BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 31021
	)	
DAVID RODRIGUEZ	)	**BOARD DECISION**
	)	(Precedential)
From rejection during probationary	)	
period from the position of	)	**NO. 94-29**
Administrator I, Department of	)	
Fair Employment and Housing at	)	
Long Beach	)	November 1-2, 1994

Appearances: Carlos Alcala, Attorney, The Alcala Law Firm on behalf of Appellant, David Rodriguez; Suzanne M. Ambrose, Assistant Chief Counsel, Department of Fair Employment and Housing on behalf of Respondent, Department of Fair Employment and Housing.

Before Carpenter, President; Ward, Vice President; Stoner, Bos and Villalobos, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) after the Board granted the Department of Fair Employment and Housing's (Department or DFEH) Petition for Rehearing in the appeal of David Rodriguez (appellant).

Appellant was rejected from his position as Administrator I with the Department based upon allegations that he inappropriately used a State vehicle for commuting purposes and instructed his subordinate employees to falsify information on timesheets used to bill the Department's clients.

The Administrative Law Judge (ALJ) who heard the appeal set aside appellant's rejection during probation on the grounds that it was done in bad faith. The ALJ based the finding of bad faith on the fact that the Department had previously served appellant with

an Official Reprimand for the misconduct related to misuse of a State vehicle, had told appellant that the Official Reprimand would not affect his probation, and had previously failed to take any action against appellant for the misconduct relating to the timesheets, despite the fact that the Department was aware of that misconduct when it issued the Official Reprimand.

The Board adopted the ALJ's Proposed Decision, but subsequently granted the Department's Petition for Rehearing. After a review of the record in this matter, including the transcript, exhibits, and the written arguments of the parties, the Board affirms appellant's rejection from probation for the reasons set forth below.[1]

FACTUAL SUMMARY

Appellant has worked for the State since 1975 and for DFEH since 1980. During his tenure with DFEH, he held a variety of positions. On March 1, 1991, he promoted to the position of FEH Administrator I, and became responsible for the Southern California Office of Compliance Program (OCP) in Long Beach. This position had a one-year probationary period. Appellant was rejected during probation from this position on February 28, 1992.

As an Administrator I, appellant was responsible for managing the OCP and overseeing a staff of persons charged with monitoring state contractors' and subcontractors' non-discrimination programs. The OCP was the result of two contracts with the Department, one with the Los Angeles County Transportation Committee (LATCTC) and

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[1] Neither party requested oral argument.

one with the federal government to administer the Immigration Reform and Control Act (IRCA).

At the beginning of appellant's probationary period, appellant reported to Calvin McGee, OCP Program Administrator. At that time, the Director of the Department, who was also appellant's second line supervisor, was Dorinda Henderson.

In or about early June 1991, one of appellant's subordinates complained to management that appellant was keeping a State vehicle at his home and using it, not only to drive from his home to official State business, but to commute to and from his office in Long Beach a number of times a week, even when he did not have business outside of the office. It was also alleged that appellant allowed one of his coworkers, Marisa Lawhon, to occasionally use the car for commuting purposes.

In addition to alleging misuse of the State vehicle, the same complainant alleged that appellant was having his subordinate employees falsify their monthly timesheets by instructing the employees how much time to charge to each subcontractor, even though he knew that the time being charged to each client did not at all comport with the actual time spent on that client's project. Appellant was also accused of allowing his subordinates to submit blank timesheets at the end of the month, so that he could apportion how much time he wanted to charge to each client's

project, regardless of how much work was actually done on that client's project during the past month.

A timely internal investigation of the subordinate's allegations was conducted by Brad Booth, legal counsel for the Department. Booth visited the Long Beach office where he interviewed appellant and other employees concerning the allegations. Appellant admitted during the investigation that he had used a State vehicle for commuting purposes and that he had stored the vehicle at his house for many months. He contended, however, that both Calvin McGee and Dorinda Henderson knew about the vehicle and how he was using it. Appellant further explained that he believed that the Department gave him the use of the state vehicle to compensate him for the lack of a monetary increase in his new position and the great distances he would have to travel as an Administrator I.

