BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **RALPH REY** From dismissal from the position of Janitor with Patton State Hospital, Department of Mental Health at Patton	SPB Case No. 98-2752 **BOARD DECISION** (Precedential) **NO. 99-10** November 2, 1999

APPEARANCES: Michael D. Hersh, Attorney, California State Employees Association, SEIU Local 1000, AFL-CIO, on behalf of appellant, Ralph Rey; Michael Johnson, Human Resources Director, Patton State Hospital, on behalf of respondent, Department of Mental Health.

BEFORE: Florence Bos, President; Ron Alvarado, Vice President; Richard Carpenter and William Elkins, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) primarily to review issues relating to the application and effect of Government Code §§ 19574 and 19574.5. In this Decision, the Board finds that the facts of this case did not permit respondent, Department of Mental Health (Department), to place appellant, Ralph Rey, (appellant) on unpaid administrative leave and dismiss him retroactively under Government Code § 19574.5. The Board finds that the appropriate remedy for this improper reliance upon Government Code § 19574.5 is to change the effective date of discipline to the day after appellant's Skelly meeting, and to award appellant backpay and benefits up through and including the date of the Skelly meeting. The Board also finds that the requirement in Government Code § 19574 that an appointing power must

file a notice of adverse action with SPB within 15 days after the effective date of the adverse action is directory, not mandatory, and the Department's failure to comply with this requirement does not invalidate the adverse action or warrant Skelly damages. Finally, the Board finds that the just and proper penalty for the proven misconduct is a 10 working day suspension.

BACKGROUND

Factual Summary[1]

(Employment History)

Appellant's employment history record[2] maintained by the Controller's Office indicates that appellant worked as a seasonal Park Aid for the Department of Parks and Recreation from July 8, 1981 through September 17, 1981. It also indicates that he was appointed as a Janitor with Patton State Hospital (PSH) on September 1, 1994.

(June 23, 1998 Incident)

The parties stipulated to the following facts set forth in the notice of adverse action (NAA) dated July 13, 1998:[3]

On June 23, 1998, at approximately 0615 hours, appellant entered the PSH parking lot and attempted to park his car. In the process of parking, he crashed into a sign and damaged it. He then drove off, but was stopped by a PSH Correctional Officer and detained. The Correctional Officer contacted the California Department of Highway

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[1] The factual summary is taken substantially from the Proposed Decision.

[2] The ALJ took official notice of this record.

[3] The parties stipulated to certain of the allegations set forth in the NAA. Neither party submitted any testimony or other evidence relating to those allegations.

Patrol (CHP), which responded to the scene. A CHP officer conducted field sobriety tests (FSTs). Using a portable "Intoxilizer" device, the CHP officer found appellant to have a blood alcohol content of .20, .18, and .17, respectively.[4] The CHP officer arrested appellant for violations of Vehicle Code §§ 20002(a) (hit and run), 23152(a) and (b) (driving under the influence), and 14601.1(a) (driving with a suspended license).

As a result of his arrest, appellant was inexcusably absent without leave on June 23, 1998. He was placed on administrative leave on June 24, 1998 under Government Code § 19574.5.

(Prior Adverse Actions)

Appellant stipulated that he received the following, as set forth in the NAA, from PSH:

(1) September 1, 1994[5] – Contract for Continued Employment, through 8-13-95;

(2) October 18, 1994 – Adverse Action (Dismissal);

(3) November 1, 1994 – Contract for Continued Employment, through 11-31-95;

(4) December 14, 1994 – Adverse Action (Dismissal) stipulated to 6-month suspension without pay and "Last Chance Contract."

(5) December 22, 1994 – "Last Chance Contract" through 12-21-95.

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[4] The NAA did not explain why appellant was found to have three different blood alcohol levels. Presumably, the CHP officer tested appellant's blood alcohol level three times and got three different results. All three results are well over the legal limit of .08 set forth in Vehicle Code § 23152(b).

[5] As set forth above, the Controller's employment history record indicates that appellant's employment with PSH began on September 1, 1994, the same day as the first Contract for Continued Employment listed on the NAA. The Contract for Continued Employment was not submitted into evidence. The Department offered no testimony or evidence to explain why the date of appellant's first day of work with PSH was the same as the date of his first Contract for Continued Employment.

The Department did not submit any testimony or evidence to explain the nature or scope of the two prior adverse actions against appellant. It also did not submit copies of, or offer any testimony to explain the content and scope of, the "Contracts for Continued Employment" or "Last Chance Contract" that were listed in the NAA.

