

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 31038
)
 HOPE VASQUEZ) **BOARD DECISION**
) (Precedential)
 From an official reprimand)
 as a Personnel Services) **NO. 93-09**
 Specialist I with the Northern)
 Reception Center-Clinic, Department) March 3, 1993
 of the Youth Authority, Sacramento)

Appearances: Ramon Perez, Attorney, representing appellant Hope Vasquez; Jerry Cassesi, Hearing Representative, Department of the Youth Authority, representing the Department of the Youth Authority

Before Carpenter, President; Stoner, Vice-President; Ward and Bos, Members.¹

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Hope Vasquez (appellant) from an official reprimand as a Personnel Services

¹ Oral argument took place at the October 6, 1992 Board meeting before Board members Richard Carpenter, Clair Burgener and Lorrie Ward. Prior to rendering a decision in this case, Clair Burgener's term of office expired. With only two Board members remaining who were present at the oral argument, Board staff contacted the parties' representatives and asked whether they had any opposition to having the two current Board members who were not present for the oral argument listen to a tape recording of the oral argument and participate in the decision. No timely opposition was received from the parties. All four Board members participating in this decision have reviewed the transcript of the administrative hearing and the written arguments, and have listened to the oral arguments.

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Specialist I at the Northern Reception Center-Clinic, Department of the Youth Authority (Department) at Sacramento.

The Department imposed an official reprimand upon the appellant after appellant was convicted of petty theft for stealing merchandise from a department store. The ALJ who heard the appeal sustained the official reprimand after finding appellant to be guilty of dishonesty and other failure of good behavior based on the shoplifting incident. The Board subsequently rejected the proposed decision of the ALJ at its meeting of June 11 and 12, 1992.

After a review of the entire record, including the transcript and briefs submitted by the parties, the Board revokes the official reprimand.

FACTUAL SUMMARY

The facts of this case are relatively simple and uncontested. On March 30, 1991, Appellant was arrested for shoplifting \$166.50 worth of goods from Mervyn's department store. As a result of this incident, appellant was charged with violating Penal Code section 484, petty theft, to which she pled "no contest". During the hearing before the ALJ, the appellant admitted to the charge.

Based upon this incident, almost one year later, the Department served appellant with an official reprimand. The charges stated in the notice of adverse action were Government Code section 19572, subdivisions (f) dishonesty, and (t) other failure

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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.

The ALJ sustained the official reprimand against appellant on the ground that appellant's off-duty misconduct constituted both dishonesty and other failure of good behavior, finding a nexus between the nature of the appellant's job and the act of shoplifting.

ISSUE

Whether there is a nexus between appellant's off-duty misconduct and her job as a Personnel Services Specialist I?

DISCUSSION

Through the years, the courts have placed limitations on the conditions under which state employees may be disciplined for misconduct.

In determining whether an employee should be disciplined, whatever the cause, the overriding consideration is whether the conduct harms the public service. [Citation.] If the misconduct bears some rational relationship to the employment and is of a character that can reasonably result in the impairment or disruption of public service, the employee may be disciplined. [Citation.] Vielehr v. State Personnel Board (1973) 32 Cal.App.3d 187, 192. (Emphasis added.)

The requirement of a rational relationship between the misconduct and the employment is often referred to as a "nexus". When an employee's misconduct takes place outside of work hours, it is even

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more important that there be a nexus between the misconduct and the person's employment.

When dealing with the issue of disciplining employees for failure of good behavior while off duty, the courts have stated:

The legislative purpose behind [Government Code section 19572] subdivision (t) was to discipline conduct which can be detrimental to state service. [Citations.] It is apparent that the Legislature was concerned with punishing behavior which had potentially destructive consequences." (Citation.) The Legislature did not intend "...to endow the employing agency with the power to dismiss any employee whose personal, private conduct incurred its disapproval.'" (Citations.) Yancey v. State Personnel Board (1985) 167 Cal.App.3d 478, 483.

These restrictions apply regardless of whether the charge is one of dishonesty or other failure of good behavior. (Viehler v. State Personnel Board 32 Cal.App.3d at 192; See also, G [REDACTED] J [REDACTED] (1992) SPB Dec. No. 92-01, page 8, fn.2.)

The Department contends that there is a nexus between appellant's shoplifting incident and her job as a Personnel Services Specialist I. The Department presented evidence at the hearing to show that appellant's position involves dealing with important confidential information on a daily basis. The Department asserts that appellant's job requires her to handle matters such as employees' time balances and, occasionally, employee paychecks. Thus, the Department concludes that any person filling appellant's position must be scrupulously honest, particularly since there are insufficient resources within the personnel department to double-check appellant's work.

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The Department attempted to prove the existence of a nexus by introducing testimony at the hearing concerning another employee in the personnel department who years ago defrauded the Department of money by improperly obtaining other employees' paychecks. The Department contends that this incident shows that the public service can be harmed by a dishonest person holding appellant's position. The Department argues that the risk of public harm is too great given appellant's position to allow her off-duty misconduct to go unpunished.

The appellant, on the other hand, argues that there is no nexus between the misconduct and appellant's job. Specifically, the appellant argues that the Department's entire case is premised upon speculation, and that there is insufficient evidence to support a finding of a nexus between the shoplifting incident and appellant's position in the personnel department.

