BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **L[redacted] W[redacted]** From a dismissal from the position of State Traffic Officer, Department of the California Highway Patrol in Los Angeles.	)	SPB Case No. 29018 **BOARD DECISION** (Precedential) NO. 93-17 June 1, 1993

Appearances: Anthony M. Santana, Esq. Legal Counsel representing appellant, L[redacted] W[redacted]; Martin H. Milas, Deputy Attorney General, representing the California Highway Patrol, respondent.

Before Carpenter, President; Stoner, Vice President; and Ward, Member.

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 L[redacted] [redacted]. W[redacted] (appellant) who had been dismissed from her job as a State Traffic Officer with the Department of Highway Patrol (Department or Highway Patrol). The Department dismissed appellant upon discovering that she possessed methamphetamine, an illegal substance, at her home.

The ALJ who heard the matter found that appellant was guilty of possessing and using methamphetamine. However, she also found sufficient evidence that appellant had been rehabilitated from drug use since her dismissal, and took that evidence into account in modifying the dismissal to a 19 month suspension. The Board

determined to decide the case itself, based upon the record and additional arguments submitted both in writing and orally. After a review of the entire record, including the transcript and briefs submitted by the parties, and after having listened to oral argument, the Board rejects the Proposed Decision of the ALJ and affirms the Department's dismissal of appellant for the reasons set forth in this decision.

FACTUAL SUMMARY

Appellant began work as a State Traffic Officer for the Highway Patrol in 1983. She has one prior adverse action from 1985, a two days' suspension, for falling asleep while driving and causing an accident with her patrol vehicle.

In March of 1986, Captain Tex Driver of the Highway Patrol, who had known appellant for a long time, suspected that appellant was taking illegal drugs. Captain Driver had a long talk with appellant one evening, suggesting that appellant had a drug problem and asking if he could help in any way. He urged appellant that if she did have such a problem, she should discuss it with someone, such as a close friend or someone she trusted. Appellant denied having any problem, but did later call a friend and they discussed different counseling-type resources. Captain Driver did not bring up the matter again and nothing appears to have happened as a result of the conversation with the friend.

On October 21, 1990, appellant was residing at the home of her

boyfriend, Deputy Ruben Mendoza, a Los Angeles Deputy Sheriff assigned to the Narcotics Bureau. Appellant had been living with Deputy Mendoza for about a year. On this night, Deputy Mendoza observed appellant to be manifesting symptoms which indicated to him that she might be under the influence of a drug or stimulant. Deputy Mendoza had previously suspected drug use, and had even asked appellant from time to time if she was using drugs. Appellant always avoided the question. On this night, while appellant was taking a shower, Deputy Mendoza went into appellant's clothes closet and searched appellant's purse. He found methamphetamine in the purse.

When appellant stepped out of the shower, Deputy Mendoza confronted her with what he had discovered. Appellant confessed to Deputy Mendoza, her boyfriend, that she had been taking the methamphetamine and that she knew she needed help. Deputy Mendoza immediately seized the drug and contacted appellant's employer, the Highway Patrol, and reported to them what he had found. The Highway Patrol subsequently dismissed appellant effective November 29, 1990, charging appellant with violation of Government Code section 19572(t), other failure of good behavior either during or outside of duty hours which is of such nature that it causes discredit to the appointing authority or the person's employment. Appellant was never arrested by law enforcement officials for her possession of the methamphetamine.

The evidence in the record reveals that appellant was using methamphetamine for approximately four years on an occasional basis before the October 1990 incident. She claims that her drug problem began in 1986 when she began using prescription diet pills to help her with weight loss. She subsequently became addicted, and when unable to obtain the diet pills through legal means, she turned to purchasing methamphetamine.

Immediately after being confronted with the drugs, appellant voluntarily entered a professional drug rehabilitation program where she remained for a period of about 18 days. Afterwards, she was released from the program and continued to receive out-patient therapy to help her with her addiction. A physician from appellant's drug rehabilitation program testified at the hearing that he had overseen appellant's progress since entering the rehabilitation program and felt, in his estimation, she had a very good chance of never returning to drug use. Appellant claims she has not used illegal drugs since the night of October 21, 1990.

ISSUE

Whether evidence of rehabilitation should have an impact on the penalty assessed against a peace officer who has possessed and/or used controlled substances?

DISCUSSION

Consideration Of Rehabilitation Evidence In The Assessment Of The Proper Penalty

The ALJ's expressed rationale for modifying the penalty was

that the Board has traditionally considered evidence of rehabilitation in determining whether peace officers or others should be given a second chance after being dismissed for illegal drug use.