(Skelly Issues)

The NAA was dated July 13, 1998. Appellant received it on July 14, 1998. The NAA provided that the effective date of the adverse action was June 24, 1998, the date appellant was put on administrative leave under Government Code § 19574.5

Sometime after appellant received the NAA, Nellie Lynn (Lynn), appellant's Labor Relations Representative, contacted Ted Sutton (Sutton), Labor Relations Analyst for PSH, and requested a Skelly meeting. An initial Skelly meeting was set for July 17, 1998, but was re-scheduled to July 20, 1998.[6]

On July 18, 1998, Lynn sent Sutton a letter by facsimile transmission, in which she asserted that, as a consequence of the date of service of the notice of adverse action, appellant's administrative leave had to be "with pay".

[6] No evidence was submitted regarding the reasons for the rescheduling of the Skelly meeting.

A Skelly meeting[7] was held on July 20, 1998, with PSH Executive Director William L. Summers acting as the Skelly officer. Appellant attended the Skelly meeting with his representative Lynn; Sutton and Randy Bohlmann, PSH nursing coordinator, attended the meeting on behalf of the Department.

During the Skelly meeting, the parties discussed ideas for a stipulated resolution of the adverse action, but were unable to reach a settlement. The parties continued to seek a settlement of the adverse action for a short while after the Skelly meeting, but were not successful.

The Skelly officer issued a letter on July 29, 1998 sustaining the adverse action.

Appellant filed a notice of appeal from the NAA dated July 17, 1998, which was received by the Board on July 20, 1998. A copy of the NAA was filed with the Board on August 5, 1998.[8]

Procedural History

In the NAA, the Department asserted that appellant's behavior constituted cause for discipline under Government Code § 19572, subdivisions (b) inefficiency, (c) incompetency, (d) inexcusable neglect of duty, (e) insubordination, (g) drunkenness on

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[7] The Department asserted that the meeting on July 20, 1998 was a Skelly meeting. Lynn, during her testimony, agreed that the meeting was a Skelly meeting. Appellant's counsel, however, in his briefs and during oral argument, asserted that this meeting cannot technically be considered a Skelly meeting because it did not take place before appellant was terminated. Appellant's counsel also contended that since this meeting was primarily focussed on determining whether the parties could reach a negotiated settlement, it should not be deemed to be a Skelly meeting. The Board finds that the meeting on July 20, 1998 was a Skelly meeting even though it took place after the retroactive effective date of the adverse action. The Board also concludes that the mere fact that the parties took advantage of the opportunity to engage in settlement negotiations during the meeting does not preclude it from being a Skelly meeting.

[8] The Department's closing brief filed with the ALJ argued that the notice of adverse action was mailed to the Board on Friday, July 31, 1998. The ALJ found that there was no evidence presented to establish this date as the date of mailing.

duty, (h) intemperance, (j) inexcusable absence without leave, (o) willful disobedience, (p) misuse of state property, and (t) other failure of good behavior either during or outside duty hours which is of such a nature that it causes discredit to the appointing authority or to the person's employment.

Appellant moved to dismiss the action, contending that: (1) the adverse action was not served upon appellant nor filed with the Board within the 15 days required by Government Code § 19574.5; and (2) the adverse action was invalid under Government Code § 19574 because it was not served within the 15 days set forth in that statute and appellant did not have a Skelly meeting prior to the effective date of the action. Appellant also contended that the Department failed to establish legal cause for discipline.

In his Proposed Decision, the ALJ found, among other things, that, since the Department failed to establish that "extraordinary circumstances" required the immediate dismissal of appellant without prior procedural safeguards as mandated by Warren v. State Personnel Board (Warren),[9] the Department could not rely upon Government Code § 19574.5 to make the effective date of appellant's discipline retroactive. The Proposed Decision, therefore, modified the effective date of the discipline to July 20, 1998, the date of appellant's Skelly meeting, and awarded appellant backpay accordingly. The Proposed Decision also found that the Department had established legal cause for discipline and sustained appellant's dismissal.

[9] (1979) 94 Cal. App. 3d 95.

The Board rejected the Proposed Decision and asked the parties to brief issues relating to both Government Code §§ 19574.5 and 19574, and whether the Department established legal cause for discipline.

The Board has reviewed the record, including the transcripts, exhibits, and written arguments of the parties, and has heard the oral arguments of the parties, and now issues the following decision.

