

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 31679
)
 I █████ █████ M █████) **BOARD DECISION**
) (Precedential)
From dismissal from the position)
of Medical Technical Assistant) **NO. 94-12**
at the Pelican Bay State Prison,)
Department of Corrections at)
Crescent City) April 5-6, 1994

Appearances: Suzanne L. Branine, Staff Legal Counsel, California Correctional Peace Officers Association on behalf of the appellant, I █████ █████ M █████; Julius M. Engel, Staff Counsel, Department of Corrections, on behalf of the respondent, Department of Corrections.

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

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board granted a Petition for Rehearing filed by the appellant, I █████ █████ M █████ (appellant), who was dismissed from his position as a Medical Technical Assistant (MTA) at the Pelican Bay State Prison, Department of Corrections at Crescent City (Department).

Appellant was dismissed from his position as an MTA after an inmate whom he had bathed suffered serious burns over much of his lower body as a result of the bath. The Administrative Law Judge (ALJ) who heard appellant's appeal issued a Proposed Decision sustaining the dismissal, finding that the bath water was too hot, that the bath water was responsible for the inmate's burns and that

(M [REDACTED] continued - Page 2)

appellant was responsible for his injuries as the person in charge of the bath.

The Board adopted the ALJ's Proposed Decision at its meeting of May 4, 1993. The appellant filed a petition for rehearing to determine whether there was sufficient evidence to support his dismissal. The Board granted the petition at its meeting on July 6, 1993.¹ Subsequent to the granting of the petition for rehearing, appellant and respondent submitted evidence directly to the Board for its consideration. Neither parties' submissions were reviewed by the Board or made a part of the administrative record in this case for the reasons set forth in this decision.

After a review of the record, including the transcripts², exhibits, and the written and oral arguments of the parties, the Board sustains appellant's dismissal.

¹ The Department failed to file a timely opposition to the petition for rehearing.

² In this case, the parties agreed to include in the record as direct evidence six volumes of testimony and accompanying exhibits from a hearing which took place from October 23, 1992 through October 30, 1992 before the Board of Vocational Nurse and Psychiatric Technician Examiners of the Department of Consumer Affairs ("Board Examiners"). This hearing was to determine whether appellant's vocational nurse's license should be revoked because of the conduct which is the subject of the present case, as well as conduct which was the subject of a prior adverse action. As a result of that hearing, the Board Examiners revoked appellant's license. We are aware that appellant filed an administrative writ of mandamus with the Sacramento Superior Court to challenge the revocation and that the superior court denied appellant's petition, thereby affirming the Board Examiner's revocation of appellant's license.

FACTUAL SUMMARY

Appellant is a licensed vocational nurse (LVN) having obtained his license in 1983. He began his career in state service in 1985 and, at the time of the incident in question, he was an MTA for the Department. One of the minimum qualifications for the classification of MTA is the possession of a vocational nurse's license. As an MTA, appellant's duties included rendering subprofessional medical care to inmates, assisting the institution's registered nurses and doctors, and working with the clinical laboratory within the prison.

Appellant has one prior adverse action in 1991. In that adverse action, the Department originally dismissed appellant citing as causes for discipline Government Code section 19572, subdivisions (c) inefficiency, (f) dishonesty, (m) discourteous treatment of the public or other employees, (o) willful disobedience, (q) violation of this part or Board rule, and (t) other failure of good behavior either during or outside of duty hours which is of such nature that it causes discredit to his agency or his employment. Appellant and the Department ultimately settled the adverse action by the Department agreeing to modify the dismissal to a 10 days' suspension and appellant agreeing to the following facts as reasons for the adverse action:

On November 7, 1990 you employed an improper medical procedure on an (sic) semi-conscious inmate which expressed a methodology of intentionally intensifying and prolonging the sharp, caustic and acrid sensations

(M [REDACTED] continued - Page 4)

associated with the insertion of ammonia inhalant pads into the nostrils. You ignored instructions from other medical staff to remove the ammonia inhalant pads and allowed them to remain for a prolonged period (between two to three minutes).

You were dishonest when you stated that you did not tapethe inmate's mouth closed and that the placing of ammonia inhalant pads in the nostrils is an accepted medical practice at California Institute for Men.

