

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)

T [REDACTED] B [REDACTED])

From two working days suspension from)
the position of Senior Special Agent in)
Charge with the Department of Justice at)
Sacramento)

SPB Case No. 02-2856

BOARD DECISION

(Precedential)

NO. 04-01

May 4-5, 2004

APPEARANCES: Jolie N. Poper, Legal Counsel, California Union of Safety Employees (CAUSE), on behalf of appellant, T [REDACTED] B [REDACTED]; Susan Slager, Deputy Attorney General, Department of Justice, on behalf of respondent, Department of Justice.

BEFORE: Ron Alvarado, Vice President; Maeley Tom and Anne Sheehan, Members.

DECISION

This case is before the State Personnel Board (Board) after the Board rejected the ALJ's Proposed Decision granting appellant's motion to dismiss the majority of the charges on the ground that the disciplinary action was not brought within the 1-year period specified in the Public Safety Officers' Procedural Bill of Rights Act (POBOR).¹ In this Decision, the Board concludes that the 1-year period began to run when a person with authority to initiate an investigation into possible misconduct by appellant received a draft audit report concerning the cause of a cash discrepancy, not when the audit itself was commenced. Accordingly, the Board denies appellant's motion to dismiss and remands this matter for hearing on the merits of the remaining charges.

¹ Gov. Code, § 3304, subd. (d).

BACKGROUND

Factual Summary²

Since his appointment with the Department of Justice (DOJ) in 1985, appellant has held the positions of Special Agent (SA), Special Agent Supervisor (SAS), Special Agent in Charge (SAC), and, since 1998, Senior Special Agent in Charge (SSAC). Appellant is a peace officer and is therefore entitled to the protections set forth in the Public Safety Officers Procedural Bill of Rights (POBOR).³ In 2001, appellant received an official reprimand based upon allegations that he violated numerous DOJ policies and procedures related to the misplacement and re-depositing of \$5,000 in State funds.

As an SSAC, appellant is the senior manager of the Bureau of Narcotics Enforcement (BNE), Sacramento Regional Office. In that capacity, he is responsible for administrative and operational oversight of DOJ's narcotics enforcement regarding the trafficking of illegal narcotics in 16 counties. He is also responsible for the Investigative Fund and for ensuring that the Sacramento Regional Office complies with the DOJ Policy and Procedures Manual. Appellant is ultimately responsible for all matters regarding these funds and compliance with the manual. Appellant has over 100 employees under his charge.

² The Board adopts substantially the ALJ's factual findings as set forth herein. Only those facts relevant to the POBOR issue are set forth herein.

³ Gov. Code, § 3300, et seq.

In November 2000, appellant conducted a routine monthly audit on the Sacramento BNE's funds on hand and determined that the BNE had an approximate \$1,000 discrepancy for which he could not account. Appellant repeated the audit to discover the source of the discrepancy, but could not find it. Appellant reported the discrepancy to his supervisor, Assistant Chief of the BNE. In February 2001, auditors from the Fresno BNE regional office conducted an audit for November 2000 of the Sacramento regional office, but they were still unable to find the cause of the discrepancy.

The Director and Assistant Director of the DOJ Division of Law Enforcement became concerned that the discrepancy may have been due to an error by the Bank of America, whose error had accounted for a similar discrepancy in the past. Therefore, the Assistant Director decided to have an internal audit conducted by the Office of Program Review and Audits (OPRA), which is part of a different division of the DOJ. OPRA is responsible for conducting all audits on State funds within DOJ and has access to all accounting records, bank deposit slips and copies of State Controller's Office tapes. According to Wilfred Cid, Acting Chief of the Mission Support Branch (MSB), the purpose of the OPRA audit was not to investigate appellant for wrongdoing but to determine the cause of the monetary discrepancy.

On June 1, 2001, Patrick Lunney, Director of the DOJ Division of Law Enforcement, sent a "Letter of Understanding" to Georgia Fong, Director of OPRA, requesting a "special" review of the BNE Sacramento Regional Officer's Operator

Evidence Funds. The letter stated that the scope of the review was to determine if:

- Policies and Procedures regarding the use of the operator evidence funds were adequate for internal control purposes.
- The operator evidence funds were adequately safeguarded.
- The use of the operator evidence funds was properly authorized.
- The supporting documents, including receipts for money advanced (IOUs), vouchers, operator files, evidence files, informant files provided an adequate audit trail and sufficient information as to the purpose of each advance.
- Monthly evidence cash fund audit reports were properly prepared and reported.
- The Recovered Money Receipts are adequately safeguarded and recorded.

