o) and (t). Since we have found that no Skelly violation occurred, we do not award back pay to either appellant.

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 dismissals of appellants Gary Sharp and Frankie J. Johnson are sustained;
2. The ALJ's attached Proposed Decision is adopted to the extent it is consistent with this Decision;
3. This opinion is certified for publication as a Precedential Decision (Government Code § 19582.5).

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 and therefore did not participate in this decision.

* * * * *

(Sharp-Johnson continued - Page 10)

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on October 3, 1995.

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

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PROPOSED DECISION

APPEARANCES

This matter came on regularly for hearing before Jose M. Alvarez, Administrative Law Judge, State Personnel Board, on June 21, 1994, July 18, 1994, and September 8, 1994, at Sacramento, California. The parties filed written final arguments the last of which was received October 28, 1994.

The appellant Gary Sharp, was present and was represented by Harry Gibbons, Attorney, California State Employees Association.

The appellant Frankie J. Johnson was present and represented by Richard Burton, Attorney.

The respondent was represented by Roger Sato, Attorney, Department of Motor Vehicles.

(Sharp and Johnson continued - Page 2)

Evidence having been received and duly considered, the Administrative Law Judge makes the following findings of fact and Proposed Decision:

I

JURISDICTION

The dismissal of Gary Sharp effective February 1, 1994, and the dismissal of Frankie J. Johnson effective February 8, 1994, and appellants' appeals therefrom comply with the procedural requirements of the State Civil Service Act.

II

EMPLOYMENT HISTORY

Appellant Sharp was appointed a Mailing Machine Operator I by the respondent on July 2, 1990. On January 31, 1992 he was appointed a Mailing Machine Operator II.

Appellant Sharp has received a prior adverse action. This was an official reprimand effective November 12, 1992. The reprimand was for discourtesy, disobedience, and failure of good behavior pursuant to Government Code section 19572 (m), (o), and (t). The reprimand was for engaging in confrontational behavior towards a co-worker, Frankie Johnson.

Appellant Johnson was appointed a Janitor with the Department of General Services on April 22, 1987. On July 1, 1990, he was appointed a Mailing Machine Operator I with respondent.

Appellant Johnson has received a prior adverse action. This was a 5% reduction in salary for 3 months effective October 16, 1992. The reduction in salary was for

(Sharp and Johnson continued - Page 3)

discourtesy, disobedience, and failure of good behavior pursuant to Government Code section 19572 (m), (o), and (t). The reduction in salary was for engaging in confrontational behavior towards a co-worker, Gary Sharp.

III

ALLEGATIONS

As cause for dismissal in both of these matters respondent alleges intemperance, discourtesy, willful disobedience, and failure of good behavior pursuant to Government Code section 19572 (h), (m), (o), and (t).

IV

FINDINGS OF FACT

The appellants were co-workers and friends both on and off the job. They socialized by taking breaks and having meals together and by attending professional sporting events together.

The two appellants also socialized with Vincent Morales and a fourth co-worker named "Sean." All four employees worked the swing shift from 2 p.m. to 10:30 p.m. in the respondent's Mass Mail Unit, which is located in one large room at respondent's headquarters. The room contains eight mail machines as well as an area to one side with desks for the operators and the unit supervisors.

There were 23 Mail Machine Operators working for the unit in 1993, divided among three shifts that overlap for 30 minutes during the change in shift.

V

Mailing Machine Operators are different from the clerical classes, in that they are "...to operate machines in processing large volumes of outgoing United States and other carrier mail."

Mailing Machine Operators are to be able to "carry out oral and written instructions;..." and also to "work well with others."

VI

On November 23, 1993 both appellants were working at their machines. The machines fold paper and stuff the paper into envelopes. Morales was at one of the machines preparing registration renewals to be sent to the public. Another co-worker, Dorries Ivory, was also at a machine running registration items. Luis Balayut, or Lead Operator was at a desk. The appellants were also assigned to folding machines. Their machines were separated from each other by Morales' machine and Ivorys' machine.

VII

THE CART INCIDENT

Shortly after the two appellants reported for work at 2:00 p.m. on November 23, 1993, they loaded their work carts with materials. The two appellants then pushed their work carts down a hallway to the unit, one trailing the other. They were alone in the hallway Sharp's cart hit Johnson's cart and they began yelling at each other. This attracted the attention of their lead operator, Balayut and their

(Sharp and Johnson continued - Page 5)

supervisor, Stuart Chase, as well as the unit manager, Harold Wilson. The two appellants were separated, spoken to individually, told their behavior would not be tolerated, and instructed to return to work and stop arguing. The appellants returned to their work.

