

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 30982
)
R [REDACTED] E [REDACTED]) **BOARD DECISION**
) (Precedential)
From 10 working days' suspension)
from the position of State Traffic)
Officer with the Department) **NO. 93-21**
of California Highway Patrol at)
Woodland) August 3, 1993

Appearances: Neal F. McClellan, representing R [REDACTED] E [REDACTED],
appellant; Marybelle D. Archibald, Deputy Attorney General,
representing 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) after the Board granted the Petition for Rehearing filed by the appellant R [REDACTED] E [REDACTED] (appellant or E [REDACTED]), a State Traffic Officer with the California Highway Patrol (CHP or Department). The Administrative Law Judge (ALJ) had sustained the 10 working days' suspension taken against E [REDACTED] by the CHP and the Board had originally adopted the Proposed Decision of the ALJ.

Pursuant to its granting of the Petition for Rehearing, the Board accepted written briefs filed by the parties and heard oral arguments. After review of the entire record, including the transcript and briefs submitted by the parties, the Board revokes the suspension for the reasons that follow.

FACTUAL SUMMARY

Appellant was appointed to the position as a State Traffic Officer in 1968. He has received one prior adverse action when he was suspended for three days for willful disobedience to an order.

On October 30, 1992, appellant was working the day shift and he was assigned to beat 10. Appellant admitted that he took radio extender¹ 11 from its charger and wrote down the number 11 on the daily schedule as he was required to do whenever he took out equipment.

Appellant testified that he recalled putting the extender on a table and assumed he must have left it there because when he went to reach for it while on patrol, he discovered that it was not on his belt.

At the end of his shift, appellant was rushed because he had a physical therapy appointment. He happened to notice that he had signed out extender unit 11 on the daily charge sheet but that he had not signed out camera II. Remembering that he had used the camera, but that he did not have an extender, he changed the number 11 on the charge sheet to Roman numeral II simply by inscribing two horizontal lines on the top and the bottom of the number 11 on the charge sheet.

¹A radio extender allows an officer to communicate via a repeater system in the trunk of the patrol unit when the officer is away from the unit.

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Griselda Diaz, an Office Assistant with the CHP, recalled taking a telephone call from a member of the public on October 30, 1991 who said he was working somewhere along Interstate 80 and had found what turned out to be extender 11. Appellant's beat assignment covered the area where the extender was recovered.

On November 1, 1991 someone came to the Woodland office and offered Diaz extender 11; since Sergeant S [REDACTED] I [REDACTED], (I [REDACTED]) was then present, Diaz turned the man over to him. I [REDACTED] recalled receiving extender 11 from an unidentified man. He locked it in his desk.

Since no one had reported a missing extender as required by department policy, I [REDACTED] apparently checked the records to see who might have had it last. Officer R [REDACTED] had checked it out on October 29, 1991 and it looked to I [REDACTED] as if appellant may have checked it out on October 30 since the Roman Numeral II appearing next to B [REDACTED]'s name on the daily sheet appeared to have been made from an Arabic number 11.

I [REDACTED] put the extender in his drawer until November 8, 1991, when he conducted an investigative interview with appellant. Appellant initially stated in his interview that he typically uses Roman numerals to identify cameras and that he did not recall altering the 11 to a Roman II. A few moments later, he admitted that he may have made a Roman II out of the 11, but he did so because he had taken camera II, and had not taken an extender.

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At the hearing, appellant explained that at the time of the investigative interview, he had not clearly recalled the day in question as he was unaware of the nature of the investigation. He had not recalled that he had taken a camera that day and had forgotten to originally sign it out. Neither did he initially recall that it was on the day he was rushing to get to a physical therapy appointment that he made the changes to the daily sheet to reflect that he did take the camera but apparently did not take the extender. Since he had recently acquired a new equipment belt, he did not consider that the extender might have fallen out. Thus, when he realized he did not have his extender with him on his beat, he assumed he must have left the extender in the office.

As causes for the adverse action, the CHP charged appellant with violations of Government Code section 19572, subdivisions (c) inefficiency, (p) misuse of state property, and (q) violation of Board Rule 172².

The Notice of Adverse Action described the misconduct that formed the basis for the above-referenced charges against appellant as follows: (1) accepting responsibility for a radio extender which he ultimately lost; (2) concealing the fact that he had accepted responsibility for the radio extender by changing the entries on the daily shift schedule; and (3) being untruthful and

² Notably, CHP did not charge appellant with violating Government Code section 19572, subdivisions (d) inexcusable neglect of duty, or (f) dishonesty.

