

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by ) SPB CASE NO. 31012  
 )  
 **JOHN J. RIZO** ) **BOARD DECISION**  
 ) (Precedential)  
 From dismissal from the position )  
 of Equipment Operator with the ) NO. 93-05  
 Department of Transportation at )  
 Marysville ) January 12, 1995

Appearances: Ron Glick, Operating Engineers Local Union No. 3 representing appellant and James E. Livesey, Staff Counsel, Department of Transportation representing Department of Transportation.

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

**DECISION**

This case is before the State Personnel Board (Board) for determination after the Board rejected the proposed decision of the Administrative Law Judge (ALJ).

Appellant, John J. Rizo (appellant) was dismissed from the position of Equipment Operator with the Department of Transportation (Department) at Marysville, California, for failing to possess a valid driver's license while working for the Department and for falling asleep while assigned to chain control duty.

After a hearing on the matter, the ALJ dismissed the charges based upon the failure to have a driver's license. However, the ALJ found appellant to be guilty of inefficiency, inexcusable neglect of duty, and other failure of good behavior based upon the

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sleeping incident.<sup>1</sup> The ALJ modified appellant's dismissal to a suspension, effective on February 14, 1992 and concluding on the Monday following the adoption of a decision in the case.

The Board determined to decide the case itself based upon the record and additional arguments submitted in writing.<sup>2</sup> After a review of the record, including the briefs submitted by the parties, the Board having rejected the proposed decision of the ALJ, modifies the original penalty of dismissal to a 60-day suspension.

#### **STATEMENT OF FACTS**

Appellant was a permanent intermittent employee with the Department of Transportation. His position was that of Equipment operator, requiring him to service highway maintenance and perform emergency services. Appellant has no prior adverse actions.

On February 14, 1992, appellant was dismissed from his position. The adverse action charged appellant with violations of Government Code section 19572, subdivisions (f) dishonesty and (o) willful disobedience, as well as subdivisions (c) inefficiency, (d) inexcusable neglect of duty, and (t) other failure of good behavior. The charges stemmed from two separate incidents which occurred within a few days of each other.

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<sup>1</sup>Government Code section 19572 subdivision (t) provides that discipline may be imposed for "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." However, for sake of brevity, this subdivision is referred to in this decision as "other failure of good behavior."

<sup>2</sup>The parties did not request or present oral arguments.

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The first incident occurred on January 7, 1992 when appellant was found sleeping in his car while on chain control duty in the Sierra Nevada mountains. Appellant was parked on the on-ramp to Interstate 80 in the Kingvale area, facing in the opposite direction of traffic. His assignment was to watch for cars entering onto Interstate 80 and to stop those cars which did not have snow tires or chains.

Appellant's supervisor testified that he drove up beside appellant's car around 8:30 a.m. and observed the appellant to be asleep in his car for 3 to 5 minutes. Appellant admitted at the hearing that he may have nodded off momentarily, but denies ever having been in a "deep" sleep. No cars drove past appellant's checkpoint during the period of time while the appellant was being observed.

The second incident occurred the following week, on January 13, 1992. Appellant reported for duty in the Central Region office in Marysville. Appellant was thereafter sent to the local Department of Motor Vehicles (DMV) office to obtain a special endorsement for his driver's license so that he could operate a tanker with hazardous materials. At the DMV office, appellant became aware for the first time (according to the appellant's testimony) that his license had expired March of 1991. Until that time, appellant had believed that his license expired the following March of 1992. The DMV thereafter denied issuing the appellant an endorsement and new license because their computer indicated that appellant had an unpaid ticket on his record. Appellant was

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instructed by DMV personnel that he should contact the courthouse in Nevada City, where the ticket had been issued, to rectify the situation.

The next day, January 14, 1992, appellant went to the Nevada City courthouse and took care of the problem which had prevented him from obtaining a new license. Thereafter, on January 15, 1992, a license was issued to appellant. Furthermore, appellant passed the examination for the special endorsement he needed.

One of the requirements for the position of Equipment Operator is the possession of a valid California driver's license.

The Department contends that appellant was wrongfully compensated at the Equipment Operator level for the period of time between March of 1991 when his license expired, and January 15, 1992 when it was renewed. The Department has charged appellant with dishonesty and willful disobedience in its adverse action based on this incident.

At the administrative hearing, the parties stipulated to the fact that appellant had allowed his driver's license to expire and to the fact that appellant had never driven a state vehicle during the period of time that he failed to hold a valid driver's license.

The ALJ dismissed the charges of dishonesty and willful disobedience brought against the appellant by the Department based upon the failure to have a driver's license. The ALJ came to this decision after finding appellant's testimony (that he did not realize his license had expired) to be credible. If the appellant did not know his license had expired, the ALJ opened that he could not have acted with dishonesty or willful disobedience.

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The Board finds substantial evidence in the record to support the ALJ's findings of fact on this issue, and concurs in the ALJ's decision to dismiss the charges based upon this incident.

As to the sleeping incident, the ALJ found appellant's actions to constitute inefficiency, inexcusable-neglect of duty, and other failure of good behavior. However, he modified the penalty of dismissal to a suspension beginning on February 14, 1992, and ending on the Monday following the Board's adoption of the decision. The Board subsequently rejected the ALJ's decision and asked the parties to brief the following issue.

#### **ISSUE**

What is the appropriate penalty for the proven misconduct of falling asleep on chain duty in this case?

#### **DISCUSSION**

Appellant's dismissal was premised upon two incidents; failure to possess a driver's license and sleeping on duty. However, having dismissed the charges based upon failure to possess a driver's license, the Board must consider whether the sleeping incident alone supports the penalty of dismissal.