The Letter of Understanding authorized the review to begin in June 2001 and to conclude by September 30, 2001. All of the areas identified for the auditor concerned the subject matter over which appellant had immediate responsibility or for which he was ultimately responsible.

While the OPRA audit was considered a “special” review in that it occurred earlier than normal, the six areas identified in the letter of understanding were the same six areas normally covered by all OPRA audits. Appellant’s office had previously been the subject of approximately six or seven prior OPRA audits. These audits routinely occurred approximately every 18 months, were conducted by two auditors, and lasted approximately one week. This audit was different in that three auditors were assigned

to conduct the audit and that it took several weeks to complete. It was also different in that, in the past, appellant had received a copy of the audit findings, whereas on this occasion he did not receive a copy until he received the notice of adverse action in this case.

During the OPRA audit, the auditors asked appellant questions to clarify issues or explain how the system worked. Appellant admitted that he was not formally interrogated as he would have been if he had been subjected to an internal affairs interview.

OPRA completed the draft audit report on June 27, 2001. The report began by stating that the auditors “have examined management’s assertion, included in its representation letter dated July 27, 2001, that the Department of Justice, Bureau of Narcotics Enforcement maintained adequate internal control over financial reporting as of April 30, 2001.”⁴ The report concluded: “In our opinion, subject to the numerous conditions mentioned in the executive summary, management’s assertion that the Department of Justice, Bureau of Narcotic Enforcement maintained adequate internal control over financial reporting as of April 30, 2001 [sic]. The internal process, taken as a whole, was sufficient to meet the objectives stated above.” The report went on, however, to list 11 areas of concern, known as “Conditions,” that had been identified by the auditors, along with recommendations for correcting those Conditions. Of these Conditions, Condition 2 (Evidence Expense Vouchers were incompletely filled out and contained inaccurate information) and Condition 3 (IOU books were not filled out

⁴ The July 27, 2001 letter is not included in the record before the Board.

completely and accurately) further identified the specific individuals, by title, including appellant, who had committed errors. In addition, Condition 11 focused specifically on the \$1,000 shortage and the cause of that shortage. The report concluded that the auditors could not determine the cause for the \$1,000 shortage, but recommended that appellant personally reimburse the \$1,000 because he had “ultimate responsibility” for all funds in the BNE Sacramento regional office.

On October 9, 2001, Fong and the auditors presented the draft audit report to Cid. On December 20, 2001, Cid sent the finalized report to Director Lunney for his comment. Director Lunney returned the audit report and authorized Cid to conduct an internal affairs investigation into the situation. According to Cid, the internal affairs investigation was opened to determine who was responsible for the mismanagement in the BNE office that had been identified in the OPRA audit report.⁵

The matter was then forwarded to the DOJ Professional Standards Group (PSG), which began an investigation on January 2, 2002. The OPRA audit report was forwarded to the investigator for use in the investigation. The investigator met with the auditors from OPRA, who provided her with the underlying documentation supporting the audit. The investigator also reviewed most of the same documents the OPRA auditors reviewed. The investigative report cites the findings and conclusions of the OPRA audit report.

⁵ The record contains some testimony indicating that DOJ decided not to take adverse action against appellant based upon the missing \$1,000 because of the 1-year statute of limitations set forth in Government Code section 3304, subdivision (d). The issue of whether or not the Department was correct in its determination that it was barred from taking disciplinary action on that basis is not before the Board in this proceeding and will not be addressed in this decision.

On January 22, 2002, the PSG sent appellant a letter notifying him that PSG had received information that alleges appellant may have violated Government Code section 19572, subdivisions (c), (d) and (t), and that an internal affairs investigation had been initiated against him. The investigative report was completed on May 27, 2002. The Department served appellant with a Notice of Adverse Action on July 26, 2002.