ISSUES

1. Was the Department entitled to rely upon Government Code § 19574.5 to place appellant on unpaid administrative leave and dismiss him retroactively?

2. What is the effect, if any, of the Department's failure to file the notice of adverse action with the Board within the 15-day period specified in Government Code § 19574?

3. Did the Department establish by a preponderance of the evidence that appellant's conduct constituted legal cause for discipline?

4. If legal cause for discipline was established, what is the appropriate penalty?

DISCUSSION

Government Code § 19574.5

Circumstances in which Government Code § 19574.5 May be Invoked

Government Code § 19574.5 permits a state employer to order an employee on a mandatory, unpaid leave of absence and to impose retroactive discipline under certain limited conditions as follows:

> Pending investigation by the appointing power of accusations against an employee involving misappropriation of public funds

> or property, drug addiction, mistreatment of persons in a state institution, immorality, or acts which would constitute a felony or a misdemeanor involving moral turpitude, the appointing power may order the employee on leave of absence for not to exceed 15 days. The leave may be terminated by the appointing power by giving 48 hours' notice in writing to the employee.
>
> If adverse action is not taken on or before the date such a leave is terminated, the leave shall be with pay.
>
> If adverse action is taken on or before the date such leave is terminated, the adverse action may be taken retroactive to any date on or after the date the employee went on leave. Notwithstanding the provisions of Section 19574, the adverse action, under such circumstances, shall be valid if written notice is served upon the employee and filed with the board not later than 15 calendar days after the employee is notified of the adverse action.

The Third District Court of Appeal in Warren analyzed the limited circumstances in which Government Code § 19574.5 may be relied upon by an employer to place an employee on mandatory unpaid leave and impose retroactive discipline. The court found that, to utilize Government Code § 19574.5, an employer not only had to show that the disciplined employee was accused of engaging in one of the five types of listed misconduct, it also had to prove that the alleged misconduct "actually was extraordinary requiring immediate dismissal." As the court stated:

> We hold that before an employee may be dismissed pursuant to Government Code section 19574.5, the conduct must not only relate to his job performance but must also constitute such a job-related extraordinary circumstance that immediate removal is required.[10]

In this case, appellant was charged with driving into PSH's parking lot while intoxicated, hitting a sign, and driving away.[11] The Department did not introduce any

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[10] Warren, supra, 94 Cal. App. 3d at p. 110.

[11] The Department alleged that appellant was also absent without leave on June 23, 1998.

evidence to show that this misconduct was related to appellant's job as a Janitor. Moreover, the Department did not show that this misconduct constituted extraordinary circumstances such that immediate dismissal was necessary without prior procedural safeguards. The Department, therefore, failed to show that it was entitled to rely upon Government Code § 19574.5 to place appellant on mandatory, unpaid leave, or to impose discipline upon appellant retroactive to June 24, 1998.[12]

The Proper Remedy for Improper Use of Government Code § 19574.5

Appellant contends that, because the Department failed to establish that it was entitled to rely upon Government Code § 19574.5, it should have provided appellant with a pre-termination Skelly meeting in accordance with Skelly v. State Personnel Board (Skelly)[13] and Government Code § 19574.[14] Appellant asserts that the Department's failure to provide him with a pre-termination Skelly meeting violated his due process rights, thereby mandating the invalidation of his adverse action and an award of Skelly

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[12] Since the Board finds that the Department failed to establish the existence of job-related extraordinary circumstances to justify reliance upon Government Code § 19574.5, the Board does not need to reach the issue of whether appellant's alleged misconduct may properly be classified as one of the five types of misconduct listed in that statute. Specifically, the Board makes no findings as to whether misdemeanor hit and run driving involving property damage constitutes a misdemeanor involving moral turpitude.

[13] (1975) 15 Cal. 3d 194.

[14] Government Code § 19574 provides, in relevant part, as follows:

> (a) The appointing power, or its authorized representative, may take adverse action against an employee for one or more of the causes for discipline specified in this article. Adverse action is valid only if a written notice is served on the employee prior to the effective date of the action, as defined by board rule. The notice shall be served upon the employee either personally or by mail and shall include:
> (1) a statement of the nature of the adverse action; (2) the effective date of the action; (3) a statement of the reasons therefor in ordinary language; (4) a statement advising the employee of the right to answer the notice orally or in writing; and (5) a statement advising the employee of the time within which an appeal must be filed. The notice shall be filed with the board not later than 15 calendar days after the effective date of the adverse action.

damages from the retroactive date of dismissal until the date of the Board's final decision in this matter.