On the day of the incident that is the subject of the instant adverse action, April 22, 1992, appellant was working as an "acuity rover" in the prison, which meant that he went throughout the institution where needed: delivering medical files and medicine, drawing blood samples, and transporting inmates to the lab, infirmary, or wherever else they needed to be.

Several days before the incident, on April 13, 1992, inmate Vaughn Dortch (Dortch) was placed in the Security Housing Unit (SHU) because of his uncooperative and violent behavior. During the period of time he was in SHU, from April 13 until April 22 (the date of the incident) Dortch collected feces and urine in his toilet and sink and proceeded to smear it all over his naked body while lying around in his cell.

On April 18, several correctional officers were ordered to clean Dortch's cell as other prisoners were complaining about the filth and smell. Dortch was placed in restraints and taken to the showers where he was administered a shower without incident. While Dortch was in the shower, his cell was steam cleaned with a machine containing water and Pine-Odor, a disinfectant used by the prison.

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This was the usual method used by the prison for cleaning cells at the prison.

After his cell was cleaned, Dortch again began smearing himself with feces and urine he collected. During the time from April 13 until the incident on the 22nd, he was often seen by correctional officers lying around naked on the floor of his cell.

Other than the forced shower on April 18, Dortch refused to shower from the time he was admitted into the segregated cell on April 13, until he was again removed from his cell on April 22.

On April 22, Correctional Lieutenant Robert Carpenter contacted Program Administrator Don Helsel and informed him that Dortch had again been smearing himself with feces and urine, and that he and his cell were again posing a health hazard to the prison. Helsel told Carpenter that since Dortch had repeatedly attempted to bite correctional officers, and had successfully bitten an officer just a few days before, Dortch should be placed in restraints and taken to the infirmary for a bath (the infirmary had the only bathtub on prison grounds). Helsel further requested that somebody from "medical" be involved in giving Dortch the bath and asked that females not be present at the bath because Dortch was known to enjoy exposing himself.

Initially, Dortch was handcuffed and taken out of his cell, but was soon after placed back in his cell, as an emergency arose in the SHU and the officers did not have time at that moment to

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bathe him. In the meantime, however, his cell was sponge-mopped with water and Pine-Odor.

A few hours later, several correctional officers, Officers Harms, Madrid, Vecchetti, Boyce and Williams, were assigned to escort Dortch from his cell to the infirmary for his tub bath. All of the officers wore gloves because of the feces and urine smeared on Dortch. Because of Dortch's propensity toward violence, Dortch's arms were cuffed behind his back, his legs were chained together by leg irons, and a mask was placed over his face to prevent him from spitting and biting. The officers also threw a paper gown around Dortch's body during his escort to the infirmary because he was naked. Throughout the escort, Dortch repeatedly tried to bite the officers and ranted on about being a "killer bee".

Upon the arrival at the infirmary, the officers and Dortch were met at the door by Officer John Kubecek, a correctional officer who was on duty in the infirmary. Officer Kubecek had been informed just a few minutes earlier that the officers were bringing Dortch in for a bath. At that time, Officer Kubecek asked appellant if he would help give Dortch the bath. Appellant agreed to do so, although he testified that he did not believe that he would be in charge of administering the bath. Appellant proceeded to put on latex gloves in preparation for the bath.

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As Officer Kubecek went to open the door for Dortch and the officers, he walked past the infirmiry bath tub and turned the single-control faucet approximately three-quarters around to start the water running into the tub. As Kubecek was letting the officers and Dortch into the infirmiry, appellant was busy gathering the supplies to administer the bath, including numerous towels, washrags, soap and a large bristle brush.

After the water had been running for a minute or two, appellant claims to have tested the temperature, running his hand under the faucet for approximately 5-8 seconds and letting the water drip onto his bare wrist and forearm. According to his testimony, the temperature of the water was warm, but not hot. A few minutes later, he again put his arm in the water all the way to the bottom and swirled his arm for approximately 10 seconds. Appellant claims that the water went up to the middle of his forearm where he could again feel that the water was not hot. He did not use a water thermometer to test the bath temperature as he was not aware one was available. As it turns out, the only thermometer which would have been available nearby was a food thermometer which was kept in the kitchen, and appellant was unaware of its existence.

