

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	SPB Case No. 34669
)	
G [REDACTED] ■. R [REDACTED])	BOARD DECISION
)	(Precedential)
)	
From three working days')	NO. 95-19
suspension and administrative)	
reassignment as a State Traffic)	
Officer in the Inland Division,)	
Department of California Highway)	
Patrol)	December 5-6, 1995

Appearances: Burton C. Jacobson, Attorney, on behalf of appellant G [REDACTED] ■. R [REDACTED]; Daniel E. Lungren, Attorney General, by Thomas Sheerer, Deputy Attorney General on behalf of respondent, California Highway Patrol.

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 attached Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of G [REDACTED] ■. R [REDACTED] (appellant or R [REDACTED]) from his three (3) day suspension and administrative reassignment from his position as a State Traffic Officer in the Inland Division, Department of California Highway Patrol (Department). At the time of this adverse action, appellant was a State Traffic Officer working as an aircraft pilot, a position designated as a Specialty Pay Position. After a hearing, the ALJ sustained without modification appellant's three day suspension but rescinded appellant's

(R [REDACTED] continued - Page 2)

Administrative Reassignment on grounds that such disciplinary transfers are prohibited by Government Code § 19994.3.¹ After a review of the entire record, including the transcript, exhibits, and the written arguments of the parties, the Board adopts the ALJ's Proposed Decision to the extent it is consistent with the discussion below.

We agree that appellant's three day suspension should be sustained. We disagree, however, with the ALJ's interpretation of section 19994.3 and find that section 19994.3 does not prohibit disciplinary transfers. Although we find that disciplinary transfers are not unlawful per se, we do not believe that appellant's misconduct should result in permanent reassignment and order that appellant's reassignment be limited to a period of 12 months after which appellant is to be returned to his Specialty Pay Pilot position.

ISSUES

1. Does Government Code § 19994.3 prohibit disciplinary transfers?
2. What is the appropriate penalty under all the circumstances?

¹Hereinafter all code citations will be to the Government Code unless specifically stated otherwise.

DISCUSSION

The appointing power has the right to transfer employees between positions within the same class. Government Code § 19994.1 provides, in pertinent part:

An appointing power may transfer any employee under his or her jurisdiction: (a) to another position in the same class; or (b) from one location to another whether in the same position, or in a different position as specified above in (a) or in Section 19050.5.²

The appointing power's right to transfer is, upon protest, initially subject to review by the Department of Personnel Administration (DPA) as provided in section 19994.3:

(a) If a transfer is protested to the [Department of Personnel Administration (DPA)] by an employee as made for the purpose of harassing or disciplining the employee, the appointing power may require the employee to transfer pending approval or disapproval of the transfer by [DPA]. If [DPA] disapproves the transfer, the employee shall be returned to his or her former position, shall be paid the regular travel allowance for the period of time he or she was away from his or her original headquarters, and his or her moving costs both from and back to the original headquarters shall be paid in accordance with the department rules.

Neither section 19994.3, nor the statutes defining discipline preclude a department from transferring an employee as a means of discipline.³ Section 19570 defines adverse action to mean

²Government Code § 19050.5 allows appointing powers to transfer between classes if the Board has designated the transfer as appropriate.

³The Board expresses no opinion on the policy question of whether a transfer should be made for disciplinary purposes.

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"dismissal, demotion, suspension, or other disciplinary action" (emphasis added). The Board has found that when an employee is reassigned for disciplinary purposes, the reassignment falls within the meaning of "other disciplinary action." C [REDACTED] D [REDACTED] SPB Dec. No. 94-22, p.5. A disciplinary transfer, like any adverse action, triggers a number of rights including, but not limited to, the right to notice (section 19574), the right to inspect documents (section 19574.1), and the right to a hearing before the SPB (section 19578).

The purpose of section 19994.3 is to prevent a Department from transferring an employee for disciplinary reasons without affording the employee the panoply of rights triggered by the adverse action process. Whether a transfer is disciplinary in nature is a question of fact.