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evasive when questioned about both the loss of the extender and his alteration of the records.

The Notice of Adverse Action then concluded that the appellant's misconduct constituted "negligence" which "occurred without excuse or justification."

The ALJ sustained the penalty imposed by the CHP, finding that the appellant altered the daily sheet to mislead the department into thinking that he had not signed out the extender and that he tried to mislead the CHP when he was questioned about the extender.

The ALJ did not find credible appellant's explanation that he originally signed out extender 11 and had left it in the office, and altered the daily sheet in order to reflect that he had taken camera II. We accept the ALJ's credibility determination.³

ISSUE

This case raises the following issues for our consideration:

- (1) Was the Petition for Rehearing timely filed?
- (2) Whether violation of Board Rule 172 constitutes a cause for adverse action for dishonesty separate and apart from that created by Government Code section 19572(f)?

³The Board will generally accept the credibility determinations of an ALJ, absent record evidence that casts sufficient doubt upon those credibility determinations to warrant a different conclusion. In the instant case, while the Board might have come to a different conclusion regarding whether or not appellant was evasive during his investigatory interview, the ALJ was able to observe appellant's demeanor while testifying at the hearing and read the transcript of the investigatory interview in that light.

(E [REDACTED] continued - Page 6)

(3) Whether the charged misconduct constitutes inefficiency or misuse of state property under Government Code section 19572, subdivisions (c), and (p), respectively?

DISCUSSION

The Petition for Rehearing Was Timely

The Department contends the petition for rehearing was not timely filed in this case.

Government Code section 19586 provides:

Within thirty days after receipt of a copy of the decision rendered by the board in a proceeding under this article, the employee or the appointing power may apply for a rehearing by filing with the board a written petition therefor....

The Board rendered its original decision on May 5, 1992.

The Department argues that since representatives of the Department placed a copy of the decision in appellant's "pigeon-hole" mailbox at work, since they saw him near the mailbox on or after the date that the decision was placed there, and since he apparently received a paycheck that was in the same mailbox, appellant must have received a copy of the decision as early as May 14, 1992, but not later than June 1, 1992. The petition for rehearing was not filed until July 9, 1992.

Appellant contends that he never received a copy of the decision in his mailbox at work, and did not in fact receive a copy of the decision until he received a copy of it from his representative on or about June 11, 1992.

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Government Code section 19582(e) provides, in pertinent part:

"...Copies of the decision shall be delivered to the parties personally or sent to them by registered mail."

We find that the above-quoted language envisions service by SPB and does not refer to delivery of a copy of the decision by the appointing power.

In the instant case, a proof of service in the record reflects that the decision of the Board was originally mailed to appellant's representative by certified mail, return receipt requested, on May 11, 1992. The envelope, however, bore an incomplete street name (Almendra rather than La Almendra) and was returned to the Board unclaimed. A notation in the file reflects that the letter was resent regular mail to appellant's representative on June 1, 1992, but the notation is unsigned and there is no new proof of service.

Under these circumstances, we accept appellant's representative's representation that he did not receive the decision until June 9, 1992. The envelope in which appellant's petition for rehearing was received by the Board's hearing office bears a receipt stamp of July 8, 1993. We therefore accept the petition for rehearing as timely.

The Alleged Misconduct Was Not Properly Charged

While the Notice of Adverse Action is far from clear, the gravamen of the CHP's complaint appears to be that Officer B [REDACTED] lost his radio extender, and then tried to cover up the loss, first by changing the sign out sheet and later through his evasiveness

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during an investigatory interview. Significantly, at the hearing, the CHP's representative clarified that the CHP was not charging appellant with negligence for the loss of the extender. The action was based on appellant's alleged failure to inform his supervisor of the fact that he had lost the extender, his alteration of the sign-out sheet to reflect that he took a camera rather than the extender, and his alleged evasiveness at the investigatory interview. As noted above, appellant was charged only with violations of subdivisions (c) inefficiency, (p) misuse of state property, and (q) violation of this part or Board rule (Board Rule 172).

The Board cannot sustain discipline for conduct where the proper cause for discipline is not alleged in the Notice of Adverse Action. In Negrete v. State Personnel Board (1989) 213 Cal. App.3d 1160, an employee of the Franchise Tax Board was charged in the Notice of Adverse Action with violations of subdivisions (d) inexcusable neglect of duty, (o) willful disobedience, (q) violation of Board Rule 172, (r) (section 19990, conflicting employment), and (p) misuse of state property. Notably missing was subdivision (c) inefficiency. The SPB, however, concluded that the sole ground justifying the discipline imposed on the employee was "inefficiency."