Prior to placing Dortch into the bathtub, appellant did an assessment of Dortch's physical condition, noting that he had an open wound on one of his knees. He noted this wound so that he

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would be sure to clean it and treat it carefully. Other than the knee wound and the hardened feces and urine on Dortch's body, appellant did not notice any other problems.

The officers placed Dortch in the tub by swinging his legs over the side and into the inside of the tub. Dortch's shackled arms remained out of the water behind his back. According to the testimony of most of the witnesses, which varied, the water was approximately 6-8 inches deep, hitting somewhere about Dortch's waistline.

When first placed into the tub, Dortch sat down but refused to straighten his bent knees and place both legs completely into the water as appellant asked. After a minute or so, Officers Vechetti and Williams gently pushed Dortch's knees down and he did not resist. Officer Williams testified that when he pushed Dortch's knees down into the water, his bare wrists touched the water for about 3-5 seconds and he did not find the water to be hot. Similarly, Officer Vechetti testified that he did not find the water to be too warm when he pushed Dortch's leg down into the water. (Vechetti was wearing two pairs of gloves.)

At the beginning of the bath, appellant turned to one of his indirect supervisors, Nurse Barbara Kuroda, and asked her if she would help him with the bath, stating that it was really her job. Appellant testified he had never given a tub bath to anyone before, other than about a dozen times to his children, and did not feel it

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was something he should be doing. Kuroda, however, told him she was not going to participate in the bath and so appellant continued to administer the bath to Dortch. A few minutes later, appellant again turned to Kuroda, who was seated several feet away in a glass-partitioned nurses' station, and asked her whether he should use a blue bottle of head and body shampoo and a bristle brush on Dortch. Kuroda nodded her approval. Although Kuroda did not participate in the bath, she observed it periodically from the nurses' station.

Appellant then placed a washcloth on the head of the brush and used it to clean the excrement off Dortch's body, as a washcloth alone did not appear to him to be sufficient to remove it. Appellant cleaned most of Dortch's body parts with the brush, but refused to clean Dortch's genitals and buttocks. The entire bathing process took no more than 5 to 10 minutes, during which time Dortch sat still in the tub. At some point during the bath, the water to the tub was turned off, but no one present was quite sure of when and by whom.

During the bath, Officers Harms, Madrid, Vechetti, Williams and Kubecek placed themselves around the tub, prepared to control Dortch should he become combative. At no time, however, did Dortch attempt to get out of the tub or become aggressive in any way. Quite the opposite took place - witnesses testified that Dortch seemed to relax during the bath, even enjoying it, although the

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officers testified that he continued to rant about being a "killer bee".

After approximately 5 to 7 minutes in the bath, appellant began rinsing Dortch off with fresh water from the tap using a large pitcher. Officer Williams assisted appellant in the rinsing process. When appellant finished, the officers assisted Dortch to his feet and appellant proceeded to take a dry towel and gently pat his legs to dry him off. A dark substance came off on the towel and appellant remarked something to the effect of whether or not Dortch had ever before taken a shower. It was then that large patches of skin from the back of Dortch's legs began peeling off in sheets, eventually falling around the leg irons on Dortch's ankles.

Realizing that something very odd was happening, appellant ran to the nurses' station to summon Nurse Kuroda and fill out an incident report. Nurse Kuroda exited the nurses' station and went immediately to Dortch. She noticed that his buttocks were bright red and that his skin had peeled off his legs and was hanging around his ankles. From her past experience as a nurse in burn units, she immediately concluded that Dortch had been subjected to a thermal burn from the bathwater.

Appellant and the correctional officers testified that they were shocked to see Dortch's condition as Dortch did not yell, scream or otherwise express any pain during the bath. While Officer Kubecek did testify to hearing Dortch say, upon entering

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the bathtub, something to the effect of "damn this sh-t is hot," he claims Dortch said it in an almost laughing tone and did not appear to be in any pain.³ In addition, Officer Kubecek saw appellant with his hands in the water when Dortch made that statement, and thus concluded that the water could not have been too hot.