Procedural Summary

At a bifurcated hearing, the ALJ granted appellant's motion to dismiss all but two of the charges on the ground that the notice of adverse action was not served within 1 year after the Department authorized and commenced the OPRA audit.⁶ After taking evidence on the two remaining charges, the ALJ recommended modifying the discipline to an official reprimand.⁷

The Board rejected the ALJ's Proposed Decision to consider whether the OPRA audit constituted an "investigation" under POBOR so as to trigger the 1-year period for giving notice of proposed disciplinary action.

ISSUE

Whether the OPRA audit commenced on June 1, 2001 constituted an "investigation" under POBOR so as to trigger the 1-year period for giving notice of proposed disciplinary action against appellant.

⁶ The ALJ did not dismiss the remaining charges because they did not appear to correspond to any of the findings of the OPRA audit report.

⁷ Those charges involved allegations that appellant failed to provide a proper accounting for recovered money receipts and failed to comply with a memorandum requiring the use of new operator-evidence expense voucher forms.

DISCUSSION

POBOR has been described as “primarily a labor relations statute” that “provides a catalog of basic rights and protections that must be afforded all peace officers by the public entities which employ them.”⁸ POBOR, therefore, provides specific procedural rights to peace officers who are under investigation.⁹ Included among those basic rights is the requirement that an agency must notify a peace officer of any proposed disciplinary action within 1 year of the public agency’s discovery of the alleged misconduct by a person authorized to initiate an investigation. Government Code section 3304, subdivision (d), provides, in pertinent part:

Except as provided in this subdivision and subdivision (g), no punitive action ... shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency’s discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct. This one-year limitation period shall apply only if the act, omission, or other misconduct occurred on or after January 1, 1998. In the event the public agency determines that discipline may be taken, it shall complete its investigation and notify the public safety officer of its proposed disciplinary action within one year ... (emphasis added.)¹⁰

Recently, the Board addressed the issue of who constitutes a “person authorized to initiate an investigation” within the meaning of section 3404, subdivision (d). In H M and L S (“M / S”),¹¹ we concluded that the mere fact that

⁸ California Correctional Peace Officers Association v. State of California (2000) 82 Cal.App.4th 294 (hereinafter “CCPOA v. State”).

⁹ Pasadena Police Officers Assn. V. City of Pasadena (1990) 51 Cal.3d 564, 567; see also Los Angeles Police Protective League v. City of Los Angeles (1995) 35 Cal.App.4th 1535, 1540 (“[T]he act is concerned primarily with affording individual police officers certain procedural rights during the course of proceedings which might lead to the imposition of penalties against them.”)

¹⁰ Government Code section 19635 sets forth a three-year limitations period within which state employers must take formal disciplinary action against state civil service employees.

¹¹ (2003) SPB Dec. No. 03-07.

correctional officers witnessed their supervisor and a fellow officer engaging in misconduct was insufficient to trigger the 1-year period under POBOR. Instead, we stated:

We conclude that, for the limitations period set forth section 3304, subdivision (d), to come into play, and in the absence of any specific identification or authorization by the Department, the “person authorized to initiate an investigation” must be affirmatively vested with some authority to conduct or supervise an investigation into the alleged misconduct and to either take disciplinary action or to report the investigatory findings to one who can act upon them. We will not presume that a mere witness to possible misconduct who has no such authority is vested with such authority *per se*, notwithstanding any obligation he or she may have to report the misconduct.¹²

The decision of the Court of Appeal in Haney v. City of Los Angeles¹³ is also relevant here. In that case, several police officers with the Los Angeles County Police Department (LAPD) held a Memorial Day barbecue on an abandoned naval base while they were supposed to be on duty. Within a few days, a sergeant learned of the barbecue but, at that point, was concerned only that there might have been a breach of protocol and did not suspect misconduct. One month later, after completing a routine attendance audit, the sergeant discovered a discrepancy in the attendance of two of the officers who had been involved in the barbecue. At that point, he became concerned that this incident might be indicative of a broader problem and that the officers may have engaged in misconduct in connection with the barbecue. He reported his concerns to his captain, who ordered an investigation. The court held that the public agency did not discover the alleged misconduct until the sergeant relayed his concerns

¹² Id. at p. 8.

¹³ (2003) 109 Cal.App.4th 1.

to the captain one month after the incident. Prior to that date, the sergeant knew only that the officers may have violated protocol by holding a barbecue, but did not know if the event had been authorized by anyone. Thus, the 1-year period was not triggered until the sergeant discovered the additional attendance discrepancy that led him to suspect misconduct and reported the potential misconduct to someone with authority to initiate an investigation.

