

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 26358
)
C [REDACTED] D [REDACTED]) **BOARD DECISION**
) (Precedential)
From 1 step reduction in salary)
for 6 months as a Correctional) **NO. 94-22**
Officer with the Department of)
Corrections at Sacramento) July 6, 1994

Appearances: Mabel Lew, Hearing Representative for the California Correctional Peace Officers Association representing Appellant, C [REDACTED] D [REDACTED]; Victor James, Attorney, representing Department of Corrections.

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

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board granted the Petition for Rehearing filed by appellant C [REDACTED] D [REDACTED] (appellant). Appellant, a Correctional Officer (transportation unit) with the California Department of Corrections (Department), received a one-step reduction in salary for six months and a reassignment out of the transportation unit for allegedly mistreating an inmate. The Administrative Law Judge (ALJ) who heard appellant's appeal issued a Proposed Decision which revoked appellant's salary reduction on the ground that appellant's actions did not constitute mistreatment of an inmate, but reasonable self-defense. The ALJ, however, refused to rescind the reassignment, finding that the Board was without jurisdiction.

(D [REDACTED] continued - Page 2)

The Board adopted the ALJ's Proposed Decision. Although appellant was successful in getting the salary reduction revoked, she filed a Petition for Rehearing, asking the Board to reconsider its decision that it did not have jurisdiction to rescind the reassignment. The Board granted appellant's Petition for Rehearing asking the parties to brief the issue of whether, under the circumstances, the Board has jurisdiction to order rescission of the reassignment.

After a review of the record in this case, including the oral and written arguments of the parties, the Board finds that the ALJ's findings of fact are free from prejudicial error. We are also in substantial agreement with her conclusions of law and therefore we adopt her Proposed Decision as our own, with the exception of her conclusions concerning the Board's jurisdiction over appellant's reassignment. As to that subject, the Board finds that it does possess jurisdiction over appellant's reassignment and orders appellant reinstated to the transportation unit.¹

¹ No backpay is awarded to appellant as part of this decision as we understand that the base salary for both positions is the same. The appellant argues, nevertheless, that she should be compensated for lost overtime pay which she would have likely accrued had she remained on the transportation unit during the time of her appeal. We conclude that potential for overtime is not "salary" for purposes of awarding backpay and furthermore, that it would be too speculative to calculate such an award.

ISSUE

Does the State Personnel Board have jurisdiction to rescind appellant's reassignment out of the transportation unit?

DISCUSSION

Appellant's Notice of Adverse Action dated July 5, 1989 informed appellant that she was receiving a temporary reduction in salary, as well as a reassignment out of the transportation unit, for the reasons cited in the notice. The notice further stated that appellant had the right to appeal the adverse action to the State Personnel Board. Appellant did so in a timely manner.

At about the same time, appellant contested the reassignment through the Department's grievance procedure, taking the matter all of the way up the chain of command. At each stage of review of appellant's grievance, however, the Department indicated to appellant that the State Personnel Board was the proper agency from which to seek rescission of the reassignment. The appellant also appealed the reassignment to the Department of Personnel Administration (DPA). DPA also denied her appeal, contending that appellant's right to appeal was through the grievance provisions of appellant's Memorandum of Understanding.

The Department now contends that the Board does not have jurisdiction to determine the propriety of appellant's reassignment, as the Legislature has specifically given only DPA

(D [REDACTED] continued - Page 4)

the right to hear appeals from reassignments pursuant to Government Code sections 19994.3 and 19994.4.² We disagree.

The Notice of Adverse Action lists appellant's mistreatment of an inmate as cause for appellant's adverse action. The adverse

² Section 19994.3 provides:

(a) If a transfer is protested to the [Department of Personnel Administration]... by an employee as made for the purpose of harassing or disciplining the employee, the appointing power may require the employee to transfer pending approval or disapproval of the transfer by the department. If the department disapproves the transfer, the employee shall be returned to his or her former position, shall be paid the regular travel allowance for the period of time he or she was away from his or her original headquarters, and his or her moving costs both from and back to the original headquarters shall be paid in accordance with the department rules.

(b) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

Section 19994.4 provides:

(a) At the time it is filed with the department a copy of the protest shall be filed with the appointing power. Such a protest shall be made within 30 days of the time the employee is notified of the transfer.