VIII

About two weeks before November 23, 1993, appellant Johnson borrowed \$15 from Appellant Sharp with the understanding that Johnson would repay Sharp after receiving his next paycheck for working overtime. After receiving the expected paycheck Johnson failed to pay Sharp immediately and, for a week, refused to pay Sharp because Sharp would not speak to Johnson or "show any respect." During this week of silence, appellant Johnson did have the money to pay appellant Sharp. Johnson kept the \$15 cash concealed in his wallet and during this period avoided paying Sharp the agreed amount of the personal debt due to his perception of Sharp's lack of respect. Johnson waited for Sharp to ask for payment of the \$15. Prior to Sharp's cart hitting Johnson's cart, Johnson had asked Sharp why he was not talking to him and Sharp had replied that he was not talking to him since he had not paid his debt.

After their carts hit, Johnson and Sharp argued loudly. Johnson perceived Sharp's act of bumping his cart was intentional. He told Wilson to "keep this guy away from me." Johnson was upset by the incident.

IX

THE SNACK BAR

At about 4:30 p.m. on November 23, 1993, both appellants were at a snack bar in respondent's building. They were standing in line waiting to pay for the items they had selected to purchase.

While there, another confrontation developed between the two. Both appellants blame each other for trying to provoke a fight. Sharp eventually went to talk to a security officer about the matter. Neither of the appellants informed their supervisor of this incident.

Sharp indicates Johnson made sniveling noises at him and uttered derogatory statements towards him at the snack bar.

Johnson indicates that Sharp was jumping and putting his hands in front of his face and flicking them towards him while at the snack bar. He believed Sharp was going to strike him.

X

THE MOP INCIDENT

On November 23, 1993, appellant Johnson was assigned Machine No. 2 and Sharp was assigned Machine No. 6. The machines were at opposite ends of the room from each other. At 6:30 p.m. Sharp used a dust mop to clean up the area around his machine. He then walked across the room and went to Machine No. 2. While there he shook the dust mop in Johnson's work area, Johnson became irritated. He asked Sharp why he had done that. Sharp laughed and left to return to his machine. Johnson then swept up the dirt and other materials

(Sharp and Johnson continued - Page 7)

and put them in his hand. He followed Sharp across the room to where Sharp's machine was located and threw the dirt onto the floor in Sharp's work area. Johnson then smirked and walked away to return to his machine.

XI

THE FINAL CONFRONTATION

At 8:45 p.m. in the evening both appellants were in the area of the men's restroom closest to the Mass Mail Unit. A narrow passage way with a door at each end separated the restroom from the hallway. Sharp was exiting the restroom into the passage way as Johnson entered into the passage way from the hallway. As the appellants passed each other in the passage way their shoulders came into contact. Sharp believes Johnson bumped him intentionally. Johnson believes Sharp bumped him intentionally.

Johnson then struck Sharp on the left side of the face. Johnson did this since he perceived Sharp was about to strike him. Sharp left the area and went to complain to the supervisor, Stuart Chase, who was in the Mass Mail Unit.

XII

Chase was working in the desk area of the unit with Lead Operator Balayut. Chase and Balayut observed Sharp enter the room holding the left side of his face. Sharp's face looked red and flushed. Sharp told them Johnson just hit him. At that point Johnson entered the room shouting "I got you once and I'll get you again." At that point Sharp shouted back and both began shouting threats and profanities at each other such

(Sharp and Johnson continued - Page 8)

as "fuck you!" and "I'll kick your ass!" and "motherfucker!". Sharp was angry. Chase restrained Johnson and Balayut restrained Sharp by holding him in a bear hug. Sharp tried to break free and scratched Balayut on the left hand in the process. Supervisor Chase directed Balayut to call Security and ordered both appellants to return to their separate work stations to clean-up and then go home early. Chase told both appellants he was going to talk to them separately.

Balayut released Sharp and went to call the security officers. Sharp did not return to his work station.