The court of appeal in Negrete noted that the Notice of Adverse Action is divided into two parts. The first part asserts

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the causes warranting discipline. The second part sets forth the acts or omissions which "can do no more than provide detail which amplifies the claimed application of a stated "cause" to the case.

The court further noted that:

...such criteria cannot create a new cause, one not formally identified in the notice as a cause. Rather such criteria show the correct application of the cause.... (213 Cal.App.3d at 1168).

The court then concluded that the acts or omissions set forth in the notice of adverse action did not allege conduct that came within any of the stated causes. Since the SPB had rested its decision to punish Negrete solely upon grounds of "inefficiency" which was suggested in the acts or omissions of the Notice of Adverse Action, but not set forth as a specific cause of discipline, the discipline could not stand. (Id. at 1169-1171).

In the instant case, none of the causes for discipline plead by the CHP, Government Code section 19572, subdivisions (c), (p) and (q) are supported by the facts of this case. Had the CHP chosen to charge appellant with the loss itself, the CHP should have pled subdivision (d), inexcusable neglect of duty, to cover the loss of the radio extender. The CHP might also have relied upon subdivision (d) to properly plead the attempts to cover up the loss as a cause for discipline if it could establish that its officers have a duty to respond forthrightly at investigatory interviews pertaining to alleged misconduct. If the CHP believed appellant's actions constituted dishonesty, then subdivision (f), dishonesty,

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would have been the appropriate charge. As in Negrete, the acts or omissions charged do not allege conduct that comes within a stated cause.

Inefficiency

Appellant's actions subsequent to the loss of the extender do not constitute "inefficiency." "Inefficiency" under Government Code section 19572, subdivision (c) generally connotes a continuous failure by an employee to meet a level of productivity set by other employees in the same or similar position. In some instances, an employee's failure to produce an intended result with a minimum of waste, expense or unnecessary effort may also constitute "inefficiency" for purposes of discipline under subdivision (c). For example, in the case of Bodenschatz v. State Personnel Board (1971) 15 Cal.App.3d 775, the court of appeal affirmed the Board's decision sustaining the dismissal of a state traffic officer for inefficiency, on grounds that the officer's law enforcement activity was considerably below that of other officers in the same line of work. The court relied on statistical compilations by the California Highway Patrol as a reliable indicator of the appellant's level of efficiency as compared to other officers performing like duties under like circumstances. (Id. at 781). In Sweeney v. State Personnel Board (1966) 245 Cal.App.2d 246, another court of appeal affirmed the dismissal of an attorney with the Secretary of State's office on grounds of inefficiency based

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on testimony of witnesses that others doing the same work had accomplished more than did appellant and that the appellant's work output should have been substantially greater than it was. (See also, Wilson v. State Personnel Board 58 Cal. App.3d 865).

In the instant case, the charged misconduct cannot be construed as "inefficiency." The charge of inefficiency is therefore dismissed.

Misuse of State Property

Neither does the charged misconduct constitute "misuse of state property." The charge of "misuse of state property" under Government Code section 19572, subdivision (p) generally implies either the theft of state property or the intentional use of state property or state time for an improper or non-state purpose often, but not always, involving personal gain. For example, in Flowers v. State Personnel Board (1985) the court of appeal affirmed the dismissal of a correctional officer who had been charged, inter alia, with misuse of state property based on evidence that he removed a public address system from the facility in which he worked, telling another correctional officer that the system belonged to him. In Wilson v. State Personnel Board, supra, an appellate court noted that the appellant, a fish and game warden, had misused state property when he used his patrol vehicle for personal business. In our precedential decision issued in the case of Ernest Dale Switzer (1992) SPB Dec. No. 92-14, we found that a

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fire apparatus engineer had misused state property when he used state time and a state vehicle to facilitate a private business arrangement between an inmate he supervised and another party who did not work for the state.

"Misuse of state property" may also connote improper or incorrect use, or mistreatment or abuse of state property.

The misconduct charged in the instant case does not constitute misuse of state property. The charge of misuse of state property is dismissed.