Even when a reassignment is related to a disciplinary action, the reassignment is not necessarily disciplinary in nature. For example, in Orange County Employees Association v. County of Orange (1988) 205 Cal.App.3d 1289, an employee was written up for a lack of thoroughness and later criticized for poor management style. When the employee was transferred, the employee appealed on grounds that his transfer was punitive.⁴ The court declined to find that

⁴Orange County did not interpret Government Code § 19994.3 but, instead, Government Code § 3303 which prohibits punitive transfers of peace officers.

the transfer was punitive, stating:

Deficiencies in performance are a fact of life. Right hand hitters sit on the bench against certain pitchers, some professors write better than they lecture, some judges are more temperamental with criminal cases than others. The manager, chancellor or presiding jurist must attempt to find a proper role for his personnel. Switching Casey from shortstop to second base because he can't throw to first as fast as Jones is not in and of itself a punitive transfer. (Id. at 1294.)

The court found "there is a difference between a transfer to punish for a deficiency in performance, versus a transfer to compensate for a deficiency in performance." Id. (emphasis added).

Put another way, an employer has a right to place the right person in the right position.

In cases in which the appointing power has not indicated that the transfer was disciplinary, the employee who suspects his or her transfer was disciplinary in nature may protest the transfer or reassignment to DPA for evaluation. If DPA finds the transfer was, in fact, punitive in nature, DPA disapproves the transfer and the employee is returned to his or her original position.⁵ As discussed below, the appointing power may thereafter pursue the transfer as a disciplinary measure by serving a Notice of Adverse Action as in other disciplinary cases. If DPA approves the transfer, i.e., finds that the transfer was not punitive in nature,

⁵DPA does not have jurisdiction to hear appeals from disciplinary transfers. The SPB is the state agency designated by the California Constitution to review disciplinary actions, (California Constitution, Article VII, section 3(a)).

(R [REDACTED] continued - Page 6)

the employee remains in the position to which he or she has been transferred.

In this case, however, the Department purposely designated the reassignment as disciplinary in nature. The Notice of Administrative Reassignment was attached to the Notice of Adverse Action and specifically stated that the reassignment was being taken based on appellant's "propensity to abuse [his] position as an aircraft pilot, misuse State resources and flagrantly disobey the policies and procedures of the Department." The Notice of Administrative Reassignment informed appellant of his right to appeal to the State Personnel Board. Thus, appellant's reassignment was clearly for disciplinary purposes and falls within the meaning of "other disciplinary action."

Where, as here, a transfer is openly designated as a disciplinary transfer, the employee may appeal directly to the SPB. **PENALTY**

Having determined that the permanent disciplinary transfer in this case was not per se unlawful, we now turn to the question of whether it was an appropriate penalty under all the circumstances.

When performing its constitutional responsibility to review disciplinary actions [Cal. Const. Art. VII, section 3(a)], the Board is charged with rendering a decision which is "just and proper". (Section 19582). In determining what is a "just and proper" penalty for a particular offense, under a given set of

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circumstances, the Board has broad discretion. (See Wylie v. State Personnel Board (1949) 93 Cal.App.2d 838.) The Board's discretion, however, is not unlimited. In the seminal case of Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194, the California Supreme Court noted:

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 in such a way as to render a decision that is "just and proper," the Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board considers are those specifically identified by the Court in Skelly as follows:

...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in [h]arm to the public service. (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (Id.)

Appellant's misconduct consisted of removing his Departmental weapon and placing it on a chair next to him in an airport restaurant; removing the magazine from his weapon and allowing a private citizen to inspect it; twirling his PR-24 baton and throwing it to the ground to demonstrate how to trip a fleeing suspect; excessively testing his siren on one occasion; using his aircraft's public address system to make a joking comment to a

(R [REDACTED] continued - Page 8)

friend; failing on a few occasions to immediately notify dispatch of his location; failing to properly secure his aircraft during a meal break at the Hesperia Airport; and increasing power over a friend's house to get his friend's attention.⁶ As noted above, we agree with the ALJ that this misconduct warrants the three day suspension taken by the Department. The remaining issue is whether appellant's misconduct also warrants a permanent disciplinary transfer.

