

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by ) SPB Case No. 28961  
)  
                  **DANIEL J. KOMINSKY**                  ) **BOARD DECISION**  
) (Precedential)  
From 5% reduction in salary for )  
6 months as a Supervising Cook I ) **NO. 92-19**  
with the California Men's Colony, )  
Department of Corrections at ) November 3, 1992  
San Luis Obispo )

Appearances: Victor J. James II, Attorney at Law, Littler, Mendelson, Fastiff and Tichy, representing respondent, Department of Corrections; Dave Carey, Business Manager II, Department of Corrections.

Before Carpenter, President; Stoner, Vice-President; Burgener, Chavez and Ward, Members.

**DECISION**

This case is before the State Personnel Board (SPB or Board) for a determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in an appeal by Daniel J. Kominsky (Appellant or Kominsky), a Supervising Cook I with the Department of Corrections (Department) at the California Men's Colony, San Luis Obispo (CMC) from a five percent reduction in salary for six months.

The ALJ sustained the five percent salary reduction finding that appellant's off-duty drunk driving accident, combined with related prior actions, merited disciplinary action. Specifically, the ALJ found a nexus between appellant's duties at CMC and the drunk-driving accident.

(Kominsky continued - Page )

The Board determined to decide the case itself, based upon the record. After a review of the entire record, including the transcript and briefs submitted by the parties, and having heard oral arguments, the Board revokes the discipline for the reasons set forth below.

#### **SUMMARY OF THE FACTS**

At the time of the drunk driving accident on July 29, 1990, appellant was a Supervising Cook I at CMC. Appellant had held this position since November 6, 1989. Prior to that time, appellant had worked at CMC as a Food Service Worker, and prior to that time, as a janitor at the Atascadero State Hospital.

As a Supervising Cook I, appellant's duties primarily entailed the preparation of meals for residents and employees of CMC. Additionally, appellant was responsible for the supervision of residents assigned to assist him in the kitchen. Incidental to this supervisory responsibility was the protection of personal and real property at CMC.

In June 1988, appellant was convicted of driving under the influence of alcohol. Appellant was subsequently placed on probation and ordered not to operate a motor vehicle with any alcohol in his system. The following year, appellant received an adverse action for assaulting an inmate at the Atascadero State Hospital. As a result of this adverse action, appellant was suspended for 30 days from his position as a janitor. The adverse

(Kominsky continued - Page )

action was never appealed and appellant served the 30-day suspension.

The subject of the present adverse action is a drunk driving arrest and conviction on July 29, 1990. While off-duty from his job as a supervising cook at CMC, the appellant drove his car off of the highway, falling out of the car before it slammed into parked cars on the side of the road. Law enforcement officers at the scene of the accident administered field sobriety tests to the appellant which he failed. Later that night, appellant's blood alcohol level was tested and found to register at 1.5, almost twice the legal limit. Appellant subsequently admitted that he drank eight or nine beers that night, starting at 4:30 p.m. Appellant was convicted of driving under the influence of alcohol. Appellant does not dispute the conviction or the facts underlying the conviction.

Based upon this incident, appellant was served with a Notice of Adverse Action on November 2, 1990. The adverse action taken was a five percent reduction in salary for six months, effective November 29, 1990.

The charges stated in the adverse action were violations of Government Code sections 19572 (c) inefficiency; (o) willful disobedience; (q) violation of this part or board rule; 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 your

(Kominsky continued - Page )

agency or your employment. In addition, the adverse action charged a violation of Director's Rules, section 3391<sup>1</sup>, which states that irresponsible or unethical conduct reflecting discredit on themselves or the department either on or off-duty must be avoided by all employees.

#### **ISSUE**

Was there a nexus between appellant's off-duty conduct and his job as a Supervising Cook I at CMC?

#### **DISCUSSION**

The ALJ found appellant's conduct to constitute, among other things, a violation of Government Code section 19572, subsection (t). It is now an established principle of law that a violation of section 19572(t) requires that there be a rational relationship or "nexus" between the employee's off-duty misconduct and the employment. Yancey v. State Personnel Board (1985) 167 Cal.App.3d. 478; Nightingale v. State Personnel Board (1972) 7 Cal.3d 507.

There must be more than a failure of good behavior before the Board may discipline an employee under section 19572, subdivision (t). The misconduct must be of such a nature as to reflect upon the employee's job. In other words, the 'misconduct must bear some rational relationship to his employment and must be of such character that it can easily result in the impairment or disruption of the public service. [Citations.] The legislative purpose behind subdivision (t) was to discipline conduct which can be detrimental to the

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<sup>1</sup>All section references to Director's Rules are to Title 15 of the California Code of Regulations unless otherwise referenced.