The appellant argues that the penalty of dismissal is too severe in light of the fact that courts recognize that evidence of rehabilitation can be introduced to mitigate the severity of an administrative penalty. The Board agrees with this principle, yet it finds insufficient grounds to reduce the penalty in this case.

The Board is charged with rendering decisions that are, in its judgment, "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. (See Wylie v. State Personnel Board (1949) 93 Cal.App.2d 838, 843.) The Board's discretion, however, is not unlimited. In the case of Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194, the California Supreme Court set forth factors for the Board to consider when assessing the proper penalty:

> ...[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. 15 Cal.3d at 217-218.

The Board agrees with appellant that evidence of rehabilitation is something that the Board can consider when assessing the proper penalty to impose. Department of Parks & Recreation v. State Personnel Board (1991) 233 Cal.App.3d 813. Evidence of post-dismissal rehabilitation is relevant to the question of repeated misconduct by the employee and therefore can be considered by the Board as a Skelly factor. Id. at p. 828. However, the Board may not rely solely upon evidence of post-dismissal rehabilitation to modify the dismissal. Ibid.

In this instance, the appellant's actions constitute serious criminal misconduct. The fact that the likelihood of recurrence may be reduced because of the evidence of rehabilitation does not necessarily require the Board to modify the penalty of a dismissal. Rather, as stated in Skelly, the Board's "overriding consideration" is the harm to the public service. The Board believes that the facts of this case demonstrate sufficient harm to the public service to justify a dismissal under the circumstances.

Appellant was a peace officer employed as a Highway Patrol officer. The Board has repeatedly found, and the courts concur, that peace officers may be held to higher standards of conduct than non-peace officers. (See, Jesus H. Reyes (1993) SPB Dec. No. 93-04.) As set forth in D[redacted] G[redacted] (1992) SPB Dec. No. 92-08, dishonesty by law enforcement personnel has been treated with due harshness by our courts. (See, e.g. Pauline v. Civil Service Comm.

(1985) 145 Cal.App.3d 962; Warren v. State Personnel Board (1979) 94 Cal.App.3d 95.)

In Ackerman v. State Personnel Board (1983) 145 Cal.App.3d 395, the court emphasized the importance of honest reputations with respect to officers of the California Highway Patrol when it stated:

> 'The CHP as a law enforcement agency charged with public safety and welfare must be above reproach.' [citation]...
>
> ...CHP officers are held to the highest standard of behavior: the credibility and honesty of an officer are the essence of the function; his duties include frequent testifying in court proceedings...
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> ...The position of a CHP officer by its nature is such that very little direct supervision over the performance can be maintained...Any breach of trust must therefore be looked upon with deep concern. Dishonesty in such matters of public trust is intolerable. 145 Cal.App.3d at p. 399-400.

The Ackerman court concluded that the unlawful activity of a police officer (a Highway Patrol officer in that case) warranted dismissal. Id. at 399.

Appellant engaged in serious criminal acts during a period of four years while employed as a Highway Patrol officer. It is unlikely the department or her fellow officers will ever be able to place their complete trust in her again, as is critical to the nature of the job. Moreover, appellant's credibility as a law enforcement officer is irreversibly damaged by her misconduct. Given the seriousness of appellant's criminal activities and the direct relationship between those activities and appellant's duties

as a law enforcement officer for the Highway Patrol, the Board feels that appellant is no longer able to perform the duties required of the position. Even considering the evidence presented of appellant's rehabilitation efforts, the Board nevertheless finds the harm to the public service to be ongoing rather than transitory: the lasting harm to the public service is serious enough to merit the penalty of a dismissal.

Comparing The Penalty With Those Imposed In Alcohol Abuse Cases

Appellant also argued before the Board that the penalty of dismissal is too severe in light of the fact that the Board has traditionally imposed penalties of suspension, not dismissal, for peace officers who are involved in misconduct resulting from the abuse of alcohol, even when the incidents are repeated. The appellant argues there is little difference between misconduct resulting from alcohol and illegal drug use. The Board rejects this argument.

The cases involving alcohol abuse cited by appellant are easily distinguishable from the case at hand. The most obvious difference is that the possession, purchase and use of alcohol is legal, whereas the purchase and use of methamphetamine in this case, as admitted to by the appellant in her testimony, involved repeated serious criminal activity. Furthermore, while the Department concedes that the possession of the drug is only a misdemeanor, the facts at the hearing reveal that appellant

assisted another person in committing a felony when she purchased the drugs from another. We find appellant's criminal activity over a period of approximately four years to be serious enough to warrant a dismissal.

