

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 35376
)
D [REDACTED] ■. M [REDACTED]) **BOARD DECISION**
) (Precedential)
)
From a one step reduction in) **NO. 95-10**
salary for one month as a State)
Police Officer with the California)
State Police, Department of)
General Services at Sacramento) April 18, 1995

Appearances: Kevin S. Hutcheson, Attorney representing appellant, D [REDACTED] ■. M [REDACTED]; Donald C. Cady, Senior Staff Counsel, Department of General Services representing Respondent, Department of General Services.

Before: Lorrie Ward, President; Floss Bos, Vice President; Richard Carpenter and Alice Stoner, 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 D [REDACTED] ■. M [REDACTED] (appellant or M [REDACTED]). Appellant was subjected to a one step reduction in salary for one month as a State Police Officer with the California State Police (CSP), Department of General Services (Department) for driving high speed through a red stop light without showing appropriate lights or using a siren.

The ALJ who heard the appeal sustained the one step reduction based on a finding that appellant's conduct constituted inefficiency in violation of Government Code § 19572, subdivision (c). The Board rejected the ALJ's Proposed Decision, deciding to

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hear the case itself and requesting the parties to brief the issue of whether appellant's conduct constituted inefficiency.

After a review of the entire record, including the transcript and the written and oral arguments presented to the Board, the Board sustains the penalty for the following reasons.

FACTUAL SUMMARY

Appellant was first employed as a State Police Officer with the California State Police, Department of General Services, on May 2, 1983. Appellant has received three prior adverse actions, a 10 day suspension in November of 1985, a 20 day suspension in February of 1986, and a six month suspension in May of 1987. Appellant also received an Official Reprimand dated August 16, 1990 and a counseling memorandum dated February 25, 1994.

On March 4, 1994, at 10:00 a.m. appellant left CSP headquarters driving his state police vehicle through an alley and turning on 9th Street. He proceeded southbound on 9th Street through its intersection with "S" Street.

Appellant was responding to a situation in the south area involving two fellow state police officers who were engaged in a stop and search for a man reported to have a gun. CSP had not dispatched appellant to the scene, there was no request from the officers for back up from CSP, and appellant did not advise the dispatcher of his intent to respond. The two CSP officers at the scene had requested back-up from the Sacramento County Sheriff's

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Office since the search for the subjects would be conducted in the county's jurisdiction.

Appellant did not stop for the red traffic signal at the corner of 9th and "S" Streets. North State Commander Dennis Williams was walking nearby on "S" Street and observed appellant cross the intersection. At the hearing before the ALJ, Commander Williams testified that appellant did not have any emergency lights activated on his state police vehicle, did not have his siren on, and was accelerating at a high rate of speed as he entered the intersection.

In an emergency situation, authorized response vehicles are exempted from compliance with certain traffic laws if the driver sounds a siren as may be reasonably necessary, and the vehicle displays a lighted red lamp visible from the front as a warning to other drivers and pedestrians. (Cal. Vehicle Code section 21055(b).) California Vehicle Code section 21056 also provides, however, that:

Section 21055 does not relieve the driver of a vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor protect him from the consequences of an arbitrary exercise of the privileges granted in that section.

For his part, appellant testified that he accelerated his patrol car as he crossed the intersection, but he believed he had activated his overhead lights before he entered the intersection. Appellant did not activate his siren.

The ALJ did not resolve the conflict between Commander William's testimony that appellant had not activated his overhead lights and appellant's testimony that he had activated his overhead lights. The ALJ did not resolve the conflict because she found sufficient evidence to sustain the Department's disciplinary action without resolving the conflict. As the ALJ noted:

. . .there is no conflict regarding appellant's speed of approximately 40 mph as he drove through the downtown intersection at midmorning on Friday, March 4, 1994. In addition, appellant admitted that he did not use his siren until he had traveled three or four blocks on 9th Street.

The ALJ concluded, and we agree, that appellant drove his state police vehicle at an excessive rate of speed as he proceeded through the downtown intersection. Even if appellant's testimony that he activated his overhead lights prior to entering the intersection is fully credited, his failure to activate the siren on the vehicle and the speed of his vehicle through the intersection constituted a danger to the pedestrian and vehicular traffic which could reasonably be expected to be present on a weekday morning in downtown Sacramento. We find that the appellant failed to exercise due caution.

ISSUES

What, if any, of the stated causes for discipline are supported by a preponderance of evidence?

DISCUSSION

The Department alleged that appellant's conduct violated Government Code section 19572, subdivisions (b) incompetency, (c) inefficiency, (p) misuse of state property, and (t) other failure of good behavior during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment.

Incompetency

We cannot sustain discipline based on the cause of incompetency. The term "incompetency" is "generally used in a variety of factual contexts to indicate an absence of qualification, ability or fitness to perform a prescribed duty or function." Pollack v. Kinder (1978) 85 Cal.App.3d 833, 839. Appellant neglected to use due caution as he crossed the intersection at excessive speed. As the court noted in Pollack, "[w]hile it is conceivable that a single act of misconduct under certain circumstances may be sufficient to reveal a general lack of ability to perform [an employee's] duties," one negligent act does not usually constitute incompetency. Id. at 839. "[N]egligence and incompetence are not synonymous; [an employee] may be competent or capable of performing a given duty but

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negligent in performing that duty." Id. at 838.

