BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **R[redacted] [redacted]. N[redacted]** From dismissal from the position of Correctional Officer, San Quentin State Prison, Department of Corrections at San Quentin	)	Case No. 28742 **BOARD DECISION** (Precedential) **NO. 92-07** April 7, 1992

Appearances: Mark A. Steinberg, Staff Legal Counsel, California Correctional Peace Officers Association; Daniel B. Vasquez, Warden, San Quentin State Prison, representing respondent, Department of Corrections.

Before 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 granted the Petition for Rehearing filed by the appellant R[redacted] N[redacted] (appellant or N[redacted]) after the Administrative Law Judge (ALJ) had sustained her dismissal from the position of Correctional Officer at San Quentin State Prison.

Pursuant to its granting of the Petition for Rehearing, the Board accepted written briefs.[1] After review of the entire record, including the transcripts and briefs submitted by the parties, the Board modifies the penalty of dismissal to a six-month suspension, for the reasons set forth below.

[1]The parties did not request oral argument.

FACTUAL SUMMARY

Appellant began work with the State as an Office Assistant II with the Department of Transportation in 1981. She became a Correctional Officer at San Quentin on June 27, 1983.

In order to evaluate the propriety of the discipline imposed for the December 20, 1989 incident that is the subject of this adverse action, that incident must be viewed in the context of prior similar incidents. The timing of the prior incidents and the timing of the discipline imposed for the earlier incidents is significant.

The first incident of appellant being "less than alert" occurred on October 15, 1988. Nearly six months later, on May 6, 1989, Appellant received a Letter of Instruction (LOI) for that incident. The LOI indicates that Appellant had been observed by a Correctional Lieutenant sitting on the gunrail with her feet propped up on the railing and a jacket draped over her arms and upper body like a blanket and that she had failed to respond to the Lieutenant until after he had called to her several times. The LOI advised appellant "to demonstrate a more alert state of mind and respond in a clear manner to any staff member calling out to you."[2]

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[2]LOIs are not adverse actions and generally remain in an employee's file for one year from the date of receipt, at which time the employee may request to have it removed. The record does not reflect whether appellant requested that the above-mentioned LOI be removed from her personnel file. The LOI was introduced into evidence, without objection, for the purpose of showing that some progressive discipline had been initiated. We cite it here for the sole purpose of showing appellant received instruction to demonstrate an alert state of mind by responding when called.

The second incident of appellant being less than alert occurred on September 23, 1989. Approximately seven months after this second incident, in April 1990, Appellant received a one-step reduction in salary for one year for that incident. N[redacted] appealed the salary reduction (SPB Case No. 279091) and the Board sustained the discipline on October 23, 1990.

In November 1989, appellant applied for a job change. Appellant testified that she put in for a job change to a position as a housing officer in H-Unit where she would not be on gunrail but on the ground doing counts and reading mail. Sergeant F[redacted] [redacted]. B[redacted], III (B[redacted]) testified that he sent in the paperwork to the Personnel Lieutenant for the job change for appellant from west block to H-Unit, but he did not know what happened to the job change request. Appellant secured a job change and shift change from First Watch (graveyard) to Third Watch (3:00 o'clock to 11:00 o'clock) in February 1990, prior to receiving the adverse action for the September 1989 incident.

In the meantime, on December 20, 1989, prior to receiving the job change and prior to receiving the adverse action for the September incident, appellant was again accused of being less than alert. The ALJ made the following factual findings:

> On December 20, 1989, appellant was on duty on the West Block gunrail on First Watch. She was stationed in an

armed position, with a responsibility to provide armed cover for officers and others who were assigned guard duty on the tiers below.

About two in the morning, the First Watch Commander entered the West Block on a routine check. Appellant was in a position where she could have seen him enter, but did not acknowledge his presence. He yelled up at her and received no response. When he looked up at her, he observed that her eyes were closed and her head was resting on her hand. The Commander motioned other officers to follow him up to appellant's post. One of them testified at the hearing she observed that appellant was sleeping. Appellant awoke when she heard the jangling of keys and the calls of the Commander.

Between March 1990 and August 1990, appellant had no problems with being less than alert and her performance was at least standard. In April 1990 she was served with the Notice of Adverse Action (One-Step Reduction in Pay for Six Months) for the September 1989 incident, effective May 1990. In August 1990, appellant was served with the Notice of Adverse Action (Dismissal), effective August 28, 1990 based on the December 1989 incident.

ISSUE

Was progressive discipline appropriately administered in this case so as to justify dismissal as the appropriate penalty for the conduct charged and proven at the hearing?

DISCUSSION

We agree with the ALJ's finding that the Department established by a preponderance of the evidence that appellant is guilty of inexcusable neglect of duty and other failure of good behavior for sleeping while on an armed post. We do not agree,

however, that dismissal is the appropriate penalty under all the circumstances.

