BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **S. O.** From dismissal from the position of Correctional Sergeant with the California Medical Facility, Department of Corrections and Rehabilitation at [redacted]	)))))))))	SPB Case No. 07-1381A **BOARD DECISION** (Precedential)[1] **No. 07-03** December 4, 2007

APPEARANCES: Phillip Murray, attorney, California Correctional Peace Officers Association (CCPOA), on behalf of appellant, S. O. ; Stephen A. Jennings, Staff Counsel III, Department of Corrections and Rehabilitation, on behalf of respondent, Department of Corrections and Rehabilitation.

BEFORE: Sean Harrigan, President; Anne Sheehan, Vice President; Maeley Tom, Patricia Clarey, and Richard Costigan, 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) and determined to hear the case itself. In this Decision, the Board concludes that, where an appellant defends against an adverse action by testifying that she did not engage in the charged misconduct, the employer cannot impose further discipline for dishonesty based solely upon that testimony given in a prior hearing on appellant's appeal from dismissal based upon the same alleged incident of dishonesty. Accordingly, the Board revokes appellant's dismissal.

[1] This Decision was originally issued by the Board at its meeting on November 5, 2007. At its meeting on December 4, 2007, the Board voted to designate the Decision as precedential pursuant to Government Code section 19582.5.

ISSUES

The Department of Corrections and Rehabilitation (Department) dismissed appellant for dishonesty based upon her testimony during the hearing on her appeal of a prior adverse action in which she denied the misconduct with which she was charged. The Department contends that the ALJ's disbelief of appellant's testimony during the hearing was grounds for a new adverse action of dismissal charging appellant with dishonesty. Appellant contends that she cannot be disciplined again based upon the fact that the ALJ did not believe her defense in the prior action. The issue to be resolved is:

> May the Department discipline appellant based upon her allegedly dishonest testimony in a prior adverse action hearing?

BACKGROUND

Employment History

Appellant began her employment with the Department in 1983 and worked her way up from Correctional Officer to Facility Captain. As further discussed below, the Department dismissed appellant effective December 14, 2005, but the Board modified the dismissal to a suspension for six months coupled with a demotion from Facility Captain to Correctional Sergeant.

FINDINGS OF FACT

On or about December 5, 2005, the Department served appellant with a Notice of Adverse Action dismissing appellant from state service effective December 14, 2005. That Notice alleged that, on or about April 8, 2005, appellant failed to complete a urine

drug screen collection, in violation of the Department's drug testing policy, and that appellant was dishonest in a memo and in her investigative interview concerning the incident.

Appellant appealed the 2005 dismissal to the Board.[2] On June 21, 2006, after a hearing before an ALJ, the Board adopted the ALJ's Proposed Decision finding that appellant engaged in the charged misconduct but modifying the penalty to a suspension for six months coupled with a demotion from Facility Captain to Correctional Sergeant based upon mitigating factors.[3] On October 10, 2006, the Board denied the Department's Petition for Rehearing. The Department has not filed a petition for writ of mandate challenging the Board's Decision.

On or about April 9, 2007, the Department served appellant with a new Notice of Adverse Action dismissing her from state service effective April 20, 2007. The Notice stated that appellant was being dismissed based upon the ALJ's determination in Case No. 05-4412 that appellant was dishonest at the hearing in that case. Specifically, the Notice states that the action is based upon the following statement by the ALJ in the Proposed Decision in Case No. 05-4412:

> "In summary, appellant was dishonest during her investigatory interview <u>and at the hearing</u> when she maintained that she provided a 'large' sample and that no one from Healthworks advised her of the need to stay until she provided a sufficient urine sample or three hours had passed." (Underlining added.)

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[2] The Board takes official notice of its files and records in the Matter of the Appeal of S[redacted] O[redacted], Case No. 05-4412.

[3] The mitigating factors relied upon by the ALJ included the fact that appellant had been a state employee for 24 years and had successfully risen through the ranks of CDCR to the position of Facility Captain; testimony from appellant's supervisor as to her value as an employee; lack of evidence that appellant willfully refused to provide a sufficient urine sample; evidence of some confusion as to how long the collection facility would remain open; and appellant's need to pick up her children.