Shortly after Dortch stood up in the tub, revealing his injuries, he fainted and was grabbed by one of the officers standing near the tub. Dortch was immediately wheeled into the prison's emergency room where the prison's doctors and nurses examined him briefly and Nurse Kuroda applied Silvadene cream to the burn. Shortly thereafter, Dortch was taken to Sutter Coast Hospital for further treatment and was later flown by helicopter that same day to the U.C. Davis Burn Treatment Center where he was treated for serious second degree burns.

A senior MTA, Ed Thayer, accompanied Dortch to U.C. Davis, speaking to him both in the helicopter and the next day in Dortch's hospital room. Thayer testified that Dortch told him that he told appellant and the officers during the bath that "this sh-t is hot".

When Thayer asked Dortch why he did not do anything other than that to communicate that the water was too hot, Dortch told Thayer that "you have to take your pain like a man" and that he suffered the pain because he believed the hot bath was retaliation for his

³ Officer Boyce recalls also hearing something about "hot water" but did not recall exactly what was said or by whom.

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biting a correctional officer the week before. Dortch also told Thayer that the officer he bit had "ran like a baby" after he bit him, and that he was not going to run away from pain like that.

Meanwhile, immediately after the incident occurred, Officer Kubecek was ordered to get a thermometer to test the temperature of the bath water. Since there was no bath thermometer kept in the infirmary, Officer Kubecek had to retrieve a food thermometer from the kitchen. He then refilled the bathtub, which had since drained, and turned the faucet the entire way around to the hottest point. The thermometer recorded a temperature of 150 degrees. He then recorded the temperature of the water turning the faucet to where he believed he had placed it when he ran Dortch's bath and measured the temperature this time to be 99 degrees. There was no temperature control gauge on the faucet itself at the time of the incident.⁴

Based on the bathing incident, the Department dismissed appellant effective June 25, 1992. In the adverse action, the Department alleged as causes for the dismissal Government Code section 19572, subdivisions (c) inefficiency, (d) inexcusable neglect of duty, and (t) other failure of good behavior either during or outside of duty hours which is of such a nature that it

⁴ The record reveals that a temperature control gauge was later installed on the tub, but this evidence was admitted only for the limited purpose of showing that there was no such device installed at the time of the incident.

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causes discredit to the appointing authority or the person's employment. No other employee received an adverse action for this incident.

ISSUES

1. Could the Board properly consider as part of the record the evidence the parties sent to the Board subsequent to the granting of the Petition For Rehearing?

2. Do the principles of res judicata or collateral estoppel impact this decision based upon the fact that appellant's conduct was also the subject of an administrative decision to revoke appellant's vocational nurse's license?

3. Is there a preponderance of evidence to support a finding that appellant's actions constituted inexcusable neglect of his duties and a failure of good behavior?

4. Do the facts of this case support the charge of inefficiency?

5. Assuming appellant should be disciplined for his conduct, what is the appropriate penalty under the circumstances?

DISCUSSION

Evidence Submitted To The Board

After the petition for rehearing was granted, appellant submitted to the Board for incorporation into the record witness declarations of [REDACTED] Newton, I [REDACTED] M [REDACTED], [REDACTED] Alexander and [REDACTED] Alvarado. In several letters to the Board, the Department

expressed its objection to the submission of these declarations.⁵

Government Code section 19587 provides, in pertinent part:

If the petition for rehearing is granted, the matter shall be set down for rehearing by the board or its authorized representative....If the matter is set for hearing before the board itself, the board may provide the parties with an opportunity to provide written or oral argument and may decide the case upon the record, including the transcript, with or without taking additional evidence. (emphasis added)

This statute permits the Board, in its discretion, to take additional evidence itself or to remand the case to an administrative law judge to take additional evidence. See California Administrative Hearing Practice (Cont.Ed.Bar 1984) section 4.22, page 230.