When performing its constitutional responsibility to "review disciplinary action" [Cal. Const. Art. 7, §3(a)], the Board is charged with rendering a decision which, in its judgment, is "just and proper" (Government Code section 19582). One aspect of rendering a "just and proper" decision involves assuring that the discipline imposed is "just and proper." In determining what is a "just and proper" penalty for a particular offense, under a given set of circumstances, the Board has broad discretion; it is not obligated to follow the recommendation of the employing power. (See Wylie v. State Personnel Board (1949) 93 Cal.App.2d 838, 843, 109 P.2d 974.) The Board's discretion, however, is not unlimited. In the seminal case of Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194, the California Supreme Court noted:

> While the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, it does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion. (Citations.) 15 Cal.3d at 217-218.

In exercising its judicial discretion in such a way as 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 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.)

In this case, the harm to the public service is serious. Other officers and inmates rely on the gunrail officer for their personal safety and essential security. The job of gunrail officer requires absolute alertness.

An evaluation of the circumstances surrounding the misconduct in this case, however, reveals a problem with the Department's application of progressive discipline. Historically, the SPB has followed the principles of progressive discipline in exercising its constitutional authority to review disciplinary actions under the State Civil Service Act. The principles of progressive discipline require that an employer, seeking to discipline an employee for poor work performance, follow a sequence of warnings or lesser disciplinary actions before imposing the ultimate penalty of dismissal.[3] The obvious purpose of progressive discipline is to provide the employee with an opportunity to learn from prior mistakes and to take steps to improve his or her performance on the job. Thus, corrective and/or disciplinary action should be taken

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[3] While the principles of progressive discipline are well-suited to treating problems of poor work performance, it should be noted that serious willful misconduct on the part of an employee may well warrant dismissal in the first instance.

by a department on a timely basis: performance problems should not be allowed to accumulate before progressive discipline is initiated.

While the Department, in this case, did administer progressively severe discipline for appellant's performance problem of "being less than alert" on the job, the Department's timing of the disciplinary actions and its disregard of appellant's attempts to remedy her problem did not fulfill the purpose of progressive discipline. The discipline was not administered in a timely fashion, the incidents accumulated before successive formal adverse actions were served, and appellant's attempts to rectify the situation and actual improvement after her transfer to Third Watch were not recognized.

The first incident of "less than alert" occurred in October 1988 and was the subject of the informal discipline of an LOI which was not issued until six months later in May 1989. The second incident which occurred in September 1989 did not result in formal adverse action until April 1990, after seven months had elapsed from the charged incident and after a third incident had occurred. Thus, the April 1990 discipline could not possibly serve as a formal warning preceding the December 1989 incident.

Nevertheless, in November 1989, after the September 1989 incident, Appellant took steps to solve her "less than alert" problem by requesting a transfer from First Watch (graveyard shift)

to Third Watch. Unfortunately, appellant's request for transfer was not granted until February 1990, after the December 1989 incident occurred. Thus, appellant was afforded no opportunity to alleviate the cause of her problem by seeing her transfer through, until she had already committed the same misconduct again.[4] She was then not disciplined for the December 1989 incident until after she had transferred to Third Watch and successfully worked that shift for eight months. Thus, the training aspect of progressive discipline was substantially absent in this case.

Other circumstances having bearing on our view that dismissal is inappropriate in this case include appellant's longevity of state service (approximately nine years), generally good work record, and absence of adverse actions other than the one prior formal adverse action discussed herein.

Furthermore, the Department has not demonstrated the likelihood of recurrence of the misconduct. In fact, the appellant demonstrated the unlikelihood of recurrence once she transferred from First Watch to Third Watch and successfully worked the new shift for a period of eight months without incident. The parties

[4] What we recognize here is the undisputed fact that appellant had sufficient seniority to be entitled to work her choice of shifts. We do not mean to suggest here that any Correctional Officer who has a demonstrated "less than alert" problem be excused from this serious performance deficiency merely because he or she is working First Watch. Obviously, being alert is a primary responsibility of a Correctional Officer working an armed post on any shift.

all agreed at the hearing that appellant had enough seniority so that she would not have to work a First Watch schedule.

CONCLUSION

Although the nature of appellant's misconduct is serious, we find that the ultimate penalty of dismissal is not appropriate under all the circumstances. We find a six-month suspension without pay to be an appropriate penalty in this case. We note, however, that appellant has now been clearly warned: should appellant be proven less than alert again, dismissal may well be appropriate.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code sections 19582 and 19584, it is hereby ORDERED that:

1. The above-referenced adverse action of dismissal taken against R[redacted] N[redacted] be modified to a six-month suspension.

2. The Department of Corrections and its representatives shall reinstate appellant R[redacted] N[redacted] to her position of Correctional Officer and pay to her all back pay and benefits that would have accrued to her had she not been wrongfully terminated, from a date six (6) months after the effective date of the termination to the date of reinstatement.

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 opinion is certified as publication as a Precedential Decision (Government Code section 19582.5)

STATE PERSONNEL BOARD*

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

*President Richard Chavez did not participate in this decision.

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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 7, 1992.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board