Some of the particular misconduct in which appellant engaged is conduct directly related to his specialty pay position as a pilot. Appellant used his state aircraft's public address system and siren in a frivolous manner. While flying over his friend's house, appellant powered up his state aircraft to get his friend's attention. These incidents of misconduct would not have occurred had appellant not been a CHP pilot. As appellant's supervisor noted at the hearing, as a pilot, appellant works in a "non-structured unit" that is, for the most part, unsupervised. Consequently, good judgment is imperative.

On the other hand, the ALJ found appellant to be a good pilot, stating that there was no evidence that appellant was not fully capable of continuing to work in his assignment as a pilot.

In evaluating appellant's misconduct, appellant's supervisor found

⁶The ALJ did not find any impropriety in appellant's practicing short takeoffs or revving his engine.

(R [REDACTED] continued - Page 9)

that the most egregious error made by appellant was removing the magazine from his weapon and allowing private citizens to inspect it. While the totality of appellant's misconduct which specifically relates to his pilot position shows poor judgment, it was not so egregious as to justify permanent removal from the pilot position. Consequently, we limit appellant's Administrative Reassignment to 12 months. We believe that reassignment for one year should impress appellant with the necessity of taking his pilot duties more seriously.

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 ALJ's attached proposed decision is adopted to the extent it is consistent with this Decision;

2. The three day suspension taken by the Department of California Highway Patrol is sustained but the permanent Administrative Reassignment from a Specialty Pay Position is modified to a period of 12 months.

3. The Department of California Highway Patrol is ordered to pay appellant all back pay and benefits which would have accrued to him had he been Administratively Reassigned for 12 months rather than permanently reassigned.

4. This matter is hereby referred to the Administrative Law Judge and shall be set for hearing on written request of either

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party in the event the parties are unable to agree as to the salary and benefits due appellant.

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

THE STATE PERSONNEL BOARD*

Lorrie Ward, President

Floss Bos, Vice President
Richard Carpenter, Member
Alice Stoner, Member**

*Member Ron Alvarado was not present when this decision was adopted and therefore did not participate in this decision.

Member Alice Stoner concurring in part and dissenting in part:

I concur with the Board's decision to sustain appellant's three day suspension but I dissent from the Board's decision to reassign appellant for 12 months. I would completely rescind appellant's Administrative Reassignment.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on December 5-6, 1995.

C. Lance Barnett, Ph.D.
Executive Officer
State Personnel Board

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PROPOSED DECISION

This matter came on regularly for hearing before Byron Berry, Administrative Law Judge, State Personnel Board, on September 29, 1994 and November 22, 1994, at Rancho Cucamonga, California.

The appellant, G [REDACTED] ■. R [REDACTED], was present and was represented by Burton C. Jacobson, attorney.

The respondent was represented by Daniel E. Lungren, Attorney General, by Thomas Scheerer, Deputy Attorney General.

Evidence having been received and duly considered, the Administrative Law Judge makes the following findings of fact and Proposed Decision:

I

The above three working days' suspension and the administrative reassignment effective February 27, 1994, and appellant's appeal therefrom comply with the procedural requirements of the State Civil Service Act.

II

Appellant has worked as a State Traffic Officer and State Traffic Officer Cadet since his appointment on August 10, 1981. He has no prior adverse actions.

III

The adverse action alleged that appellant used poor judgement and failed to follow the Department's rules on July 8, 1993, and July 27, 1993. It also alleged that during his administrative interrogation, appellant admitted that he failed to use good judgement and follow Departmental rules.

Inefficiency, inexcusable neglect of duty, misuse of state property, and failure of good behavior that causes discredit to the appointing authority or appellant's employment have all been alleged against appellant pursuant to Government Code section 19572. These allegations must be established by a preponderance of the evidence in order for the Department to prevail in this matter.

In addition to the three working days' suspension, appellant received a Notice of Administrative Reassignment Resulting in Loss of Specialty Pay. Appellant was transferred from his job as a pilot to other State Traffic Officer duties. He lost his specialty pay as a result of the transfer. The transfer was based on the same allegations stated in the adverse action.