Appellant also explained during the investigation that he had a permit to store the vehicle at his home, and later, introduced evidence at the hearing that he had completed the paperwork for a home storage permit. The record reveals, however, that while appellant may have submitted paperwork for the permit, the home storage permit was never issued to him.

After interviewing appellant and his staff in connection with the above allegations, Booth wrote a draft of a report dated June 20, 1991 and gave it to the Department Director, Dorinda

Henderson. This report reflected Booth's belief that appellant had violated State laws and regulations by using a State vehicle to commute to work, storing the vehicle at home without obtaining a home storage permit, allowing a subordinate to use the vehicle for commuting purposes and encouraging subordinates to falsify time on their timesheets. Based on his findings, Booth recommended that some type of action be taken against appellant.

Shortly thereafter, Director Henderson asked Booth to give her the draft report, informing him that the investigation would no longer be necessary. Henderson then caused to be issued against appellant a Notice of Adverse Action of an Official Reprimand, effective July 24, 1991. This Official Reprimand cited as causes for discipline, misuse of state property [Government Code section 19572, subdivision (m)] and other failure of good behavior [Government Code section 19572 subdivision (t)]. The Official Reprimand alleged only that the appellant stored a State vehicle in his home without having a home storage permit, used the State vehicle improperly to commute back and forth from his home to his office, and wrongfully allowed his coworker to use the State vehicle for commuting purposes. The Official Reprimand also stated that the actual cost attributable to the misuse of the car would be determined so that appellant could make restitution.

At the hearing on the rejection during probation, the appellant testified that shortly after he was served with the

Notice of Adverse Action in July, 1991, he had a private conversation with Henderson. In that conversation, he told Henderson that he was concerned that the Official Reprimand would have an effect upon his probationary status. He testified at the hearing that Henderson assured him during this conversation that the Official Reprimand would not impact his status. Appellant claims that based upon that representation, he did not appeal the Official Reprimand.

Shortly thereafter, in August of 1991, Director Henderson was replaced by Nancy Gutteriez and Calvin McGee was replaced by Earl Sullaway. Gutteriez was appointed the new Director in August, but was out on leave during the month of September, taking over the Director's duties in October. Also in October, appellant received his first and only probationary report from Earl Sullaway. This report indicated that appellant was performing at a satisfactory level in all areas except "work habits", where the report rated him as unacceptable based upon the particulars contained in the Official Reprimand.

When Gutteriez began work in October, she was consumed with budgetary cutbacks which had hit the Department, requiring her to oversee a layoff of a number of Department employees. During her review of the Department's employees, Gutteriez became aware of appellant's past misuse of the State vehicle and the falsification of timesheets. The Department also determined that the amount of

money appellant owed the State resulting from his misuse of the vehicle for commuting purposes was approximately six thousand dollars ($6,000).

Gutteriez considered all of the above information, both the matters referenced in the Official Reprimand and the falsification of the timesheets, and concluded that appellant did not have the requisite good judgment and integrity that an Administrator I should possess. She then made the decision to reject appellant during probation.

Appellant was subsequently served with a Notice of Rejection On Probation on February 5, 1992. In this notice, the Department rejected appellant for reasons related to his qualifications and the good of the service and for failure to demonstrate merit and efficiency. (Government Code section 19173.) The specific reasons for the rejection as listed in the rejection notice were that appellant had misused a State vehicle for commuting purposes, that the costs owing to the State for the personal commuting totalled approximately $6,000, and that appellant had instructed employees to falsify their timesheets. The Department further noted that appellant's actions were so egregious that he could not be entrusted with the responsibilities of a District Administrator independently managing a District Office.