Disparate Treatment Argument

Appellant also argues that other peace officers have been found to have used illegal drugs in the past, yet the Board has allowed them to remain in their jobs. The appellant argues therefore that she has been the subject of disparate treatment.

A similar issue arose in the case of G[redacted] O[redacted] (1992) SPB Dec. No 92-11.[1] In the O[redacted] case (which is factually similar to the case at hand), a State Traffic Officer was dismissed from his job after it was discovered that he had been purchasing and using marijuana on a regular basis. O[redacted] raised the argument that past Board decisions have upheld penalties of less than a dismissal where there was evidence that the peace officer had used drugs. O[redacted] urged that the Board should do likewise and modify his dismissal to a suspension.

The Board noted in O[redacted] that non-precedential decisions of the Board are not binding. Moreover, the Board found that the peace officer cases cited by O[redacted] were not persuasive authority

[1] The O[redacted] case is before the San Francisco Superior Court, Case No. 946462 on a petition for writ of administrative mandamus. At the time of the issuance of this decision, no decision had been issued in that case.

for modifying O[redacted]' penalty from a dismissal, in that the former cases were all distinguishable from Mr. O[redacted]' case. The Board in O[redacted] found that dismissal was appropriate as O[redacted] was a State Traffic Officer charged with law enforcement and broke the law on numerous occasions by using and purchasing marijuana. In determining that the penalty of dismissal was appropriate, the Board cited case law which stated:

> A law enforcement agency cannot permit its officers to engage in off-duty conduct which entangles the officer with lawbreakers and gives tacit approval to their activities. Such off-duty conduct casts discredit upon the officer, the agency and law enforcement in general. Warren v. State Personnel Board (1979) 94 Cal.3d 95, 106.

As in O[redacted], appellant argues that the Board in prior decisions (B[redacted] L[redacted], SPB No. 22750; C[redacted] G[redacted], SPB No. 9296; S[redacted] T[redacted], SPB No. 9971; and E[redacted] V[redacted], SPB No. 23854) approved penalties of less than a dismissal for conduct involving a peace officer's use of illegal drugs.[2] However, the Board has no trouble reconciling these prior decisions with the assessment of the penalty of dismissal in this case.

Again, the cases cited are factually distinguishable from appellant's case. None of the cases involved evidence of the use of controlled substances such as methamphetamine, and none appear to have involved evidence of the purchase of such drugs from

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[2] The appellant also cites Cortez Brown and Michael J. Walsh which the Board need not consider. Brown was a non-peace officer case and Walsh was a case which was apparently not before the State Personnel Board or published decision.

another person. Thus, the Board does not find those cases to be persuasive authority for reducing the penalty from a dismissal to a suspension.

Impact Of The Rehabilitation Act And
The Americans With Disabilities Act

Finally, appellant argues that drug addiction is a "handicap" as defined by The Rehabilitation Act of 1973 and The Americans With Disabilities Act of 1990, and thus, appellant can not be dismissed for misconduct attributable to a "handicap."

The Rehabilitation Act of 1973 (29 U.S.C. section 701 et seq.) prohibits discrimination against disabled persons in the federal government, in entities which contract with the federal government, and in entities which receive federal subsidies. Under the Rehabilitation Act, an individual is defined as "handicapped" if i) they have a physical or mental impairment which substantially limits one or more of such person's major life activities, ii) has a record of such an impairment, or iii) is regarded as having such an impairment. 29 U.S.C. section 706(8)(B). To meet this definition of "handicapped", the individual must also be "otherwise qualified" for the position; in other words, otherwise able to meet all of the requirements for the job in spite of the disability.

The Americans With Disabilities Act (ADA), passed in 1990, extended anti-discrimination protection of the disabled to almost all other employers. The definition of who is disabled under the ADA is almost identical to that set forth in the Rehabilitation

Act. The Department is subject to both sets of laws.

Drug addiction is considered to be a disability under both Acts, and therefore persons with such addictions are generally provided protection from discrimination. However, persons who are terminated from their position for "currently" abusing drugs would not be protected under either the Rehabilitation Act or the ADA. 29 U.S.C. section 706(8)(C)(i); 42 U.S.C. section 12210(a).[3]

Appellant cites to Teahan v. Metro-North Commuter Railroad Co. (2nd Cir. 1991) 951 F.2d 511 as authority for the proposition that a substance abuser is still protected as "handicapped" under the Rehabilitation Act if at the time that disciplinary action was instituted, that person was not using drugs. Appellant contends she was at all relevant times handicapped from 1986 through 1990, but was not a "current" user of drugs for purposes of both Acts, as she was not a using drugs at the time of her discharge on November 29, 1990.