In English v. City of Long Beach (1950) 35 Cal.2d 155, a city police officer filed a petition for writ of administrative mandamus challenging the city's decision to dismiss him. The California Supreme Court ordered the police officer reinstated to his position on the ground that he was deprived of a fair hearing because the Board members who made the decision took evidence outside of the

⁵ After this case was taken under submission and a decision was being prepared, the Department also submitted a copy of the decision of the Sacramento Superior Court denying the appellant's petition for administrative mandamus to the Board. No motion was made by the Department to reopen the matter for additional evidence. Thus, it was too late for the Board to consider any additional evidence and the superior court decision was not reviewed by the Board in rendering this decision. In any event, we have no reason to consider that decision since we find, as explained below, that the superior court decision has no collateral estoppel or res judicata effect on this case.

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hearing into consideration (i.e. one Board member consulted his personal physician for his opinion). In concluding that English was deprived of a fair hearing, the Court stated:

Administrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were present....A hearing requires that the party be apprised of the evidence against him so that he may have an opportunity to refute, test, and explain it, and the requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced. Id. at pages 158-159.

When the Board granted the instant petition for rehearing, it did not order a hearing for the purpose of accepting additional witness testimony. Nor did either party move this Board to conduct a hearing for the purpose of taking additional witness testimony. The Board will not generally accept witness testimony which is not already part of the record unless the testimony is either stipulated to by the parties or proffered to the Board upon proper notice and motion so that each party has the opportunity to object to the taking of additional testimony. If the Board grants the motion to reopen the record, the Board may take the additional testimony itself or refer the case to an Administrative Law Judge to take the testimony.

In this particular case, the declarations of Newton, M [REDACTED], Alexander and Alvarado contain several instances of hearsay. Accepting such witnesses' declarations into evidence, without

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giving the respondent an opportunity to cross-examine the declarants, would be highly prejudicial to the respondent. Accordingly, the Board did not consider these declarations in rendering this decision.

Res Judicata/Collateral Estoppel

As previously noted, appellant's license was revoked by the Board of Examiners on May 12, 1993, and a petition for writ of administrative mandamus challenging this decision was denied by the Sacramento Superior Court. At oral argument, this Board raised the issue as to whether either party thought the Board Examiner's administrative decision to revoke appellant's vocational nurse's license based, in part, on appellant's bathing of Dortch, impacted this appeal under the principles of res judicata or collateral estoppel. Written briefs were submitted by both parties urging the Board that neither principle of law applied and asking the SPB to issue its decision independently of the decision of the Board Examiners or the decision by the Superior Court. We agree that the principles of res judicata and collateral estoppel do not apply to bar our independent exercise of discretion.

Res judicata is a legal principle which precludes the relitigation of a cause of action between the same parties in subsequent litigation. For res judicata to apply, a court or administrative agency acting in a judicial capacity must have had jurisdiction over the same parties in the previous litigation, the

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litigation must have involved the same subject matter, and the same cause of action must have been fully litigated on its merits.

(DeWeese v. Unick (1980) 102 Cal.App.3d 100; City and County of San Francisco v. Ang (1979) 97 Cal.App. 3d 673.) Since the parties in the revocation hearing (the Board of Examiners and the appellant) are different than the parties to this action (the Department of Corrections and appellant), the prior administrative license revocation decision has no res judicata impact on the instant case.

Collateral estoppel is a legal principle which applies when issues have been litigated in another proceeding, and one of the parties is attempting to bar the issue from being relitigated in a later proceeding. For collateral estoppel to apply, three prerequisites must be met: 1) the issue necessarily decided at the previous proceeding must be identical to the one which is sought to be relitigated; 2) the previous proceeding must have resulted in a final judgment on the merits; and, 3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior proceeding. People v. Sims (1982) 32 Cal.3d 468. In addition, courts will look at whether the public interests of the forums involved would be served by the application of the doctrine of collateral estoppel. Lucido v. Superior Court (1990) 51 Cal.3d 335, 349.