The ALJ who heard appellant's appeal revoked the rejection during probation, finding that the Department had acted in bad

faith. The ALJ concluded that the Department erred in rejecting appellant from probation for the same acts (the misconduct relating to misuse of the car) which were already covered by the Official Reprimand. The ALJ found that appellant was credible in testifying that Henderson promised him that the Official Reprimand would resolve the matter, particularly since his subsequent probationary report listed his overall performance as satisfactory. The ALJ also determined that the Department could not bring a rejection action based upon misconduct relating to the misuse of the car because the subject matter was "res judicata" as a result of the Official Reprimand action.

Finally, the ALJ determined that appellant could not be rejected during probation for instructing employees to falsify their timesheets as the doctrine of equitable waiver applied. The ALJ opined that in July of 1991, when the investigation into appellant's misconduct was concluded, the Department could have included the timesheets incident in the Official Reprimand, but did not do so. The ALJ reasoned that, by failing to include the timesheets misconduct as a basis for the Official Reprimand or rejecting appellant during probation at or about the time the Department issued the Official Reprimand, the Department waived its right to reject appellant later for this misconduct.

ISSUE

Did the appellant prove that there was no substantial evidence to support the reasons for rejecting him during probation or that the rejection was made in fraud or bad faith?

DISCUSSION

A person rejected during probation may be restored to his or her position under the following conditions:

> [O]nly if the board determines, after hearing, that there is no substantial evidence to support the reason or reasons for rejection, or that the rejection was made in fraud or bad faith. At any such hearing the rejected probationer shall have the burden of proof; subject to rebuttal by him or her, it shall be presumed that the rejection was free from fraud and bad faith and that the statement of reasons therefor in the notice of rejection is true. (Government Code section 19175(a).)

The Court of Appeal in Dona v. State Personnel Board (1951) 103 Cal.App.2d 49, set forth standards applicable to cases involving probationary state employees. The court in Dona held:

> In considering this evidence it must be remembered that appellant is a probationary employee...the purpose of a probationary appointment and the rights of the employee, are far different from those of a permanent employee. In Wiles v. State Personnel Board 19 Cal.2d 344, 347, the purpose of a probationary period for employees was stated as follows: `The object and purpose of a probationary period is to supplement the work of the civil service examiners in passing on the qualifications and eligibility of the probationer. During such period, the appointive power is given the opportunity to observe the conduct and capacity of the probationer, and if, in the opinion of that power, the probationer is not fitted to discharge the duties of the position, then he may be discharged by the summary method provided for in the Civil Service Act before he

acquires permanent civil service status.'

> As said by the court in Broyles v. State Personnel Board 42 Cal.App.2d 303, 307: The appointing power must necessarily be allowed to exercise discretion and personal judgment in determining whether a probationary employee shall acquire permanent status. Dona v. State Personnel Board (1951) 103 Cal.App.2d 49, 51-52.

Misuse Of The State Vehicle

After a review of the record in this case, the Board finds substantial evidence supports the reason for the rejection that appellant improperly used a State vehicle for commuting purposes.[2] Under normal circumstances, such misconduct would be more than sufficient to support the rejection of appellant during probation under Government Code section 19175(a), particularly when the rejection is from a high level position such as Administrator I. In this case, however, we have the unusual circumstance of the Department having previously issued an adverse action based on some of the same misconduct now charged in the rejection action, as well

[2] The appellant alleges, and there is some evidence in the record, that his supervisors knew at all times what he was doing, and since the supervisors did not stop him, he cannot be rejected during probation for the misconduct. Under some limited circumstances, the fact that a supervisor knows of an employee's misconduct and fails to act could establish the employee's lack of knowledge that the conduct was wrong and mitigate the disciplinary action taken. We find, however, that appellant's conduct in utilizing a state vehicle for personal commuting was intrinsically wrong, and that the fact that his supervisors may have been aware of the misconduct does not excuse it. Moreover, we consider significant the fact that the misconduct occurred while appellant was on probation as administrator of the office, during which time his judgment and leadership were being tested. The facts of this case militate against the supervisor's alleged knowledge serving as mitigation.

as the Department's alleged assurance that the Official Reprimand would not impact appellant's probationary status.