XIII

Chase walked with Johnson towards Johnson's machine as Johnson picked up some boxes to take them to recycling. Chase walked with him. They observed Sharp walking towards them. He was walking at a fast pace and his fists were balled up. He appeared angry and upset. As Sharp approached Johnson Chase stood between them facing Sharp with Johnson behind him. Johnson then dropped the boxes reached over Chase and hit Sharp. Chase then held Sharp as Sharp tried to hit Johnson. Chase also yelled to Morales who was close by to restrain Johnson. Morales did not do so. He was afraid of being injured. During the altercation both appellants engaged in a heated verbal exchange. Chase was eventually able to get Sharp to walk back to their desks area. Johnson returned to his work area.

(Sharp and Johnson continued - Page 9)

Thereafter the Security Officers arrived. The officers summoned the State Police. When the police arrived they spoke to the appellants. Neither appellant pressed any charges. Both appellants were sent home early.

XIV

The incident directly involved both appellants, as well as Chase, Balayut, Morales, and Ivory, a co-worker, whose attention was drawn from her work when she observed Sharp approaching Johnson as well as the ensuing scuffle. She had also had her attention drawn away from her work since she had also observed the incident with the dust mop.

The other employees in the unit were affected by the incident. They were instructed to shut down their machines early and to write statements relative to what they had seen or heard occur between both appellants.

XV

After the incident on November 23, 1993 as Johnson was preparing to go home, Morales approached Johnson and provided him with a knife to take with him.

* * * * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT THE ADMINISTRATIVE LAW JUDGE MAKES THE FOLLOWING DETERMINATION OF ISSUES:

APPELLANT SHARP

Appellant Sharp's conduct constitutes discourtesy, willful disobedience and failure of good behavior pursuant to Government Code section 19572 (m), (o), and (t). Sharp

(Sharp and Johnson continued - Page 10)

contends that Johnson was the assailant and he only acted in self defense. While Sharp fared worse than Johnson in the physical altercation his action contributed to the escalation of events. Sharp intentionally walked from his machine to Johnson's machine to shake out his dust mop. This act upset Johnson. Sharp then laughed at Johnson. Based on Sharp and Johnson's interaction in the hallway, where their carts collided, and at the snack bar, a reasonable individual would have avoided contact of this nature. Sharp's actions were acts of discourtesy and failure of good behavior.

After their altercation in the restroom both Sharp and Johnson exchanged obscenities. Sharp's statements to Johnson and his behavior requiring Balayut to physically restrain him constitute failure of good behavior as well as discourtesy.

After the incident near the restroom and the confrontation by Chase's desk, Sharp and Johnson were told to return to their work stations. Sharp did not return to his work station. He approached Johnson in an aggressive manner, further escalating events. Sharp's acts constitute willful disobedience, discourtesy and failure of good behavior.

APPELLANT JOHNSON

Appellant Johnson's conduct constitutes discourtesy, willful disobedience, and failure of good behavior pursuant to Government Code section 19572 (m), (o), and (t). Johnson hit Sharp in the face on two occasions. He contends he did this in self defense.

The evidence of the incident which occurred near the restroom does not bear this out, and further even if

(Sharp and Johnson continued - Page 11)

Sharp intentionally bumped him as they walked through the passage way, Johnson's response was disproportionate to the perceived insult or threat. Johnson's conduct was a failure of good behavior. Johnson also contends that after the incident in the passage way while he was in the restroom at a urinal Sharp entered the restroom and hit him causing him to fall against the urinal. This is found to lack credibility. The evidence is that after the incident near the restroom Johnson went to where Sharp was complaining to Chase about being hit and yelled "I got you once and I'll get you again." Johnson only mentions his hitting Sharp and not that Sharp hit him. His actions and statements while at Chase's desk cast serious doubt and disbelief on his contention that Sharp attacked him in the restroom.

After the incident at Chase's desk Sharp approached Johnson. Chase stepped between them to keep them separated. Chase's actions were clear but despite his efforts Johnson struck Sharp. He engaged in this act after having been told during the incident when the carts collided that this type of behavior would not be tolerated and after Chase took action to separate thereby sending them to their work station. Johnson's striking Sharp was in excess to any threat he faced from Sharp at the time.

Johnson's conduct at Chase's desk and his striking Sharp thereafter as Chase tried to keep them separated constitutes discourtesy, disobedience, and failure of good behavior.

(Sharp and Johnson continued - Page 12)

The respondent contends that both appellants' behavior constitutes intemperance pursuant to Government Code section 19572 (h). In the Third College Edition Webster's New World Dictionary (1988) intemperance is defined as a "lack of temperance restraint; immoderation, "and" excessive drinking of alcoholic liquors." The word intemperate is defined as "not temperate" and "not moderate, lacking restraint, excessive, going to extremes" and "drinking too much liquor".