Board Rule 172

CHP alleged as a further cause for discipline, violation of Board Rule 172, under subdivision (q) "violation of this part or board rule." In the case of Michael Prudell, SPB Dec. No. 92-15,⁴ the Board adopted a Proposed Decision of an ALJ which addressed the issue of whether an appointing power could discipline a permanent employee for violating the provisions of Board Rule 172. The ALJ had reasoned:

...Government Code Section 19572(q) cites as a cause for discipline of "an employee or person whose name appears on any employment list..."Violation of this part or board rule..."... Board Rule 172, Title 2 California Code of Regulations 172, which contains the cited language, appears in Article 8 of the Board's regulations,

⁴The Board's precedential decision in Michael Prudell was vacated when the Board granted a Petition for Rehearing. Although the Board vacated its precedential decision in Michael Prudell after granting a petition for rehearing, we have reaffirmed our interpretation of the effect of Board Rule 172 in the case of D [REDACTED] M [REDACTED] (1993) SPB Dec. No. 93-06, p.1, fn.1.

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entitled, "Examinations." The article as a whole derives its authority from Government Code Section 18930 and the sections following it. These sections deal exclusively with the Minimum Qualifications and procedures for civil service examinations. Rule 172 is entitled "General Qualifications". It states:

"All candidates for, appointees to, and employees in the state civil service shall possess the general qualifications of integrity, honesty, sobriety, dependability, industry, thoroughness, accuracy, good judgment, initiative, resourcefulness, courtesy, ability to work cooperatively with others, willingness and ability to assume the responsibilities and to conform to the conditions of work characteristic of the employment, and a state of health, consistent with the ability to perform the assigned duties of the class. Where the position requires the driving of an automobile, the employee must have a valid state drivers' license, a good driving record and is expected to drive the car safely. The foregoing general qualifications shall be deemed to be a part of the personal characteristics of the minimum qualifications of each class specification and need not be specifically set forth therein. The board may prescribe alternative or additional qualifications for individual classes and such shall be made a part of the class specifications."

The other Board rules in Article 8 all refer to procedures for examinations for civil service positions. It is clear both from the language of Rule 172 and its placement in the regulatory scheme, that it was not intended as a basis for punishing civil service employees. The individual qualifications are too vague to serve as a meaningful standard for discipline, except where the standards are repeated in Section 19572, which prescribes the specific causes for discipline. Since Section 19572 applies to discipline of people whose name appears on an examination list as well as permanent civil service employees, it is conceivable that this section might have some applicability outside of discipline of civil service employees. However, Rule 172 is not a proper basis for punishment of civil service employees. The list of specific charges under Government Code Section 19572 is extremely broad, and covers a wide range of possible grounds for discipline. It even contains a catch-all Section 19572(t), which allows punishment for

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other behavior, not listed, both on duty and off duty. There should be no situation where a Department seeks to properly discipline an employee where a legal basis cannot be found on the list of charges in Section 19572.

In the present case, the CHP could have charged appellant with a violation of subdivisions (f) dishonesty, or possibly (d) inexcusable neglect of duty (for loss of the radio extender), but failed to do so. For the foregoing reasons, the charge in this case of violation of Board Rule 172 is dismissed.

CONCLUSION

The adverse action fails on procedural grounds. The law is clear that the Notice of Adverse Action must specifically allege those subdivisions of Government Code section 19572 that constitute the causes for discipline being relied upon by the appointing power in taking the adverse action. Specificity is important so that the appellant is clearly on notice whether the facts alleged in the Notice of Adverse Action are alleged for background and information only, or whether the appointing power has determined that those facts constitute cause for discipline under the Government Code. The specific charges often determine the seriousness with which the charged misconduct is viewed by the appointing power, and have bearing on the appropriateness of any penalty imposed.

In this case, while the Notice of Adverse action set forth the facts relied upon by the appointing power in bringing the action, it did not set forth those subdivisions of section 19572 that would have supported discipline under those facts.

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For all of the foregoing reasons, the 10 working days' suspension is revoked.

ORDER

Upon the foregoing finds 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 a 10 working days' suspension is revoked;

2. The Department of the California Highway Patrol shall pay to appellant R [REDACTED] A. E [REDACTED] all back pay and benefits that would have accrued to him had he not been suspended.

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 for publication as a Precedential Decision (Government Code section 19582.5).

STATE PERSONNEL BOARD*

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

*Member Floss Bos was not present and therefore did not participate in this decision. Member Albert R. Villalobos was not a member of this Board when this case was originally heard and 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 August 3, 1993.

GLORIA HARMON

Gloria Harmon, Executive Officer
State Personnel Board