

**BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA**

In the Matter of the Appeal by )

R [REDACTED] . T [REDACTED] )

From 45 day suspension from the )  
position of Correctional Captain at )  
Pleasant Valley State Prison with the )  
Department of Corrections at Coalinga )

SPB Case No. 97-4115

**BOARD DECISION**  
(Precedential)

**NO. 98-11**

December 8-10, 1998

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**APPEARANCES:** Barry J. Bennett, Attorney, on behalf of appellant, R [REDACTED] . T [REDACTED]; Barbara L. Sheldon, Senior Staff Counsel, on behalf of respondent, Department of Corrections.

**BEFORE:** Florence Bos, President; Richard Carpenter, Vice President; Lorrie Ward, Ron Alvarado and James Strock, Members

**DECISION**

Appellant R [REDACTED] T [REDACTED], a Correctional Captain with the Department of Corrections (Department), was served with a Notice of Adverse Action suspending him from his position for 45 days. Appellant appealed the suspension and moved for its dismissal as untimely on the ground that the Department had not served the notice within three years of the events that formed the basis of the action.

In this decision, the Board finds the Department did serve the notice within the three year period, that the action should not be dismissed as untimely, and that the matter must be referred back to the Chief Administrative Law Judge for a hearing on the merits.

## **BACKGROUND**

### Factual Summary

Appellant was appointed a Correctional Officer on June 16, 1980. On January 26, 1987, appellant was appointed a Correctional Sergeant. Appellant was appointed a Correctional Lieutenant on March 19, 1990. On October 31, 1996, appellant was appointed a Facility Captain, and on February 1, 1997, he was appointed a Correctional Captain. Appellant has not received any prior disciplinary action.

In July of 1994, appellant was assigned to Corcoran State Prison. Appellant was the Security Squad Commander. During that month, an incident occurred involving the use of firearms at the institution by Correctional Officer R. Caruso. On July 11, 1994, appellant was assigned to investigate the incident. On September 19, 1994, appellant submitted his Investigative Report on the matter to his superiors. On September 19, 1997, respondent served its Notice of Adverse Action on appellant. The Notice of Adverse Action was for a 45-day suspension effective October 3, 1997.

The Notice of Adverse Action<sup>1</sup> alleged that appellant did not properly perform the investigation into the shooting incident involving Officer Caruso. The notice alleged:

- Appellant failed to interview all staff members and inmates involved in the incident;
- Appellant failed to interview the Sergeant whose concerns initiated the investigation;

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<sup>1</sup> The notice was subsequently amended by respondent during briefing of the motion to dismiss before the Administrative Law Judge. The amendments clarify that the investigation report was the source of some of the allegations but do not add any new substantive allegations.

- Appellant accepted statements about the conduct of other staff made by Officer Caruso as true without independently verifying them;
- The conclusions in appellant's investigative report were not reasonable in light of information apparent from a careful review of the videotape taken during the incident;
- Appellant failed to inquire as to the full extent of the injuries sustained by the inmate involved in the incident;
- Appellant failed to investigate a report that Officer Caruso and one other officer were aware of the possibility of the incident prior to its occurrence and determine the source of their knowledge and whether the incident could have been prevented; and
- Appellant erroneously reported the responsibilities of Officer Caruso's assigned post as reported by Officer Caruso without independent verification. Had appellant checked, he would have noted the inaccuracies in Officer Caruso's report and found that Officer Caruso had abandoned his post in order to participate in the incident.

As legal cause for adverse action, the Department alleged the following subdivisions of Government Code section 19572: (c) Inefficiency; (d) Inexcusable neglect of duty; (f) Dishonesty; (o) Willful disobedience; (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.

## **ISSUE**

When did cause for discipline first arise under the circumstances of this case?

## **DISCUSSION**

Government Code section 19635 provides:

“No adverse action shall be valid against any state employee for any cause for discipline based on any civil service law of this state, unless notice of the adverse action is served within three years after the cause for discipline, upon which the notice is based, first arose. Adverse action based on fraud, embezzlement, or the falsification of records shall be valid, if notice of the adverse action is served within three years after the discovery of the fraud, embezzlement, or falsification.”

The cause for discipline, in essence, is failure to conduct a thorough and accurate investigation. The “investigation” necessarily concludes with the preparation of a report. Appellant was given a general instruction to conduct an investigation and prepare a report of his findings. Until appellant completed the investigation through submission of the report, the Department was not in a position to determine whether he had properly performed the assignment. The omissions charged did not manifest themselves until the investigation was over; prior to that time they were nothing more than steps that had not yet been taken. Had the Department provided or required a detailed work plan with specific deadlines, appellant could have been monitored during the course of the investigation and charged with failing to follow the work plan or failure to meet deadlines as the Department became aware of the omissions. In this case, however, appellant’s alleged omissions and improper findings did not become evident until the investigation was completed and the findings reduced to final form in the report. Until that point, they were merely tentative findings, subject to further modification as the investigation progressed. In circumstances such as this, then, the logical point at which

cause for discipline “arose” was the point at which the investigation was completed by submission of a report to the Department.

The Notice of Adverse Action was served on appellant three years to the day after he submitted the investigative report. This was the maximum time allowed under Section 19635<sup>2</sup>. While filing an adverse action three years after the fact is permitted by law, the Board would prefer that state agencies take disciplinary action promptly so that employees receive timely notice of employer’s expectations and so that evidence is preserved.

### **CONCLUSION**

The Department’s service of the Notice of Adverse Action three years to the day after the investigative report was submitted was not untimely under the circumstances of this case. Whether or not appellant had conducted a complete and thorough investigation and whether the report’s findings were supported by the evidence could not be determined by the Department until appellant submitted the completed report. The motion to dismiss the action as untimely must be denied and the appeal heard on the merits.

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<sup>2</sup> At the hearing before the ALJ, appellant suggested that the 3 year deadline expired on September 18 instead of September 19. In counting time, however, we are mindful of Code of Civil Procedure Section 12: “The time in which any act provided by law is to be done is computed by excluding the first day, and including the last . . .” Calculated according to that rule, the last day on which to serve the notice was September 19. Reichardt v. Reichardt (1960) 186 Cal.App.2d 808.

**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 motion to dismiss the Adverse Action against R [REDACTED] T [REDACTED] as untimely is denied; and
2. this matter is hereby referred to the Chief Administrative Law Judge for assignment for a hearing on the merits of the appeal.
3. This decision is certified for publication as a Precedential Decision.  
(Government Code § 19582.5).

**THE STATE PERSONNEL BOARD**

Florence Bos, President  
Richard Carpenter, Vice President  
Lorrie Ward, Member  
Ron Alvarado, Member  
James Strock, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on December 8-10, 1998.

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Walter Vaughn  
Executive Officer  
State Personnel Board

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