While the Board agrees that the Department should have complied with Government Code § 19574 and notified appellant of the proposed discipline and offered him an opportunity to respond before the discipline was imposed, the Board disagrees with appellant's claims that the adverse action must be invalidated and Skelly damages awarded up to the date of this Decision.

The court in Warren was asked to address these same issues after it invalidated a state employer's use of Government Code § 19574.5. In that case, the disciplined employee was placed on a leave of absence effective December 11, 1976. On December 17, 1976, he was notified of the proposed dismissal and given until December 22, 1976 to respond. On December 22, 1976, the employee was served with a notice of punitive action, dismissing him retroactively to December 11, 1976. The court determined that the disciplined employee was entitled to an award of backpay from December 11, 1976, the date of his retroactive dismissal, through and including December 22, 1976, the date when the employee was offered the opportunity to respond to the charges.[15] The court, after analyzing the due process requirements announced in Skelly, explained the reasons for its determination as follows:

> Discipline imposed which does not comply with due process requirements is invalid, and therefore ineffective until such time as the due process requirements are met. In turn, those requirements

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[15] The disciplined employee in Warren did not take advantage of the offered opportunity to respond at a Skelly meeting.

> are met when the employee is permitted to respond to the authority initially imposing the discipline prior to the time the disciplinary decision is rendered.[16]

The court found that the minimum due process requirements in that case were met on December 22, 1976, the date by which the disciplined employee was permitted to respond to the proposed action. As the court explained:

> The vice in appellant's dismissal on December 22, 1976, was not in the imposition of discipline at that time; it was in the attempt to make that dismissal retroactive to the effective date of appellant's leave of absence. We hold that appellant is entitled to back wages and benefits from December 11, 1976 through December 22, 1976. His dismissal was effective December 23, 1976.[17]

Appellant claims that Warren should be distinguished from this action because the employee in Warren, unlike appellant in this case, was given the opportunity to respond before discipline was imposed retroactively. The Board finds that this distinction does not constitute a material difference warranting a different conclusion from the conclusion reached by the court in Warren; instead, the Board finds that the court's reasoning in Warren is applicable to this case. Appellant is entitled to back pay and benefits from June 24, 1998, the retroactive effective date of discipline, through and including July 20, 1998, the date of his Skelly meeting. The effective date of his discipline should, therefore, be changed to July 21, 1998.

15-Day Filing Deadline

Appellant argues that, because the Department was not entitled to rely upon Government Code § 19574.5, it was required to follow all the requirements set forth in

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[16] Warren, supra, 94 Cal. App. 3d at p. 111.

[17] Id. at p. 112.

Government Code § 19574, including the requirement that provides that:

> The notice [of adverse action] shall be filed with the board not later than 15 calendar days after the effective date of the adverse action. [18]

The NAA was filed with the Board on August 5, 1998. It provided for a retroactive effective date of June 24, 1998. Clearly, if the 15-day period set forth in Government Code § 19574 were calculated from the retroactive effective date set forth in the NAA, the Department did not comply with the statutory filing deadline.[19] Appellant claims that the 15-day filing requirement set forth in Government Code § 19574 is mandatory, and any failure on the part of the Department to comply should invalidate the NAA. The Board disagrees.

The California Supreme Court in California Correctional Peace Officers Association v. State Personnel Board (CCPOA v. SPB)[20] explained when a time limit in a statute will be deemed to be "mandatory" or "directory" as follows:

> The word "mandatory" may be used in a statute to refer to a duty that a governmental entity is required to perform as opposed to a power that it may, but need not exercise. As a general rule, however, a " 'directory' or 'mandatory' designation does not refer to whether a particular statutory requirement is 'permissive' or 'obligatory,' but instead simply denotes whether the failure to comply with a particular procedural step will or will

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[18] In the alternative, appellant argues that the Department should have complied with the 15-day filing deadline set forth in Government Code § 19574.5, which, in relevant part provides:

> Notwithstanding the provisions of Section 19574, the adverse action, under such circumstances, shall be valid if written notice is served upon the employee and filed with the board not later than 15 calendar days after the employee is notified of the adverse action.

Because the Board has decided that the Department could not legally rely upon Government Code § 19574.5, its filing requirements are not applicable.

[19] The Department asserts that it delayed in filing the NAA with the Board while it attempted, in all good faith, to negotiate a settlement that would have obviated the need for adverse action.

[20] (1995) 10 Cal. 4th 1133, 1145.