(Kominsky continued - Page )

state service. (emphasis omitted) [Citations.] It is apparent that the Legislature was concerned with punishing behavior which had potentially destructive consequences.' (emphasis omitted) [Citation.] The Legislature did not intend '... to dismiss any employee whose personal, private conduct incurred its disapproval.' [Citations.] Yancey v. State Personnel Board, 167 Cal.App.3d at 483.

In this case, the Board finds that there was no rational relationship or nexus established between the appellant's job as a cook and his off-duty misconduct of drunk driving.

The facts of this case are analogous to the facts of the Board's Precedential Decision in In the Matter of the Appeal by Charles Martinez, Case No. 28242, Prec. Dec. No. 92-09. In that case, Mr. Martinez was working as a Material and Stores Supervisor I at a state prison. His position entailed distributing clothing to inmates, processing inmate clothing through the laundry, and supervising inmates who performed such tasks. Mr. Martinez was arrested for driving under the influence of alcohol and interfering with police officers. He subsequently pleaded guilty to a violation of Penal Code 415, violently disturbing the peace. The Board in Martinez held that there was no nexus between Mr. Martinez' job and his off-duty misconduct and thus, no discipline could be imposed under Government Code section 19572(t). The Board found his alcohol-related conduct bore no relationship to his employment as a Material and Stores Supervisor,

(Kominsky continued - Page )

and that it was not likely to result in impairment or disruption of the public service.

Similarly, we find insufficient evidence of a nexus between appellant's off-duty conduct in this case and his job. Nor do we find that the conduct was of such character that it could easily result in impairment or disruption to the public service.

This case is distinguishable from the cases cited by the Department in its brief. Most notably, the cases cited by the Department deal with situations involving peace officers, where the rule of law has long been established that peace officers are held to a higher standard of behavior than non-peace officers. (See, i.e., Anderson v. State Personnel Board, 194 Cal.App.3d 761, 769).

The Department attempts to analogize this case to that of Parker v. State Personnel Board (1982) 120 Cal.App.3d 84. In Parker, a youth guidance counselor at the California Youth Authority was disciplined for off-duty possession of marijuana. The Department's analogy is amiss. The Parker Court found that the employee had limited peace officer status and, therefore, he could be disciplined for violating laws he was employed to enforce. Moreover, and more importantly, the Parker court noted "the irreconcilability of [Parker's] behavior and his job". Parker, 120 Cal.App.3d at 88.

While there is clearly a nexus between a person whose job it is to counsel and guide young people convicted for crimes and that

(Kominsky continued - Page )

employee's possession of illegal drugs, we are not convinced that a similar connection exists between the job of a non-peace officer Supervising Cook I and an arrest for drunk driving. As in Martinez, the appellant is not a peace officer. The fact that appellant's job duties include supervising inmates (as was the case in Martinez), is insufficient to justify holding appellant to same standard applicable to peace officers and, therefore, that fact does create a nexus between the off-duty conduct and appellant's job.

Neither do we find appellant's conduct to be of such nature that it could easily result in the impairment or disruption of the public service as required by Yancey, 167 Cal.App.3d 478. The Department argues that appellant's arrest could have resulted in his being placed in the same institution as those he supervises and thus cause him to be more sympathetic to the inmates. In addition, the Department contends that appellant's drinking could cause problems as he could be called in to work in the event of an emergency. These arguments, though, are merely speculative and not evidence of a relationship between the charged misconduct (off-duty drunk driving) and his duties as a Supervising Cook I. Consequently, there is no evidence to support the charge of violation of Government Code section 19572(t).

As to the charges of inefficiency and willful disobedience, there was insufficient evidence presented to support either of

(Kominsky continued - Page )

these allegations. Finally, as to the charge of appellant's violation of the Director's Rules, section 3391, we conclude that any off-duty misconduct which forms the basis for a disciplinary action must similarly bear a nexus to the employment. Since we did not find such a nexus in this case, this allegation must also fail.

#### **CONCLUSION**

The Board does not condone the off-duty behavior of appellant. However, the law requires that the state not impose discipline upon employees for their off-duty behavior unless it is rationally related to their job. The Department has failed to provide sufficient evidence to show how the appellant's off-duty behavior was rationally related to his position as a Supervising Cook I. There being insufficient evidence to support the adverse action, the five percent salary reduction of six months must be revoked.

#### **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 above-referenced adverse action of a salary reduction is revoked;

2. The California Department of Corrections and its representatives shall pay the appellant all back pay and benefits that would have accrued to him had he not received a five percent salary reduction for six months;



(Kominsky continued - Page )

3. This matter is hereby referred to the Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree to salary and benefits due appellant; and

4. This opinion is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD\*

Richard Carpenter, President  
Alice Stoner, Vice-President  
Clair Burgener, Member  
Lorrie Ward, Member

\*Member Richard Chavez was present for the oral argument but was not present for the vote.

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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 3, 1992.

GLORIA HARMON  

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Gloria Harmon, Executive Officer  
State Personnel Board