We disagree with the ALJ's broad premise that a Department acts in bad faith when it issues an adverse action to an employee for misconduct and then later uses the same misconduct as the basis for rejecting the employee during probation. An adverse action is a disciplinary measure which a department has the discretion to invoke against an employee for misconduct. A rejection action, on the other hand, is not a disciplinary measure; rather, it is the final step in the examination process used to determine whether an employee is fit to perform the duties of the position. (Wiles v. State Personnel Board (1942) 19 Cal.2d 344, 347.) The fact that a department invokes a disciplinary action against an employee during the probationary period does not preclude the department from making an independent decision as to whether or not to reject the employee during probation based upon the totality of his or her performance while on probation.

Similarly, we disagree with the ALJ's conclusion that the issuance of an adverse action renders a rejection action invalid because principles of "res judicata" bar relitigating the same issues. For res judicata to apply, a court or administrative agency acting in a judicial capacity must have had jurisdiction over the same parties in the previous litigation, the litigation must have involved the same subject matter, and the same cause of

action must have been fully litigated on its merits. (DeWeese v. Unick (1980) 102 Cal.App.3d 100; City and County of San Francisco v. Ang (1979) 97 Cal.App. 3d 673.) In this case, the principles of res judicata do not apply as the matters which were the subject of the Official Reprimand were never litigated on the merits.[3]

We also disagree with the ALJ's proposed decision that the appellant could not be rejected for his conduct with respect to falsification of timesheets on the theory that the Department waived its right to take action as to that misconduct by failing to include the timesheets incident in the Official Reprimand or a rejection action taken at or about the time it was discovered. First, the contention that a Department must include all incidents of poor performance or misconduct in any adverse action taken in order to later use such incidents as the basis for rejecting an employee during probation has no merit. A department has no obligation to take formal adverse action at all during the probationary period. Second, we find no merit to the proposition that a department waives its right to reject an employee during probation for misconduct or poor performance because it failed to reject the employee at or about the time an incident occurred. While a department should certainly keep an employee apprised of

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[3] Neither do the principles set forth in Steven Richins, (1994) SPB Dec. No. 94-09, that an employee should not be disciplined twice for the same misconduct govern: as noted above, a rejection during probation is not discipline.

how the employee is performing during the probationary period, a department may wait until the end of the probationary period to actually effect the rejection of the employee for conduct occurring at any time during the probationary period.

Finally, we reach the issue of whether the rejection action should be revoked because of the assurances made by Henderson to appellant that the Official Reprimand was meant to end matters and would not affect his probation.[4] As set forth in M[redacted] S[redacted] (1994) SPB Dec. No. 94-19, a department may be estopped from imposing a penalty for misconduct or poor performance under certain situations because of representations made by a department to an employee. As noted in S[redacted] at page 27, estoppel may be found when the following elements are met:

> 1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. Lentz v. McMahon (1989) 49 Cal.3d 393, 399

Assuming that the first three elements have been met, there is no showing that appellant relied on Henderson's assurances to his

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[4] In her proposed decision, the ALJ found credible appellant's testimony that Henderson stated the Official Reprimand would end matters and not affect his probationary status. A review of the record did not reveal any evidence to warrant the Board's reconsideration of this credibility finding, and therefore, it is adopted by the Board.

injury.[5] Appellant claims only that he relied on Henderson's statement to the extent that he did not appeal the Official Reprimand. Appellant's failure to appeal the Official Reprimand, however, has had no effect upon the outcome of this rejection action. Appellant was not rejected just because he had an Official Reprimand on his record. Nor was appellant deprived of his "day in court." Appellant had, in essence, his appeal hearing on the Official Reprimand as the Department put on its case against appellant at the rejection hearing just as it would have to have done at an Official Reprimand hearing.