PROCEDURAL SUMMARY

Appellant filed a timely appeal from the Department's second dismissal action. At the hearing, the Department offered the Decision adopted by the Board in Case No. 05-4412 as its only evidence in support of the instant dismissal action. Appellant took the stand and testified that all of the testimony she provided in Case No. 05-4412 was true. After hearing, the assigned ALJ issued a Proposed Decision recommending that the dismissal be sustained. The Board rejected the ALJ's Proposed Decision at its meeting on June 5, 2007. Having reviewed the record and the written and oral arguments of the parties, the Board now issues this Decision.

PRINCIPLES OF LAW

The Board has long held that an employee who has already been subject to formal or informal discipline cannot again be disciplined for charges arising out of the same facts.[4]

ANALYSIS

The Department asserts that appellant may be disciplined based upon the "finding" of the ALJ that appellant was dishonest at the hearing before the ALJ on her prior appeal from dismissal. In essence, the Department asserts that appellant may be subject to discipline every time she repeats the same statements that formed the basis for the Department's decision to dismiss her for dishonesty in 2005. We disagree. Appellant has already been disciplined for her dishonesty in connection with her failure

[4] *Gary Blakeley* (1993) SPB Dec. No. 93-20, p. 8; *Steven Richins* (1994) SPB Dec. No. 94-09.

to provide a sample for drug testing. The instant adverse action is based solely upon the fact that the ALJ chose to credit the testimony of the Department's witnesses rather than that of appellant at the hearing on appellant's appeal from that disciplinary action. Appellant had the right to testify at the hearing on her prior dismissal and to explain her version of the events underlying the charged misconduct. Although the Proposed Decision in that case stated that appellant was dishonest in her investigatory interview and at the hearing before the ALJ, this statement merely reflects the ALJ's determination that appellant's testimony lacked credibility and that the testimony of the Department's witnesses was more credible than that of appellant. Appellant's act of testifying at her appeal hearing consistent with her prior statements in an effort to refute the allegations of dishonesty against her does not establish a separate instance of dishonesty.

In determining the appropriate penalty for the proven misconduct, the Board has already taken into account the finding that appellant was dishonest during her investigatory interview and that she continued to maintain her version of the events during her testimony at the hearing. Given that the Board has already determined in the prior action the appropriate penalty for appellant's act of dishonesty during her investigatory interview, the Department cannot file a subsequent action of dismissal based solely upon appellant's repetition of the same story she told at that investigatory interview that served as a basis for the prior adverse action. To allow an appointing power to effectively re-discipline an employee for dishonesty merely because the employee's defense at the hearing remains consistent with the statements upon which

the prior dishonesty charge was based would result in an unending series of adverse actions based upon the same misconduct.[5]

CONCLUSION

Having already disciplined appellant for dishonesty concerning her participation in drug testing ordered by the Department, the Department cannot further discipline appellant based on her testimony reiterating her defense, notwithstanding the fact that the ALJ did not find the defense credible.

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 S. O. from the position of Correctional Sergeant with the Department of Corrections and Rehabilitation, is revoked;
2. The Department of Corrections and Rehabilitation shall pay to S. O. all back pay and benefits, if any, that would have accrued to her had she not been dismissed, plus interest at the rate of seven (7) percent per annum;
3. This matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing on the written request of either party in the event the parties are unable to agree on the amount of back pay, benefits, and interest due appellant;

[5] Given the Board's conclusion in this case, the Board does not address the additional arguments presented by the parties concerning whether or not the ALJ's Proposed Decision in Case No. 05-4412 constitutes proof of appellant's dishonesty at the hearing in that case by way of official notice, an exception to the hearsay rule, or the doctrine of collateral estoppel.

4. This decision is certified for publication as a Precedential Decision.

   (Government Code § 19582.5.)

STATE PERSONNEL BOARD[6]

Sean Harrigan, President
Anne Sheehan, Vice President
Maeley Tom, Member
Richard Costigan, 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 4, 2007.

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Suzanne Ambrose
Executive Officer
State Personnel Board

[6] Member Patricia Clarey did not participate in this Decision.