> not have the effect of invalidating the governmental action to which the procedural requirement relates." ... If the action is invalidated, the requirement will be termed "mandatory." If not, it is "directory" only.

According to the court, "time limits are usually deemed to be directory unless the Legislature clearly expresses a contrary intent."[21] Appellant has not provided any evidence to indicate that the Legislature, when it enacted Government Code § 19574, expressed an intent to make its filing requirements mandatory.

In addition, the court in CCPOA v. SPB stated that when reviewing a statute, an attempt should be made to ascertain the consequences of holding the statutory time limit mandatory, to determine whether those consequences would defeat or promote the purposes of the legislation.[22] The Board's jurisdiction over an adverse action is triggered when a disciplined employee's files an appeal from an adverse action with the Board, not when the employer files the notice of adverse action. If a disciplined employee does not file an appeal with the Board in accordance with Government Code § 19575, the Board will not review the adverse action, and the adverse action will stand, unless the employer withdraws the action or the parties otherwise settle the matter. If the Board were to interpret the filing requirements of Government Code § 19574 to be mandatory, it would have the effect of invalidating all adverse actions not filed with the Board within the 15-day period, even those that are not appealed by disciplined employees. Clearly, the Legislature would not have intended such a consequence when it enacted the statute.

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[21] Id.

[22] Id.

Finally, the court in CCPOA v. SPB stated that a time limit will be deemed to be directory "unless a consequence or penalty is provided for the failure to do the act within the time commanded."[23] There is no consequence or penalty set forth in Government Code § 19574 for an employer that has failed to file an notice of adverse action with the Board in accordance with the 15-day deadline. The Board, therefore, finds that the filing time limits set forth in Government Code § 19574 are directory, and not mandatory.[24]

In any event, the Board's order that the effective date be moved to July 21, 1998, causes the Department's August 5, 1998 filing of the NAA with the Board to comply with the 15 calendar day filing deadline set forth in Government Code § 19574. The Board therefore, denies appellant's requests that the adverse action be invalidated and that he be awarded Skelly damages for the Department's alleged late-filing of the NAA with the Board.

Legal Causes for Discipline

All the allegations in the NAA relate to a single incident: appellant's driving while legally intoxicated into the PSH parking lot on the morning of June 23, 1998, hitting a sign, and driving away. Appellant was arrested for this behavior and, as a result, was absent from work that day.

The Department did not submit any evidence to show that appellant was on duty at the time of the incident. The Department also offered no evidence to show the adverse impact, if any, that appellant's single act of driving while intoxicated and

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[23] CCPOA v. SPB, supra, 10 Cal. 4th at p. 1145.

[24] The same analysis applies to the 15-day filing deadline set forth in Government Code § 19574.5.

missing a single day of work as a result thereof had on his job performance. It, therefore, failed to show that appellant's conduct constituted incompetency, inefficiency, inexcusable neglect of duty, or drunkenness on duty under Government Code §§ 19572(b), (c), (d) or (g).

The Department did not introduce into evidence any orders or directives that appellant's behavior allegedly contravened. The Department, therefore, failed to establish that appellant was insubordinate or willfully disobedient in violation of either Government Code § 19572(e) or (o).

In Sharp and Johnson,[25] the Board stated that, in order to establish "intemperance" under Government Code § 19572(h), an employer must show that a disciplined employee's use of intoxicating liquor caused him or her to be unable to attend properly to his or her job duties and/or to engage in excessive conduct. The Department relied upon only one incident of drunk driving to support its adverse action against appellant. It submitted no further evidence of appellant's alcohol use or the impact, if any, such use had on appellant's ability to attend to his job duties. Standing alone, appellant's single act of drunk driving is not sufficient evidence of excessive behavior to establish cause for discipline for intemperance under Government Code § 19572(h).

In order to establish misuse of state property under Government Code § 19572(p), the Department must generally show 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,

[25] (1995) SPB Dec. No. 95-14, pp. 4-5.

involving personal gain.[26] Under certain circumstances, misuse of state property may also connote improper or incorrect use, or mistreatment or abuse, of state property. Because appellant was driving his own car, and not a state vehicle, when he damaged a sign while driving drunk on state property, this misconduct cannot be deemed to constitute misuse of state property under Government Code § 19572(p).