The appellant's conduct in this instance definitely showed a lack of restraint. Their conduct was intemperate in that it was excessive and went to extremes. Appellant's obviously affected co-workers to the point where one provided Johnson a knife. Further the behavior involved appellant's supervisor, lead worker, and a co-worker due to its intensity. Both appellants' conduct constitutes intemperance pursuant to Government Code section 19572 (h).

PENALTY

The two appellants disagree how each of these escalating events occurred. They blame each other. One thing is clear however, both appellant's participated, they both engaged each other, neither would back down or shut up. The witnesses confirm this fact. Further appellant's behavior disrupted the workplace.

The supervisor and lead worker were unable to do their work since they had to deal with the appellant's behavior. Co-workers Morales and Ivory had their attention drawn away from work. Finally due to that altercation other employees had to cease their labors to write reports on what

(Sharp and Johnson continued - Page 13)

they observed.

In assessing penalty, the State Personnel Board's overriding consideration 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." Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 218. In this instance the disruption of activities caused harm to the public service.

In dealing with violence at the workplace and threatening statements, the State Personnel Board has stated in its precedential decisions that "(t)hreats if physical violence at the work site must be taken seriously by the employer--the harm to the public service is obvious." and "(t)hreatening statements... are so inherently disruptive to the workplace that they justify discharge." Gary Blakeley 93-20 at pp. 7-8, Lolita Gonzales 94-13 at p. 9.

Skelly also dictates that in assessing penalty, (the State Personnel Board) consider the circumstances surrounding the misconduct and the likelihood of recurrence." Blakeley 93-20 at p. 8.

In the present case, both appellants in front of witnesses shouted obscenities at each other and also engaged in a physical altercation. Despite Chase's attempt to separate them and to stop them they continued their confrontation.

(Sharp and Johnson continued - Page 14)

Each appellant testified, in essence, that his co-worker provoked him. In Raymond J. Howard 93-07 at p. 6, the State Personnel Board held that "(w)hile 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." In this case the record provides sufficient evidence in the form of the testimony of Supervisor Chase, Lead Operator Balayut, and co-workers Ivory, and Gonzalez, to find that both of the appellants were responsible for the altercation. The course of conduct between the two could not be justified because both of them had options which they did not use to break the escalating cycle of violence.

Sharp could have stayed at his machine and not walked over to Johnson's area with the dust mop. Johnson could have chosen not to reply in kind. Johnson need not have hit Sharp in the restroom passage way. Sharp could have gone to his work area when told to do so by Chase. Johnson did not have to hit Sharp as Chase tried to keep them separate.

Instead both Sharp and Johnson carried out this escalation of events over a minor debt. When involved in these events they obviously were not doing their jobs.

This was both appellants second time around. They had each received prior adverse actions for similar behavior with each other and told to conduct themselves in an appropriate manner. Both appellants had notice that this type of behavior would not be tolerated.

(Sharp and Johnson continued - Page 15)

The circumstances surrounding the events of November 23, 1993, provide grounds for dismissal of both appellants.

SKELLY ISSUE

Chase wrote a hand written memo relative to the events of November 23, 1993. The memo was not provided appellant Sharp at the time the dismissal notice was served. Appellant contends failure to serve this at the same time the notice of dismissal was served constitutes a violation of the "Skelly" requirement. Appellant Sharp indicates he received Chase's memo sometime after the Skelly hearing, but does not say when. The case of Barker v. State Personnel Board (1976) 18 Cal.3d 395, provides that a failure to comply with Skelly requirements entitles an employee to back pay until the decision in the case is rendered or the violation is remedied. In this case the violation was remedied when appellant received Chase's memo and, entitled to back pay up to that date.

* * * * *

WHEREFORE IT IS DETERMINED that the dismissal taken by respondent against Gary Sharp effective February 1, 1994, is hereby sustained without modification and the dismissal taken by respondent against Frankie J. Johnson effective February 8, 1994, is hereby sustained without modification.

* * * * *

(Sharp and Johnson continued - Page 16)

I hereby certify that the foregoing constitutes my Proposed Decision in the above-entitled matter and I recommend its adoption by the State Personnel Board as its decision in the case.

DATED: January 31, 1995.

JOSE M. ALVAREZ
Jose M. Alvarez,
Administrative Law Judge,
State Personnel Board