IV

On July 8, 1993, Mr. H. Coon complained to the Department about appellant's conduct at the Hesperia Airport. He stated

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that on that day, while on duty and in uniform, appellant disarmed himself by removing his Sam Browne belt and holster containing his Departmental weapon by placing it in a chair next to him at the airport restaurant. While removing those items, appellant stated, "I'd better remove my gun before I shoot someone in the leg."

Mr. Coon also indicated that prior to leaving the airport in the Departmental aircraft, appellant created a disturbance by cycling the siren several times. He stated that appellant used the public address system to jokingly tell a friend to "leave that woman alone."

Mr. Coon also reported that appellant set the brakes on the aircraft and applied full power causing excessive engine noise prior to going down the runway.

The evidence established that appellant did remove his Sam Browne belt and make the comment about removing his gun before he "shoots someone in the leg." Appellant is a very friendly, outgoing person who sometimes likes to joke and kid around. He accepted the responsibility for removing his Sam Browne belt at the restaurant and indicated that he removed it because the chair was too small to sit in with his Sam Browne belt. The comment that he made about shooting someone in the leg was consistent with his tendency to joke or kid around.

It is customary for a State Traffic Officer to test the siren on the patrol vehicle to determine if it is working properly. It is also appropriate to test the siren on the aircraft for the same reason. However, on this occasion, he

(R [REDACTED] continued - Page 4)

tested the siren three or more times. This was excessive. It could be heard all over the airport. It was only necessary to test it once.

Appellant is also required to test his public address system to make sure that it is working properly. He used poor judgement when he jokingly told his friend to "leave that woman alone," while at the airport on the public address system. That comment focused attention on appellant and tarnished the image of the California Highway Patrol (CHP).

Appellant flew a Cessna 185 Sky Wagon with a Robinson Short Take-off and Landing Kit. He was required to practice short take-offs and landings. While doing so at the Hesperia Airport, he did not break any Departmental rules or noise abatement restrictions. There was a conflict in the testimony as to whether or not his practicing of the short take-off was noisier than a normal take-off. Since it was appropriate for appellant to practice the short take-off, and since he was not in violation of Departmental rules or noise abatement restrictions at the Hesperia Airport, it is found that it was not inappropriate for appellant to practice his short take-off. There was no evidence that he had been previously warned or advised by the Department not to practice short take-offs at that airport.

V

On July 27, 1993, appellant failed to properly secure his aircraft at the Hesperia Airport. Several tiedowns were available, but appellant failed to tie his aircraft down. The

(R [REDACTED] continued - Page 5)

Departmental rules required appellant to secure his aircraft. The evidence established the appellant was not the only State Traffic Officer Pilot who failed to properly secure his aircraft.

VI

During his administrative interrogation on August 11, 1993, appellant stated that he disarmed himself by unloading his Departmental weapon and giving it to friends to inspect. He also indicated that he partially removed his loaded weapon from his holster to display to other people when they inquired about his weapon.

Also during that interrogation, he stated that he has twirled his PR-24 baton, and that he has playfully jammed people in the back with his baton. He further commented that he has thrown the baton to the ground to show how it could trip a fleeing suspect.

VII

The adverse action alleged that appellant routinely took long lunch breaks in violation of the Department's policy. The evidence established that appellant told dispatch when he was going to lunch, and that he sometimes did paper work at the airport or in the vicinity of the airport after eating lunch. The problem was that on some occasions he did not notify dispatch if he was going to remain at the airport or in the vicinity of the airport to do paper work. He did not contact dispatch to let them know where he was so that he could be immediately reached in case there was a problem. His

(R [REDACTED] continued - Page 6)

supervisor testified that it was not inappropriate for appellant to remain in the Hesperia Airport area after eating his lunch to do paperwork as long as he advised dispatch or his supervisor where he was, and left a telephone number where he could be reached.

During the interrogation, appellant admitted flying in formation and increasing power while flying over a friend's residence to gain his attention. The evidence indicated that there were no rules prohibiting formation flying. California Highway Patrol Pilots have flown in formation at CHP funerals. Appellant's duties and responsibilities were such that he should have devoted his full attention to his assigned tasks, and not engage in formation flying. Increasing power while flying over a friend's house to get the friend's attention was inappropriate conduct.