As the Board stated in Lori Ann Mills, [27] in order to establish cause for discipline for other failure of good behavior under Government Code § 19572(t) when the alleged misconduct occurred off-duty,[28] an appointing power must show that there is a "nexus," or rational relationship, between that off-duty misconduct and the disciplined employee's employment. Because appellant is a Janitor, and not a peace officer, the mere fact that he works in a state hospital and may come into contact with some of its wards is not sufficient, in itself, to establish a nexus. Nevertheless, the incident upon which this adverse action is based occurred when appellant, on a day he was scheduled to work, drove into his employer's parking lot while intoxicated and caused damage to his employer's property (a sign). Thus, even though appellant is not a peace officer, appellant's off-duty misconduct is sufficiently related to his employment to establish the "nexus" required for application of Government Code § 19572(t).

In order to justify discipline under Government Code § 19572(t), the Department must show a failure of good behavior on appellant's part that is of such a nature as to

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[26] R[redacted] B[redacted] (1993) SPB Dec. No. 93-21, pp. 11–12.

[27] (1993) SPB Dec. No. 93-36, p. 2.

[28] Because the Department put on no evidence to show that appellant was on duty at the time of the alleged incident, the Board assumes that the incident took place while appellant was off-duty.

cause discredit to the Department or appellant's employment.[29] Appellant's hit and run drunken driving clearly constitutes such a failure of good behavior under Government Code § 19572(t).

Appellant stipulated that he was inexcusably absent without leave on June 23, 1998. This stipulation is sufficient to establish cause for discipline under Government Code § 19572(j).

Penalty

When performing its constitutional responsibility to review disciplinary actions,[30] the Board is charged with rendering a decision that is "just and proper."[31] 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 California Supreme Court in Skelly [32] 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 omitted.] Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence.

The Department has established that the single incident it alleged in the NAA constituted cause for discipline for under Government Code § 19572 subdivisions (j),

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[29] Warren, supra, 94 Cal. App. 3d at p. 104.

[30] Cal. Const. Art. VII, section 3(a).

[31] Government Code § 19582.

[32] 15 Cal.3d at pp. 217-18.

inexcusable absence without leave, and (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. Such misconduct clearly resulted in and, if repeated, is likely to result in harm to the public service.

The Department, however, failed to submit sufficient evidence to establish the circumstances surrounding the misconduct or the likelihood of its recurrence. Although the NAA listed prior adverse actions, contracts for continued employment and a "last chance" contract, the Department offered no evidence of those adverse actions or contracts. While the Department stated during oral argument before the Board that it had worked long and hard to resolve appellant's past difficulties with alcohol, it presented no evidence of those past difficulties during the hearing before the ALJ to support its contentions as to progressive discipline. In the absence of any testimony or documentation to demonstrate what were the content and scope of the Department's prior disciplinary actions against, and agreements with, appellant relating to his alleged alcohol abuse, the Board does not have sufficient evidence to analyze appellant's misconduct in the context of his past behavior or to evaluate the likelihood of its recurrence. Without such evidence, the Board is left with only the bare allegations of the NAA upon which to base its determination as to the appropriate penalty in this case.

The Board finds that the just and proper penalty for the single incident of drunken driving and absence without leave alleged in the NAA is a 10 working day suspension.

CONCLUSION

The Department has failed to show that it was entitled to rely upon Government Code § 19574.5 to place appellant on unpaid leave and dismiss him retroactively. The

effective date of discipline must, therefore, be changed from June 24, 1998 to July 21, 1998. The adverse action was not invalidated by the Department's alleged failure to file the NAA with the Board within the time limits set forth in Government Code § 19574, since such filing is directory, and not mandatory. The just and proper penalty for the single incident of misconduct alleged in the NAA is a 10 working day suspension.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The dismissal of Ralph Rey from his position as Janitor at the Patton State Hospital with the Department of Mental Health is modified to a 10 working day suspension effective beginning on July 21, 1998.

2. The Department of Mental Health shall pay Ralph Rey all backpay and benefits it may owe him under Government Code § 19584 as a result of the Board's decision to modify his dismissal to a 10 working day suspension and to change the effective date from June 24, 1998 to July 21, 1998.

3. This case shall be assigned to the Chief Administrative Law Judge for hearing should the parties not be able to agree upon the amount of backpay and benefits owing to Ralph Rey under Government Code § 19584.

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

STATE PERSONNEL BOARD[33]

Florence Bos, President
Ron Alvarado, Vice President
Richard Carpenter, Member
William Elkins, 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 November 2, 1999.

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Walter Vaughn
Executive Officer
State Personnel Board

[Rey-dec]

[33] Board Member Sean Harrigan did not participate in this decision.