The same principle applies here. OPRA is not a person or entity authorized to initiate an investigation into alleged employee misconduct, nor is it authorized to take or recommend disciplinary action. Instead, its function is to conduct internal audits of DOJ operations to enable the agency to identify the source of errors or discrepancies so that they may be corrected. The June 21, 2001 audit letter makes it clear that the purpose of the audit was not to investigate any employee misconduct—indeed, none had been alleged—but to review BNE’s policies, procedures, and actual practices concerning the safeguarding and use of funds entrusted to it. The somewhat unusual timing of the audit was precipitated by the fact that two prior audits had failed to disclose the reason for a \$1,000 cash discrepancy. Nothing in the audit letter indicates that the purpose of the audit was to investigate appellant for alleged misconduct.

The fact that the notice of adverse action utilized portions of the audit report as the basis for the charges is irrelevant. It was only after the audit report was provided to the Director of the Division of Law Enforcement that the Department commenced an investigation into possible misconduct by appellant in connection with the audit findings. Appellant was properly notified of the pendency of that investigation and received all rights to which he was entitled under POBOR.

While OPRA is obligated to report its findings to the Director, who may then decide to initiate an investigation into possible employee misconduct, the commencement of the audit itself does not constitute an investigation within the meaning of section 3404, subdivision (d). Instead, it was only when the results of the OPRA audit were turned over to Cid in October 2001 did someone with authority to initiate an investigation have knowledge of possible misconduct by appellant. Accordingly, the 1-year period did not begin to run until at least October 9, 2001, when Cid received the draft OPRA audit report.¹⁴

CONCLUSION

Strong public policies support departments conducting their own audits to identify internal operational inadequacies and to correct them. Applying POBOR's 1-year limitation for giving notice of proposed disciplinary action to such an audit would undermine that policy by requiring departments to consider every internal audit as a disciplinary investigation, even when they have no reason to suspect any specific employee misconduct. While POBOR was intended to provide protection for peace officers who are actually under investigation, it was not intended to hamper the ability of

¹⁴ The record does not indicate whether Cid had authority to initiate an investigation within the meaning of Government Code section 3304, subdivision (d), or whether only Director Lunney had such authority. Nonetheless, the Department has argued that the 1-year limitations period began to run on October 9, 2001, when Cid received the draft audit report. In this Decision, we do not reach the issue of whether the 1-year period began to run on October 9, 2001, when Cid received the draft audit report, or on December 20, 2001, when Cid forwarded the report to Director Lunney, who then authorized Cid to initiate an internal affairs investigation. In either case, the notice of adverse action would have been timely served within the 1-year limitations period.

public agencies to engage in constructive self-examination. The notice of disciplinary action in this case was timely served.¹⁵

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 motion of appellant to dismiss the disciplinary action is denied;
2. The Board adopts the ALJ's findings of fact and determination of issues concerning Charge I.7.b and Charge III, with the exception of the determination of penalty;
3. This matter is remanded for an evidentiary hearing before a different ALJ for the sole purpose of taking evidence on the remaining charges and reassessing the penalty. The ALJ shall review the transcript of the prior proceedings before the ALJ and shall prepare a new Proposed Decision that includes the prior ALJ's findings of fact and determination of issues with respect to Charge I.7.b and Charge III, and shall make further findings of fact and conclusions of law with respect to of the remaining charges and determine the appropriate penalty, if any;
4. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

¹⁵ Nothing in this decision is intended to supersede the requirement under Government Code section 19635 that disciplinary action against a state civil service employee must be served within three years after the cause for discipline, upon which the notice is based, first arose, except that, where the adverse action is based on fraud, embezzlement, or the falsification of records the notice may be served within three years after the discovery of the fraud, embezzlement, or falsification.

STATE PERSONNEL BOARD¹⁶

Ron Alvarado, Vice President
Maeley Tom, Member
Anne Sheehan, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on May 4-5, 2004.

Laura Aguilera
Interim Executive Officer
State Personnel Board

[E [REDACTED]-dec]

¹⁶ President Elkins and Member Harrigan did not participate in this decision.