The Teahan case has been cited with approval by a District Court in the Ninth Circuit. In Ham v. State of Nevada (1992) 788 F.Supp. 455, a person was removed from their job as chief of the Nevada Bureau of Alcohol and Drug Abuse after he was convicted of

[3] The Equal Employment Opportunity Commission defines "current" drug use to mean that the illegal use of drugs occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an ongoing problem. A Technical Assistance Manual on the Employment Provisions (Title I) Of The Americans With Disabilities Act, Equal Employment Opportunity Commission, January 1992, page VII-2.

driving under the influence of alcohol. Ham was removed from his position and transferred to another position after he had entered into a alcohol treatment program. Ham alleged his removal violated the Rehabilitation Act in that his position was due to a "handicap", alcoholism. The State of Nevada, on the other hand, claimed that he was not removed for being an alcoholic (they claimed that they did not even know he was one), but because of the DUI conviction and the bad publicity brought on by the conviction.

The Ham court stated that an employer must look at whether the conduct for which the employee is receiving discipline is caused by the handicap, and if so, can it then not be used as the basis for a disciplinary action. Id. at p. 459. However, the Ham court did maintain that an employer could, for instance, remove an employee if that employee was no longer able to perform his or her duties at work, despite the handicap.

The court denied the summary judgement, finding that whether Ham was an alcoholic and thus an individual with a "handicap" was a question of fact. Moreover, the court held that the state may remove Ham, if despite the alcoholism he was otherwise qualified for the position. Another question of fact.

The Board need not reach the questions raised by Teahan and Ham as to whether appellant was a "current" user of drugs, as the Board find that appellant is not "otherwise qualified" to perform the duties of a law enforcement officer, and therefore is not a

qualified individual with a disability under the law.

As set forth above, appellant is no longer qualified to be an effective law enforcement officer. Law enforcement officers must be beyond reproach, not subject to doubts, mistrust or impeachment in their testimony. They must be called upon to arrest individuals, including individuals suspected of illegal drug use, and provide trusted testimony concerning the arrests they make. Moreover, the department and fellow officers must be able to rely on their judgment and veracity from day to day without question.

In this situation, we have an individual who is now known to have engaged in repeated serious criminal misconduct for a number of years during the time she was employed as a Highway Patrol officer. Her credibility has now been destroyed and it is highly unlikely that the department will ever be able to place complete trust and faith in her again, as it must do before she goes back on patrol. It is the fact that appellant participated in criminal misconduct, not her substance addiction, which renders her now "unqualified" for work as a law enforcement officer with the Highway Patrol.

The finding that appellant is not "otherwise qualified" for the position is supported by the Third Circuit's decision in Copeland v. The Philadelphia Police Department (3rd. Cir. 1988) 840 F.2d 1139. In Copeland, a police officer was dismissed for taking illegal drugs. The officer argued that his dismissal was unlawful

as he was considered "handicapped" under the Rehabilitation Act of 197. The Third Circuit considered the matter, and concluded that Copeland's dismissal was supported as Copeland was no longer "otherwise qualified" for the position. The court stated:

> "...accommodating a drug user within the ranks of the police department would constitute a "substantial modification" of the essential functions of the police department and would cast doubt upon the integrity of the police force. No rehabilitation program can alter the fact that a police officer violates the laws he is sworn to enforce by the very act of using illegal drugs.

The Copeland court concluded that the police department was justified in terminating Copeland from the position as he was now unqualified for the position of police officer.

The Board similarly cannot allow persons known to have repeatedly committed serious criminal misconduct to be permitted to perform the duties of a law enforcement officer. Appellant is tainted by a history of criminal misconduct, rendering her ineffective as a law enforcement officer. On this basis, we find that the appellant is unqualified for the position of State Traffic Officer, notwithstanding her disability, and accordingly we sustain appellant's dismissal.

CONCLUSION

Appellant's repeated criminal misconduct constitutes a failure of good behavior which reflects badly upon the department. The potential harm to the public service caused by employing a State Traffic Officer who participated in such misconduct is serious, and

outweighs the fact that the likelihood of recurrence is reduced by the rehabilitation efforts. Moreover, the fact that appellant was dishonest by participating in illegal activities while employed as a law enforcement official renders appellant unqualified for the position of State Traffic Officer, regardless of her disability. The penalty of dismissal is the only appropriate penalty under the circumstances.

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 above-referenced adverse action of dismissal is sustained;

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

THE STATE PERSONNEL BOARD*
Richard, Carpenter, President
Alice Stoner, Vice President
Lorrie Ward, Member

*Members Floss Bos and Alfred R. Villalobos were not on the Board when this case was originally considered.

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on June 1, 1993.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board