The Board has defined "incompetency" under Government Code section 19572(b) consistent with case law. In F████ J████ (1993) SPB Dec. No. 93-34 at p.3, we stated "Incompetency is generally found when an employee fails to perform his or her duties adequately within an acceptable range of performance." In J████, we determined that appellant's one time medication error did not constitute incompetency. [Compare Mercedes C. Manayao (1993) SPB Dec. No. 93-14 (incompetence based on continuous errors despite training, direction and offers of help)].

Appellant's conduct did not constitute incompetency. His one instance of failing to follow emergency response procedures does not indicate a generally unsatisfactory performance of the duties of his position as a state police officer.

Inefficiency

In her proposed decision, the ALJ found only that appellant's conduct constituted inefficiency. In its brief before the Board, the Department withdrew the charge of inefficiency, noting that inexcusable neglect of duty should have been charged instead. We agree.

A charge of inefficiency is most often appropriate when an employee continuously fails to achieve a set level of productivity or fails produce an intended result with a minimum of waste, expense or unnecessary effort. (R████ E████ (1993))

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SPB Dec. No. 93-21, 10-11.) There is no showing that appellant's high speed driving was inefficient. Appellant's failure to exercise due caution did constitute inexcusable neglect of duty under Government Code § 19572 (d). Established case law holds, however, that the Board may sustain discipline only on the causes for discipline alleged in the Notice of Adverse Action. (Negrete v. State Personnel Board (1989) 213 Cal.App.3d 1160, 1169-1171.) Since the Department did not allege inexcusable neglect of duty as a cause for adverse action, we may not rely upon that cause to support the discipline imposed.

Misuse of State Property

Appellant was also charged with misuse of state property. The Board defined misuse of state property in R [REDACTED] B [REDACTED] (1993) SPB Dec. No. 93-21 at p. 11 as:

generally imply[ing] 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.

We also noted that misuse of state property "may also connote improper or incorrect use, or mistreatment or abuse of state property." Id. at p. 12.

In W [REDACTED] M [REDACTED] (1994) SPB Dec. No. 94-26 at p.10, we explained that:

[g]enerally speaking, misuse of state property does not occur when an employee uses state property for the purpose for which it was intended even if there is some other element of error attached to the use.

M █████ involved a California Highway Patrol (CHP) officer who fired his state issued revolver at a fleeing van in violation of CHP policy. We declined to find that M █████ misused state property, reasoning that even though M █████ violated CHP policy when he used his weapon to stop the fleeing van, he used his revolver for the purpose it was intended -- the control and/or arrest of an individual suspected to be a law breaker. Id.

In the present case, although appellant failed to exercise due caution, appellant was using his state vehicle to respond to a police radio signal, clearly a purpose for which the vehicle is intended. Appellant's conduct is not misuse of state property.

Other Failure of Good Behavior

Appellant was also charged with a violation of Government Code § 19572, subdivision (t), other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment.

Unlike the other 23 subdivisions of Government Code § 19572, which, for the most part, refer to specific kinds of conduct which constitute cause for discipline, subdivision (t) is a "catchall to include situations and acts which do not easily fit into the [23] specific causes." (Orlandi v. State Personnel Board (1968) 263 Cal.App.2d 32, 37 cited with approval in Nightingale v. State Personnel Board (1972) 7 Cal.3d 507, 512). We do not

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read subdivision (t), however, to cover only those types of misconduct which do not fit easily into the other categories. Often subdivision (t) is charged as a cause for discipline in conjunction with other subdivisions of section 19572. [See Yancey v. State Personnel Board 167 Cal. App. 3d 478, 486 and cases cited as examples therein; see also F [REDACTED] J [REDACTED] (1993) SPB Dec. No. 93-34 (appellant's failure to admit medication error constitutes inexcusable neglect of duty, dishonesty and other failure of good behavior)].

A violation of subdivision (t) requires more than mere misconduct.

The misconduct must be of such a nature as to reflect upon the employee's job. In other words, [1] the "misconduct must bear some rational relationship to [the employee's] employment and [2] must be of such character that it can easily result in the impairment or disruption of the public service." Yancey, 167 Cal.App.3d at 483 (citations omitted).

The first requisite, that the misconduct must bear some relationship to the employee's employment, is easily met. Appellant was in uniform, on duty, driving a state vehicle. The second requisite, that the misconduct bring discredit to the public service is also apparent. We believe discredit would accrue to appellant's employment if the public were aware of appellant's failure to use due caution on downtown streets during

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regular business hours.¹

We find that appellant's conduct constitutes a violation of Government Code § 19572, subdivision (t) other failure of good behavior.

CONCLUSION

For all of the reasons set forth above, the Board finds cause for disciplining appellant under Government Code § 19572, subdivision (t) other failure of good behavior. We agree with the ALJ that the discipline assessed by the Department, a one step reduction in salary for one month, the equivalent of a one-day suspension, is a just and proper penalty.

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 one step reduction in salary for one month of D█████ █. M█████, a State Police Officer with the California State Police, Department of General Services at Sacramento is sustained;
2. This opinion is certified for publication as a Precedential Decision (Government Code § 19582.5).

¹In contrast, in W█████ █. M█████ (1994) SPB Dec. No. 94-26, the Board found that although appellant used his weapon in violation of department policy, the Board did not believe that appellant's conduct of using his weapon to control a fleeing suspect in a secluded area would cause discredit to M█████'s employment.

THE STATE PERSONNEL BOARD*

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

*Member Alfred R. Villalobos was present when this case was considered, but resigned his position prior to the issuance of this decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on April 18, 1995.

WALTER VAUGHN

Walter Vaughn, Acting Executive Officer
State Personnel Board