We agree with the assertions of the Department and the appellant that the SPB is not collaterally estopped by the superior

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court's decision to uphold the revocation of appellant's license. We do not believe that the issues litigated in the present hearing, whether appellant's actions constituted inexcusable neglect of duty, failure of good behavior and/or inefficiency under Government Code section 19572, subdivisions (c) (d) and (t), are the same issues which were litigated in the Board Examiner's hearing, which dealt with whether appellant violated certain provisions in the Business and Professions Code related to his status as a licensed vocational nurse. More importantly, there has been no "final judgment on the merits" as yet since we are aware that the time for appealing the superior court's judgment has not run. National Union Fire Ins. Co. v. Stites Prof. Law Corp. (1991) 235 Cal.App.3d 1718, 1726. Finally, even if we were to conclude that the same issues were previously litigated in a final judgment on the merits, we find that the public interest concerns of the SPB, protecting the state's civil service system, are different from the interests of the licensing board and that the Board's mission would not be best served by giving collateral estoppel effect to the Board Examiner's decision. Accordingly, we hold that neither res judicata nor collateral estoppel impact to this case.

Sufficiency of the Evidence

(Inexcusable Neglect of Duty)

Appellant argues that he cannot be held liable for inexcusable neglect of duty as it was not one of his regular duties

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to bathe inmates. We disagree. As an MTA, appellant's duties include providing basic medical care to inmates. Someone in appellant's position can reasonably be expected to bathe an inmate for hygienic or medical reasons, particularly when the vocational nurses' training required of the position teaches such a procedure.

While the evidence revealed that similar baths had not previously taken place at the prison (with the exception of sitz baths), an MTA is a logical employee to perform such a task since MTAs have basic medical knowledge and training for the job, as well as training in custody procedures for prisoners.

Even assuming that giving Dortch the bath was not one of appellant's customary duties, the fact is that appellant agreed to perform the bath when asked by Officer Kubecek. That appellant did not believe that he was going to be in charge of the bath, and was rejected by Nurse Kuroda when he asked her to give the bath, does not relieve him of his responsibility for ensuring that the bath he administered was conducted properly and safely. Nor does the fact that appellant was not on duty in the infirmary on April 22, but was merely a "rover", bar the Department from holding him responsible for the administration of Dortch's bath once he undertook to give it.

Appellant further argues that his actions cannot constitute an inexcusable neglect of duty as there is no evidence that he intended to harm the inmate. Appellant's actions, however, need

(M [REDACTED] continued - Page 20)

not necessarily have been intentional to constitute inexcusable neglect of duty. This Board has previously defined inexcusable neglect of duty to include "an intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty." (R [REDACTED] H [REDACTED] (1994) SPB Dec. No. 94-07, p. 6 citing Gubser v. Dept. of Employment (1969) 271 Cal.App.2d 240, 242.) Since we find no evidence in the record that appellant intentionally tried to harm the inmate, the question is whether there is sufficient evidence that appellant acted with gross negligence in giving Dortch the bath.

This is a difficult case as we are faced with a record which reveals that the bath took place with very little incident, and yet, the inmate stepped out of the bathtub with extremely serious, life-scarring injuries. While the record does present certain conflicts which at times are perplexing, we believe a preponderance of evidence supports finding that the bathwater was too hot, and that the hot water was the cause of Dortch's injuries. Given appellant's training as an MTA, he should have known how to administer a bath to an inmate without inflicting injury. Since we find that appellant was responsible for administering the bath, we conclude that his conduct in allowing such an injury to occur was grossly negligent.

The primary support for our finding stems from the strong and solid testimony of Dortch's treating physician, Dr. Anne Missavage.

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Dr. Missavage is the head of the Burn Center at U.C. Davis where Dortch was treated and is an expert on burns and burn surgery. She examined Dortch upon his arrival at U.C. Davis and was in charge of his treatment while he resided there. She testified that there was no doubt in her mind that Dortch had been badly burned by hot water in a bath, and that the line of injury evidenced on Dortch's body was a "classic" case of a burn line from hot water in a bath.

Dr. Missavage also testified that it was clear from Dortch's injuries that he was sitting in water which was approximately 6 inches high, hitting somewhere around his waist. This testimony comports with the testimony of the witnesses to the bath. She further testified that the injury was consistent with exposure to water temperature of about 120 to 125 degrees for about 5 to 10 minutes, and that any water over 115 degrees is considered excessively hot and can cause burns if the exposure is prolonged.

