

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 28973
)
 E ■ ■ . D ■ ■) **BOARD DECISION**
) (Precedential)
From 20 working days' suspension)
as a State Traffic Officer with) **NO. 93-32**
the Department of the California)
Highway Patrol at West Los Angeles)
) November 2-3, 1993

Appearances: John D. Markey, Labor Representative, for appellant, E ■ ■ . D ■ ■ ; Daniel E. Lungren, Attorney General, by Christopher C. Foley, Deputy Attorney General for respondent, Department of the California Highway Patrol.

Before Carpenter, President; Stoner, Vice President; Ward and Bos, Members.

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 the appeal of E ■ ■ . D ■ ■ (appellant or D ■ ■). Appellant is employed as a State Traffic Officer with the Department of the California Highway Patrol (CHP or Department) and appealed a 20 working days' suspension he received for entering unauthorized notations on traffic citation forms with the specific intent to obtain overtime compensation and giving evasive and misleading answers to questions during the investigation of his actions.

The ALJ who heard the appeal sustained the 20 working days' suspension. The Board rejected the Proposed Decision, deciding to

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hear the case itself. After a review of the entire record, including the transcript, the exhibits, and the written and oral arguments presented by the parties, the Board concludes that only the charge of giving evasive answers during the investigation should be sustained, and reduces the penalty to a 10 working days' suspension.

FACTUAL SUMMARY

Appellant became a State Traffic Officer on August 13, 1979. Appellant has one previous adverse action, an official reprimand in 1988 for failing to inform the Department of criminal misconduct by a fellow officer.

The present investigation began when a state traffic sergeant noticed that a number of traffic citations included unauthorized entries. CHP Form 215, Notice to Appear, is the form used by state traffic officers to cite traffic law violators. As directed by the Highway Patrol Manual Section 100.9, one box on the form entitled "VAC DATES" (herein vacation box) is used by state traffic officers to denote vacation or other extended absences. The purpose of the vacation box is to enable court personnel to take an officer's scheduled absences into consideration when setting court appearances.

The ensuing investigation determined that twenty of the 76 officers assigned to the area had citations on file that showed an unauthorized notation in the vacation box section. The

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investigation also revealed that the vacation box was being used by traffic officers to inform court personnel at the West Los Angeles court of the officer's preference for morning or afternoon court appearances. The Department concluded that the officers were designating a morning or afternoon preference in order to position themselves for overtime or, in some cases, to better control their schedules.

The Department's policy for court appearances permits overtime for an officer required to appear in court outside of his or her normal working hours. Overtime pay is one and one-half times the regular rate.

During the investigation, appellant was interviewed twice. During the first interview, on June 29, 1990, appellant admitted to placing unauthorized notations on some citation forms but maintained that he had no idea why he made these notations. Appellant denied using the notations to position himself for possible overtime. At a second interview, appellant stated that he may have made the notations out of habit. The interviewer produced 975 of appellant's citations. Only 26 of the 975 citations contained the unauthorized notations. All 26 were for violations to be heard at West Los Angeles court. The notations used were "A.M." or a specific time such as "8:30". Appellant could not explain why he had a habit of noting "A.M" or designating a time only on forms directed to the West Los Angeles court.

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(D [REDACTED] continued - Page 4)

Based on its investigation, the Department concluded that appellant placed the unauthorized notations on citation forms with the specific intent of obtaining overtime compensation. The Department also found that appellant had given evasive and misleading answers to questions during the investigation.

As noted above, appellant was not the only officer investigated. During interviews, ten other officers admitted to using the vacation box as a means of positioning themselves for overtime. The other officers were also disciplined by the Department, but the ALJ who heard all these cases, including appellant's, revoked the disciplinary action against the other officers.¹

At the hearing before the ALJ, appellant provided an explanation of the notations that differed from his responses during the investigatory interviews. Appellant testified that during both of the departmental interviews he did not remember why he placed the notations "A.M" or "8:30" on the citations, but in the interim he had spoken to other senior officers who reminded him that the reason for the notations was to get preference in being

¹The Board takes official notice of its records in the appeals of K [REDACTED], SPB No. 28940, D [REDACTED], SPB No. 28941, G [REDACTED], SPB No. 28943, R [REDACTED], SPB No. 98944, R [REDACTED], SPB No. 28965, J [REDACTED], SPB No. 29147, E [REDACTED], SPB No. 29168, E [REDACTED], SPB No. 29308, S [REDACTED], SPB No. 29347 and D [REDACTED] SPB No. 30271. The Board may take official notice of any fact which may be judicially noticed. A court may take judicial notice of its own records. (Evidence Code, § 452 (d).)