While the burden of proof in a disciplinary case is on the appointing power which must prove the charges by a preponderance of the evidence [Evidence Code § 500; Parker v. City of Fountain Valley (1981) 127 Cal.App.3d 99], the burden of proof in a rejection action is on the employee who must prove that there is no substantial evidence to support the charges or that the rejection was taken in fraud or bad faith [Government Code § 19175(d)]. The appellant had the opportunity to defend against the substance of the allegations in the Official Reprimand at this hearing. While Rodriguez technically had the burden of proof in this case, we

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[5] It is questionable whether the other three elements necessary for estoppel are met in this case as appellant was informed in his probation report dated October 31, 1991 that his work habits were unacceptable due to the particulars referenced in the Official Reprimand.

nevertheless find the record contains a preponderance of evidence to support the charge of misconduct involving a State vehicle. Since the appellant has now had the opportunity before the SPB to refute the allegations contained in the Official Reprimand, he did not suffer any injury by failing to file his appeal based upon Henderson's representations.

Finally, we note another reason that the Department is not estopped to reject appellant for misuse of the State vehicle. California law is clear that "[A]lthough estoppel may be applied against the government when justice and right require it, the doctrine is inapplicable if it would result in the nullification of a strong rule of policy adopted for the benefit of the public." Strong v. County of Santa Cruz (1975) 15 Cal.3d 720; Morrison v. California Horse Racing Board (1988) 205 Cal.App.3d 211. We believe that allowing appellant to pass probation, despite gross misuse of a taxpayer-financed car, would result in the nullification of a strong rule of policy which has been adopted for the benefit of the public.

Falsification of Timesheets

Even assuming that appellant suffered some unspecified injury as a result of his reliance on Henderson's representations concerning the Official Reprimand, we find that appellant's action in allowing his subordinate employees to falsify their timesheets is alone sufficient reason for his rejection.

Appellant's position as Administrator I entailed responsibility for the entire Southern California OCP. We believe that the Department was not only justified, but obligated, to reject appellant from such a high level position based upon his lack of judgment as shown by his actions with respect to the timesheets.[6] Appellant's actions with respect to filling out false timesheets constitute serious misconduct. The timesheets were used as the basis for billing the Department's clients. The evidence revealed that the appellant instructed his employees to bill their time according to predetermined percentages that he set, realizing that these percentages did not match the time that his employees actually spent on the clients' projects. Moreover, the record reveals he went so far as having his employees turn in their timesheets blank, so that time could be assigned as desired, without concern to how much time was actually done on a particular client's work.

As the Board has previously held in Carol Strogen (1993) SPB Dec. No. 93-16 at page 7: "As noted by the courts, 'honesty is not considered an isolated or transient behavioral act; it is more of a continuing trait of character.' Gee v. State Personnel Board (1970) 5 Cal.App.3d 713." Appellant's actions in instructing his employees to submit false information on billing timesheets smacks

[6] Board Rule 324 requires that departments reject persons on probation if the conduct, capacity, moral responsibility, or integrity of the probationer is found to be unsatisfactory.

of dishonesty. We do not believe that he should attain permanent status in the position of Administrator I, a position involving very little oversight and one where complete trust and responsibility is an absolute prerequisite. Appellant's actions in instructing his employees to submit knowingly inaccurate timesheets are alone sufficient to support his rejection on probation.

CONCLUSION

We find substantial evidence supports the charges that appellant misused a State vehicle for commuting purposes, and knowingly generated false information on clients' billing timesheets. Such actions constitute more than sufficient reason to reject appellant from the position of Administrator I. Furthermore, we do not find that the Department took the rejection action in fraud or bad faith notwithstanding the Department's earlier representation concerning the Official Reprimand. Finally, even if the Department was estopped from relying on the allegations in the Official Reprimand as part of appellant's rejection action, we find appellant's falsification of timesheets to be a sufficient reason alone to reject appellant from his position.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Government Code

section 19582, it is hereby ORDERED that:

The rejection during probation taken against David Rodriguez is hereby affirmed.

THE STATE PERSONNEL BOARD

Richard Carpenter, President
Lorrie Ward, Vice President
Alice Stoner, Member
Floss Bos, Member
Alfred R. Villalobos, 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 1-2, 1994.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board