VIII

Attached to the adverse action was a Notice of Administrative Reassignment Resulting in Loss of Specialty Pay. Appellant was removed from his aircraft pilot position with the Inland Division of the CHP. The transfer was based on the allegations contained in the three working days' suspension.

Government Code section 19994.3 prohibits disciplinary transfers. It refers to transfers that are protested to the Department of Personnel Administration (DPA). Appellant's transfer was appealed to the State Personnel Board (SPB). The prohibition against disciplinary transfers is not diminished

(R [REDACTED] continued - Page 7)

because the appeal was made to the SPB, and not DPA.

There was no evidence presented at the hearing that appellant could not continue to work as a pilot with the CHP and do an effective job. The transfer was clearly punitive, and not based on the legitimate needs of the CHP.

* * * * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT, THE ADMINISTRATIVE LAW JUDGE MAKES THE FOLLOWING DETERMINATION OF ISSUES:

Appellant has accepted responsibility for the problems indicated in the adverse action. The evidence established that he has a good personality and that he sometimes jokes or kids around.

There was no evidence of any problems with his integrity or his ability as a pilot. The evidence indicated that appellant is a very good pilot.

Nevertheless, there has been a preponderance of evidence that appellant, on occasion, did not use good judgment.

That problem can be corrected and resolved with this adverse action. Appellant has been put on notice; and, he now has a better understanding of the Department's expectations of his behavior.

Inefficiency, inexcusable neglect of duty, misuse of state property, and failure of good behavior that causes discredit to the appointing authority, or appellant's employment, as stated by Government Code section 19572, have all been established by a preponderance of the evidence.

(R [REDACTED] continued - Page 8)

Appellant's Notice of Adverse Action dated February 1, 1994, informed him that he was receiving a three working days' suspension. Attached to the notice was a Notice of Administrative Reassignment Resulting in the Loss of Specialty Pay. The Notice of Administrative Reassignment Resulting in Loss of Specialty Pay stated that in the accordance with an agreement between the state of California and the California Association of Highway Patrolmen, Unit 5, appellant had the right to file an appeal of the Administrative Reassignment with the SPB. Accordingly, the appeal of the three working days' suspension and the appeal of Administrative Reassignment were heard at the same time by the Administrative Law Judge.

The State Personnel Board is a state agency designated by the California Constitution to review disciplinary actions (California Constitution, Article VII, section 3 (a)). The SPB is the only agency authorized by law to hear an appeal from adverse actions (Government Code section 18703, 19575, and 19582). As set forth in Government Code section 19570, adverse action means dismissal, demotion, suspension, or "other disciplinary action." The administrative reassignment in this matter can be categorized under "other disciplinary action." Appellant's Administrative Reassignment Resulting in the Loss of Specialty Pay was clearly disciplinary in nature. It was a punitive transfer that was taken in conjunction with the three working days' suspension. The reassignment was appealable to the State Personnel Board.

The evidence established that appellant sometimes used poor judgement. It also established that he has integrity, and that he is a very good pilot. There was no evidence presented at the hearing that indicated that appellant was not fully capable of continuing to work in his assignment as a pilot. The administrative reassignment was punitive and improper.

* * * * *

WHEREFORE IT IS DETERMINED that the three days' suspension taken by respondent against G █████ █. R █████ effective February 27, 1994, is hereby sustained without modification.

* * * * *

WHEREFORE IT IS DETERMINED that the Administrative Reassignment Resulting a Loss of Specialty Pay taken by respondent against G █████ █. R █████ effective February 27, 1994, is hereby rescinded. Said matter is hereby referred to the Chief 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, if any, due appellant under the provisions of Government Code section 19584.

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(R [REDACTED] continued - Page 10)

I hereby certify that the foregoing constitutes my Proposed Decision in the above-entitled matter and I recommend its adoption by the State Personnel Board as its decision in the case.

DATED: April 14, 1995.

BYRON BERRY

Byron Berry,
Administrative Law Judge,
State Personnel Board.