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(D [REDACTED] continued - Page 5)

called for trial. Appellant testified "It would be LAPD first, and then ticket people, and then UCLA, then CHP would be the last coming into court [for trial]." Appellant testified that he sought preference because he "was trying to get in and out of Court as soon as possible instead of spending my whole day off in Court."

Appellant further testified that the reason he did not previously come forward with this explanation was that he had been ordered not to discuss the investigation with anyone until the investigation was concluded and, therefore, he was unable to contact other officers to refresh his recollection of why it was his custom to make the notations. Appellant acknowledged that he had previously been the court liaison officer for the West Los Angeles court regarding scheduling.

Appellant was charged with inexcusable neglect of duty, misuse of state property, and violation of Board Rule 172 under Government Code, section 19572, subdivisions (d), (p) and (q).²

ISSUES

This case raises the following issues for the Board's consideration:

a) Did the evidence establish that the Department had a clear policy giving notice to the appellant that the charged conduct of

² The ALJ properly dismissed the charges of Government Code section 19572(q), State Personnel Board Rule 172, General Qualifications. See D [REDACTED] M [REDACTED] (1993) SPB Dec. No. 93-06.

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designating a time preference for appearing in court to increase his opportunity for overtime was prohibited?

b) Is this case distinguishable from the companion cases in which the Board adopted the Proposed Decisions of the ALJ revoking the discipline imposed against ten other State Traffic Officers charged with the same misconduct?

c) Assuming the evidence establishes that appellant was misleading and evasive in his answers to questions posed during the investigation of the charged misconduct, does that fact justify discipline under the charges cited in the Notice of Adverse Action?

DISCUSSION

Unauthorized Entries on Citation Forms

In the ten companion cases, the ALJ determined that the practice of designating a preference in the vacation box was longstanding; that overtime in general was not significant in the officers' employment (most officers worked 20-30 hours of overtime per month from other sources); and, in any event, there was no policy in place either encouraging or discouraging the acquisition of overtime. There was no evidence presented that any officer investigated actually earned overtime as a result of this practice.³

³ The Board takes official notice of its Decision in the case of T [REDACTED] J [REDACTED], SPB Case No. 29147.

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In sustaining the discipline against appellant, the ALJ distinguished appellant's case from the cases of the other officers. The ALJ found that whereas the evidence failed to establish any wrongful intent by the officers in the other cases, the evidence in appellant's case established that appellant was aware that he was wrong and knew he should not have made the entries. The ALJ based the findings of wrongful intent on the fact that appellant concealed that he knew the reasons for the entries on the citations; additionally, the ALJ reasoned that appellant had to be aware the Department would disapprove of the entries because, as a former court liaison, he was acquainted with court policies.

On the issue of culpability for making unauthorized notations on the citation forms, we do not agree that appellant's case is distinguishable from the cases of the other officers. The evidence does support a finding that appellant placed unauthorized entries on traffic citation forms in an effort to seek preferential treatment in scheduled court appearances, and that the purpose of the entries was most likely to position appellant for the possibility of overtime. Appellant himself testified that, although he was working a swing shift from 1:45 p.m. to 10:15 p.m., it was his practice to request morning court appearances.⁴ The

⁴Appellant's explanation that he was seeking preference over other police departments and not overtime does not mesh with the facts. Requesting a morning court appearance does not insure precedence over other officers of other police departments who also

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(D [REDACTED] continued - Page 8)

fact that appellant was making the notations on the citations in an attempt to increase his opportunity for overtime does not, however, establish that appellant knew he was violating Departmental policy at the time he made the notations.

The issue then is whether appellant had sufficient notice of a clear policy against officers participating in this practice of positioning themselves for the opportunity for overtime.

Notice of Respondent's Policy

In their article, "Toward a Theory of 'Just Cause' in Employee Discipline," (June 1985) authors Roger I. Abrams and Dennis R. Nolan state that the due process embodied in the concept of just cause includes "actual or constructive notice of expected standards of conduct...." Similarly, Elkouri and Elkouri, in their seminal work, How Arbitration Works (4th Ed.), quote Arbitrator William M. Hepburn's commentary on the same subject:

Just cause requires that employees be informed of a rule, infraction of which may result in suspension or discharge, unless conduct is so clearly wrong that specific reference is not necessary. (at p. 682).