We find the Department's nexus argument to be disingenuous. While asserting that dishonesty manifested on the job could have extremely serious consequences, the Department imposed only an official reprimand on the appellant, the least severe formal adverse action possible. If the Department truly believed that appellant's off-duty misconduct demonstrated a genuine propensity for dishonesty on the job and harm to the public service, then why did the Department impose only a minor penalty? If the Department was concerned that appellant's shoplifting demonstrated a

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propensity for dishonesty that put the Department at a financial risk, then the Board questions why the Department would want the appellant to remain in the position? While we can only speculate as to the Department's motive in imposing a minimal penalty in this case, we believe the Department's choice of penalty may have been motivated, at least in part, by its concerns regarding the strength of the nexus.

A Department can not compensate for the lack of a nexus by imposing a nominal penalty. Either a nexus exists or it does not, and if it does not exist, then there should be no penalty. If a nexus does exist, then a penalty appropriate to the offense should be imposed. Dishonesty in a case where a nexus exists is an extremely serious offense and may justify severe adverse action in the first instance, up to and including dismissal.

While the Board certainly does not condone shoplifting or wish to indicate that off-duty shoplifting can never form the basis for a disciplinary action, we find insufficient evidence of a rational relationship between this singular off-duty incident and the appellant's non-peace officer position.

There was no evidence that appellant handles cash or expensive goods on a daily basis, and no evidence that appellant writes checks on behalf of the Department. Rather, the evidence revealed only that appellant's job requires her to have access to employees' personnel records and occasionally to their paychecks.

We believe

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that the one-time act of shoplifting goods at a store, although clearly a form of dishonesty, does not necessarily demonstrate a propensity to engage in forgery or falsification of official government documents.

The Department cites several cases in support of its proposition that there is a nexus in this case. Among them is Gee v. California State Personnel Board (1970) 5 Cal.App.3d. 713. The Department cites Gee for the proposition that "Honesty is not considered an isolated or transient behavioral act; it is more of a continuing trait of character." Id. at 719.

In Gee, the California Court of Appeal upheld the dismissal of Gee from the position of General Auditor III at the Department of Justice (DOJ) for dishonesty. Prior to his employment with DOJ, Gee lied under penalty of perjury to the Department of Alcohol Beverage Control on three liquor license applications, claiming that he was the owner and operator of the three bars for which he sought licenses, when he was not. The court found that Gee's off-duty dishonesty prior to his employment with DOJ could form the basis for his dismissal from his position as an auditor.

Although the court found a nexus between Gee's off-duty pre-employment misconduct and his position as an Auditor General III, the case is factually distinguishable from appellant's situation.

For one, the dishonest act in Gee happened on more than one occasion. More importantly, however, there existed a direct nexus

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between the type of dishonest act committed by Gee and Gee's position. The court stated:

That policy [the Legislature's] is particularly applicable to Gee's employment, for his duties as 'General Auditor III' in the Department of Justice called for investigation of the general type of business offense against state law, which he himself was found to have committed. Id. at 719.

While Gee was not a peace officer, his job was to investigate business crimes for possible prosecution. Thus, his duties were directly related to his own dishonest actions. In contrast, appellant's act of shoplifting has nothing to do with her duties as a personnel specialist.

In addition to Gee, the Department cites the Board's precedential decision, G [REDACTED] J [REDACTED] (1992) SPB Dec.

No. 92-01, as support for the finding of nexus. In J [REDACTED], the Board did find a nexus between appellant's off-duty dishonest statements to the County Sheriff's Department and his position as a Youth Counselor for the Department of the Youth Authority. The Board, however, based its finding of nexus on the following factors: 1) J [REDACTED] was a sworn peace officer and thus was held to a higher moral standard of conduct; 2) J [REDACTED] was a sworn law enforcement official who had made misrepresentations concerning his medical condition to another law enforcement agency; 3) J [REDACTED] misrepresentations' discredited his Department in that the Department was made to appear naive and uninformed concerning the medical status of its own employee; and 4) the Department had

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legitimate concerns over J [REDACTED] willingness to bend the truth for his own convenience and personal gain because J [REDACTED] position as a Youth Counselor entailed making allegations of misconduct against the wards and the administration of ward discipline.

In the case at hand, appellant is not a peace officer, her dishonesty did not directly effect the Department or any other government agency, there were no facts showing that the Department was in any way discredited and, finally, the Department's concern over possible future acts of dishonesty is much more speculative.

Appellant was punished by the criminal justice system for her crime: we find insufficient nexus in this case to justify punishment by her employer for the same off-duty conduct.

If the Board was to find a nexus based upon this shoplifting incident, then it would similarly have to find a nexus between almost any off-duty act of dishonesty and almost any position in State service because an employee in any position can create public harm if that employee acts in a dishonest manner.

We find that this single act of dishonesty (petty theft) outside the work place, accompanied merely by speculation concerning unknown potential acts of dishonesty in the form of fraud in the work place, is insufficient justification alone for a finding of nexus. We believe that what must be shown to establish a nexus is evidence of a rational relationship between the off duty

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conduct and the job, evidence which inextricably ties the two together. We do not find sufficient evidence of such a rational relationship present in this case, and therefore, we revoke the official reprimand.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Government Code sections 19582 and 19584, it is hereby ORDERED that:

1. The adverse action of an official reprimand is hereby revoked.

2. This decision 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
Lorrie Ward, Member
Florence Bos, member

*There is one vacancy on the Board.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on March 3, 1993.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board