In addition to Dr. Missavage's testimony, the Department presented several other medical professionals who saw Dortch's injuries and testified that they too believed Dortch's injuries were attributable solely to excessively hot water in the bath. Nurses Kuroda and Suzanne Lea Bliesner, who both had previous experience with burn patients, agreed that upon looking at Dortch's injuries after the bath, they could see a distinct line of injury and were of the opinion then, and now, that his injuries were thermal burns caused by hot bathwater.

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In addition to Dr. Missavage's testimony, there is evidence in the record that Dortch did find the water to be too hot and said so. Although appellant and most of the correctional officers did not hear Dortch comment about the water, Correctional Officers Kubecek and Boyce did hear something to the effect that the water was too hot. Their testimony lends support to Dortch's statement to MTA Thayer that he did say, "damn, this sh-t is hot".

Although the fact that a person would calmly sit in water that was painfully uncomfortable is difficult to accept, given Dortch's state of mind as revealed to MTA Thayer and his violent and clearly dysfunctional psychopathology, it is not impossible to believe that Dortch made no other overt signs of his discomfort, despite the water being hot enough to burn him.

In his defense, appellant argues the possibility that the injuries were caused, not by overly hot water, but by the pre-existing deterioration of Dortch's skin. Appellant contends that the feces and urine rubbed all over his body for days prior to the bath weakened his skin. He further claims that the deterioration was exacerbated by Dortch lying around naked on the cement floor which had been cleaned with Pine-Odor, a disinfectant containing dimethyl benzyl ammonium chloride (commonly known as benzalkonium chloride). In support of this defense, appellant offered the testimony of Dr. Joel Teplinsky, a plastic surgeon on the burn staff of a private hospital. While Dr. Teplinsky agreed that

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Dortch had suffered a serious burn, in his opinion, the existence of benzalkonium chloride and feces and urine on appellant's skin might have caused the skin to burn with a much lower water temperature than normal.

Dr. Teplinsky based his opinion on a research article which discussed possible injuries which could be caused by exposure to the chemical benzalkonium chloride to people with pre-existing skin conditions. Dr. Teplinsky admitted, however, that this theory was only speculative: he did not have proof as to whether Dortch actually soaked in benzalkonium chloride, nor did he know the concentration, if any. Dr. Teplinsky admitted that he had never personally examined Dortch, and that his opinion was only an alternative theory based on his looking at photographs taken of Dortch's injuries. His basis for this alternative theory was his opinion that the lines demarcating his bodily injuries did not "add up" against the story of Dortch's bath.

Based upon Dr. Teplinsky's testimony, appellant urges this Board to consider the possibility that Dortch's injuries could have resulted, not from the water being too hot, but from warm water on skin which had already suffered chemical damage. He argues that Dr. Teplinsky's theory would explain the lack of reaction by Dortch and the fact that neither appellant nor the correctional officers noticed that the bathwater was too hot.

The "Pine-Odor" defense is rejected. Dr. Missavage, also an

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expert in both thermal and chemical burns, testified that after personally treating Dortch's injuries, she was of the opinion that they were definitely temperature-related and not the result of chemical deterioration on the skin. According to her testimony, while a mixture of such chemicals may have some effect on the condition of Dortch's skin, the injuries he suffered could not have occurred but for the water being much too hot. Since Dr. Missavage was Dortch's treating physician, and Dr. Teplinsky only formed his admittedly speculative opinion from viewing the injuries in photographs, her testimony is accorded more credit.

In addition, we reject the appellant's "Pine-Odor" defense upon reviewing other evidence. We note that the record reflects that Dortch's buttocks suffered less severe damage than the rest of his lower body. This evidence supports a finding that hot bathwater caused the damage as Dortch's buttocks were pressed against the tub during the entire bath and not directly touching the hot water. It further contradicts the Pine-Odor theory which, if true, would have resulted in the buttocks suffering the worst damage since he was allegedly sitting around naked in the Pine-Odor residue on his cell floor.

Appellant further argues that there is insufficient evidence to conclude that the water was too hot, given the testimony from appellant and the witnesses to the bath that appellant tested the water, and had some "bare arm" in contact with the water during the

(M [REDACTED] continued - Page 25)

bath. While we do not discredit appellant's testimony entirely, we do not believe that appellant properly tested the water temperature: had he done so, Dortch would not have suffered the severe injuries he exhibited.