The CHP argues that the state traffic officers had sufficient notice that the use of the vacation box to position themselves for overtime violated Department policy. The CHP contends that the Highway Patrol Manual clearly directs officers to use the vacation

have morning court appearances.

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box to enter beginning and ending dates for vacation or other absences. The Department asserts that this "positive" direction necessarily precludes the use of the box for any other purpose.

It cannot be disputed, however, that the practice of using the vacation box for other purposes was widespread. Twenty officers participated in the practice. Copies of appellant's citations containing the notations indicate that the notations were clearly noticeable. Yet, there was no showing by the Department that the Department had attempted to put an end to the practice or otherwise put the officers on notice that they were prohibited from using the vacation box for notations other than those specifically outlined in the Highway Patrol Manual.

The real issue is not, however, whether the vacation box could be used for purposes other than those specified in the manual, but whether CHP had a policy prohibiting its officers from positioning themselves for overtime. With respect to the overtime issue, the Department failed to establish that: (1) the CHP had a clear policy against officers attempting to schedule their court appearances during off-duty hours; (2) the officers had notice of such a policy; and, (3) that the CHP intended to enforce that policy. Thus, appellant's use of the vacation box to affect the scheduling of his court appearances, whether for overtime or for any other purpose, constitutes neither inexcusable neglect of duty nor misuse of state property.

(D [REDACTED] continued)

(D [REDACTED] continued - Page 10)

Evasiveness at the Interrogations

While we decline to find that appellant's unauthorized entries on the citation forms justify discipline under the circumstances, we conclude that his conduct at the departmental interrogations constitutes inexcusable neglect of duty. Appellant "stonewalled" the investigation. During both interrogations, appellant incredibly denied any knowledge of why he noted "A.M" or "8:30" on citations that would be heard in West Los Angeles. During the second interrogation, appellant claimed it was his "habit" to mark West Los Angeles citations in this manner, but had no explanation for the "habit."

The Department properly determined that appellant was evasive and misleading during the investigation. As a State Traffic Officer, appellant had a duty to participate in the interrogation.

Appellant had clear notice of his obligation in this regard, and of the Department's intent to enforce that obligation. The Advisement of Rights notice read at the interrogations informed appellant, "Your refusal to answer, or any type of evasion or deception on your part, could be cause for discipline up to and including dismissal." Even absent such a warning, it goes without saying that an employee has a duty to cooperate in a departmental inquiry. The duty to cooperate in an investigation is especially strong in the case of a peace officer who is held to a higher standard than other employees. [See Szmaciarcz v. State Personnel Board (1978) 79

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Cal. App. 3d 904 (even though police officer is himself a target of an investigation and his answers may be incriminating, he still has a duty to cooperate fully in a departmental investigation); Ackerman v. State Personnel Board, (1983) 145 Cal. App. 3d 395 (police officers are expected to tell the truth)]. In the instant case, appellant's responses in two separate interviews were less than forthcoming and constitute inexcusable neglect of his duty to cooperate in the investigation.

As only one of two equally serious charges against appellant has been sustained, a reduction in penalty seems appropriate. A 10 working days' suspension should serve to drive home the message that appellant should have been more forthright during the interrogations.

CONCLUSION

While the evidence establishes that appellant made the notations on the citations to position himself for overtime, we find that appellant did not have sufficient notice of a clear policy against officers positioning themselves for the opportunity for overtime to justify discipline based on the notations on the citation forms. We also find, however, that appellant's case is distinguishable from the other ten cases the administrative law judge dismissed. The record establishes that appellant

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intentionally evaded the questions of the investigating officers and, thereby, inexcusably neglected his duty to cooperate in the investigation.

The Board has determined that the 20 working days' suspension taken by the Department and sustained by the Administrative Law Judge is too harsh a penalty under all the circumstances. The penalty is modified to a 10 working days' suspension.

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 a 20 working days' suspension is modified to a 10 working days' suspension.

2. The Department of the California Highway Patrol at West Los Angeles shall pay to E [REDACTED] D [REDACTED] all back pay and benefits that would have accrued to him had he been suspended for 10 working days rather than suspended for 20 working days.

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 § 19582.5).

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THE STATE PERSONNEL BOARD*

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

*Member Alfred R. Villalobos was not on the Board when this case was originally considered and did not participate in this decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on November 2-3, 1993.

GLORIA HARMON

Gloria Harmon, Executive Officer
State Personnel Board