In his discussion of the appropriate penalty for the sleeping incident, the ALJ modified the penalty of dismissal to a suspension based upon the Board's recent precedential decision in the matter of the appeal of R█████. N█████ (1992) SPB Dec. No. 92-07 (N█████).

I consider this question (whether dismissal is the appropriate penalty for this single instance of misconduct] in light of the recent precedential decision in the matter of R█████. N█████ (1992) SPB Dec. No. 92.07

(sic). In that case, the Board determined that dismissal was not an appropriate penalty for a correctional officer who had fallen asleep three times while on guard duty. The Board modified the department's action to a six month's suspension.

If dismissal is not an appropriate penalty for falling asleep in a correctional institution, I do not believe it can be considered appropriate here in view of the testimony that no adverse consequences flowed from appellant's brief lapse of duty. In this case, because appellant is a permanent intermittent and not a full-time employee, it seems disproportionate to modify the discipline to that which the Board imposed for the full-time employee in the N [REDACTED] case... "

While the Board agrees that the principles set forth in N [REDACTED] apply in this case, the Board disagrees with the ALJ's statement that N [REDACTED] stands for the proposition that "dismissal is not an appropriate penalty for falling asleep in a correctional institution." In N [REDACTED], the Board determined that R [REDACTED] N [REDACTED] should not be dismissed from her position as a correctional officer for sleeping while on watch command because her appointing authority, the Department of Corrections, had failed to comply with principles of progressive discipline.

The Board stated:

The principles of progressive discipline require that an employer, seeking to discipline an employee for poor work performance, follow a sequence of warnings or lesser disciplinary actions before imposing the ultimate penalty of dismissal. (footnote omitted) The obvious purpose of progressive discipline is to provide the employee with an opportunity to learn from prior mistakes and to take steps to improve his or her performance on the job. Thus, corrective and/or disciplinary action should be taken by a department on a timely basis: performance problems should not be allowed to accumulate before progressive discipline is initiated. (N [REDACTED] at p. 6.)

Because Ms. N [REDACTED] had never been given the proper opportunity to correct her behavior through a series of timely, progressively imposed disciplinary measures, dismissal was considered improper.

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While expressly noting the seriousness of the misconduct, the Board went on to impose a six-month suspension in lieu of the dismissal after taking into consideration other factors such as Ms. N [REDACTED] longevity with the State, her good work record, and the evidence presented at the hearing which supported the assertion that the misconduct was unlikely to reoccur. At no time did the Board state that dismissal was not an appropriate penalty for falling asleep in a correctional institution.

Turning to the case at hand, the ALJ found appellant guilty of inefficiency, inexcusable neglect of duty, and other failure of good behavior based upon appellant's single incident of falling asleep while on chain control duty. The Board concurs in the ALJ's findings of fact on that issue. However, the Board modifies the appellant's penalty to a 60-day suspension for the reasons set forth in this decision.

When reviewing disciplinary actions, the Board is charged with rendering a decision which is "just and proper" under the circumstances. Government Code section 19582. In determining a "just and proper" penalty, the Supreme Court in Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d. 194, set forth a list of factors to be considered when assessing the appropriate discipline to impose.

... [W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or is likely to result in, harm to the public service. (citations.) other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (Skelly at p. 218)

In this case, while there was no evidence that appellant's

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conduct resulted in actual harm to the public, the misconduct was still quite serious. Appellant was responsible for checking the safety of cars entering onto a snowy, mountain highway. Obviously, if repeated, the misconduct could result in potentially fatal car accidents and expose the state to tremendous liability.

While the misconduct is, no doubt,, of a truly serious nature, other factors enunciated in Skelly weigh in favor of modifying the penalty of dismissal to a suspension. First, the circumstances surrounding the misconduct warrant the imposition of a less severe penalty than that of dismissal. The record reveals that appellant's misconduct occurred only one time, during which time he was asleep for a total of 3 to 5 minutes before being awakened by the sound of his supervisor's car. The incident occurred about 8:30 in the morning, after appellant had been on duty all night. Second, there was no evidence in the record that the misconduct was likely to reoccur. Appellant had no prior disciplinary actions and no other reported instances of falling asleep while on duty.

More importantly though, the misconduct was not intentional misconduct, but rather constitutes poor work performance, thus warranting the application of progressive discipline. Evidence was presented that appellant was never warned, counseled, or otherwise disciplined about the sleeping incident prior to receiving the adverse action of dismissal. Pursuant to the principles of progressive discipline enunciated in N [REDACTED], this single incident of poor work performance, albeit serious misconduct, nevertheless merits the imposition of corrective disciplinary action as opposed



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to the ultimate penalty of dismissal. Should the misconduct occur again, harsher measures may well be warranted.

#### CONCLUSION

Although appellant's misconduct is of a serious nature, we find that appellant's dismissal is without merit. The Board finds a 60-day suspension to be a more appropriate penalty under the circumstances.

#### 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 dismissal take against John Rizo is modified to a 60-day suspension.

2. The Department of Transportation shall reinstate appellant

John Rizo to his position of Equipment Operator and pay to him &11 back pay, benefits and interest that would have accrued to him had he not been dismissed.

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 as to the salary and benefits due appellant.

4. This opinion is certified as publication as a Precedential

Decision (Government Code section 19582.5).

STATE PERSONNEL BOARD\*

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

\*There is a vacant position on the Board.

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and order at its meeting on January 12, 1993.

GLORIA HARMON

Gloria Harmon, Executive Officer  
State Personnel Board