All of the personnel in attendance, especially appellant, went to great effort to avoid contact with the feces and urine on Dortch's body, some wearing two pairs of gloves. Moreover, we know that the appellant used a brush to clean Dortch, not his hands, and further testified that he refused to clean Dortch's buttocks or genitals. We are reluctant to believe that appellant and the officers had any substantial amount of contact with the feces-filled bathwater knowing that they each went to such lengths to avoid such contact. While we understand appellant's desire for not wanting to come into contact with the dirty bath water, he had the responsibility to make sure the temperature of the water was safe: given the state of the evidence before us, we conclude that he failed to fulfill this responsibility.

Finally, appellant argues that his dismissal is wrong as there were no signs during the bath that anything was wrong with the temperature of the bath. No steam arose from the bath and Dortch did not yell or attempt to get out of the bathtub. As to the first factor, Dr. Missavage testified that steam may not necessarily rise from water that is still at a temperature level which can burn, depending on the moisture conditions in a room. As to the fact

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that the inmate was calm during the bath, under the circumstances, it is reasonable to believe that, as he told Thayer, he felt he had to do the "manly" thing and suffer the pain without complaining. Moreover, there is evidence in the record from Dortch's treating physician that Dortch could withstand a great deal of pain - much more than the average person.

From a review of the record, we conclude there is sufficient evidence to support a finding that the water was too hot for the inmate's safety and that the water was the cause of the inmate's injuries. Having reached that conclusion, we can find that appellant did not adequately check the water temperature to ensure the inmate's safety and that such action constitutes gross negligence and thus, inexcusable neglect of duty. Having determined appellant was grossly negligent in his actions, we also find that his actions constituted a failure of good behavior under section 19572, subdivision (t).

Inefficiency

The Board does not believe that the charge of inefficiency was established in this case. In the case of R [REDACTED] B [REDACTED] (1993) SPB Dec. No. 93-21, p. 10, we said:

"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).

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We do not find appellant's actions in this matter to constitute inefficiency, and therefore, dismiss this charge.

Appropriateness of Penalty

As noted in the case of Skelly v. State Personnel Board (1973 15 Cal.3d 194:

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, 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" is assuring that the penalty is "just and proper".

The Skelly court set forth several factors for the Board to consider in assessing the propriety of the imposed discipline. Among the factors to be considered are the extent to which the employee's conduct resulted in, or if repeated is likely to result in harm to the public service, the circumstances surrounding the misconduct and the likelihood of its recurrence.

In this case, appellant's grossly negligent omission resulted in serious harm to the public service. Dortch suffered massive burns all over his body, requiring three major skin grafts, long-term hospitalization, and the wearing of a pressure suit for over a year. An MTA is an employee trained in basic medical procedures

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to care for the inmate population, often in emergency situations. Gross negligence in the performance of an MTA's duties can have serious and permanent ramifications on the inmates in the prison, and thus in turn on the public service. Although we do not believe appellant intended to cause Dortch harm by his actions, appellant's gross negligence nevertheless severely harmed an inmate and therefore appellant must be seriously disciplined for such action.

In addition to considering the harm to the public service, Skelly requires that in assessing the proper penalty, the Board also consider the likelihood of recurrence. If this were appellant's first instance of grossly negligent behavior in his job, the outcome of this case might be different. We must, however, seriously consider the fact that just the year prior to this incident, appellant stipulated to charges which we believe further illustrate appellant's lack of good judgment and/or poor medical skills. Like hospital patients and institutionalized persons, prison inmates are in a position where they must entirely depend upon their caretakers for their safety and security. Given appellant's track record, we believe that the Department was justified in refusing to give the appellant another chance. The Board sustains appellant's dismissal.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Government Code

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sections 19582, it is hereby ORDERED that:

1. The adverse action of dismissal taken against I [REDACTED]

[REDACTED] M [REDACTED] is hereby sustained.

2. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD*

Richard Carpenter, President
Alice Stoner, Vice President
Lorrie Ward, Member
Floss Bos, Member
Alfred R. Villalobos, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on April 5-6, 1994.

GLORIA HARMON

Gloria Harmon, Executive Officer
State Personnel Board