(b) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

(D [REDACTED] continued - Page 5)

action included, not only the salary reduction, but appellant's reassignment out of the transportation unit. The adverse action process is the mechanism used by departments to take disciplinary action against its employees. The Board is the state agency designated by the California Constitution to review disciplinary actions. (California Constitution, Article VII, section 3(a)) More specifically, the Board is the only agency authorized by law to hear appeals from adverse actions. (See Government Code sections 18703, 19575 and 19582.) As set forth in Government Code section 19570, adverse action means dismissal, demotion, suspension, or "other disciplinary action." We believe that the reassignment in the instant case is simply "other disciplinary action." As this reassignment was clearly disciplinary in nature, was taken by the Department in the form of an adverse action, and was taken in conjunction with a pay reduction, we find that the reassignment was appealable to the State Personnel Board.

Furthermore, we agree with the findings of the Administrative Law Judge that the reassignment was taken purely for punitive reasons and was without basis. Therefore, we exercise our authority to review disciplinary actions and rescind appellant's reassignment. We further order that appellant be reinstated to the transportation unit upon the adoption of this decision.³

³ The appellant also requests that the Board make a finding that the Department's action constituted discrimination on the basis of sex and take action against the Department based on such a finding. We do not find sufficient evidence in the record, however, to show that the appellant was the subject of sexual discrimination and refrain from making such a finding.

ORDER

Upon the foregoing findings of fact and conclusion of law, and the entire record in this case, it is hereby ORDERED that:

1. The one step reduction in salary for 6 months taken against C [REDACTED] D [REDACTED] is revoked;

2. The order reassigning C [REDACTED] D [REDACTED] out of the transportation unit is rescinded and C [REDACTED] D [REDACTED] is ordered to be reinstated to the Transportation Unit;

3. This matter is 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 back pay and benefits due appellant;

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

***THE STATE PERSONNEL BOARD**

Richard Carpenter, President
Lorrie Ward, Vice President
Alice Stoner, Member
Floss Bos, Member

*Member Alfred R. Villalobos was not present when this decision was adopted.

* * * * *

(D [REDACTED] continued - Page 7)

I hereby certify that the State Personnel Board made and adopted the foregoing Resolution and Order at its meeting on July 6, 1994.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

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)	

PROPOSED DECISION

This matter came on regularly for hearing before Mary C. Bowman, Administrative Law Judge, State Personnel Board, on October 1, 1990, at Folsom, California, and May 11, 1993, at Sacramento, California.

The appellant, C [REDACTED] D [REDACTED], was present and was represented by Sasha Weaver and Mabel Lew, Hearing Representatives for the California Correctional Peace Officers Association.

The respondent was represented by Dee Crippen, Assistant Chief of Labor Relations, Department of Corrections and Victor James, its Attorney.

Evidence having been received and duly considered, the Administrative Law Judge makes the following findings of fact and Proposed Decision:

I

The above 1 step reduction in salary for 6 months effective July 30, 1989, and appellant's appeal therefrom

comply with the procedural requirements of the State Civil Service Act.

The matter was off calendar from January 17, 1991, until February 1, 1993, while the appellant was engaged in active military service in Saudi Arabia serving in Operation Desert Shield/Desert Storm. The time for hearing was extended pursuant to Board Rule 52.2 by written stipulation of parties.

The second day of hearing was set for April 19, 1993. It was continued at the respondent's request with the appellant's concurrence.

II

The appellant began working for the State as a Correctional Officer at Folsom State Prison on February 24, 1984. She transferred to the Transportation Unit of the Administrative Services Division on March 7, 1988.

She is concurrently employed as a Captain in the Army National Guard. She has served with the National Guard for 16 years.

The appellant was reassigned from the Transportation Unit back to Folsom Prison effective July 24, 1989, as a result of this adverse action.

She has had no prior adverse actions.

III

As cause for this adverse action, the respondent charged the appellant with other failure of good behavior for making a threatening remark to a custodial inmate and

(D [REDACTED] continued - Page 3)

grabbing his groin; and with willful disobedience for refusing to give an inmate a lunch until ordered to do so by a Sergeant.

She was also charged with dishonesty but no acts or omissions were alleged in the adverse action as a basis for that charge. Therefore, that charge is considered as stricken from the action.

IV

The Transportation Unit is responsible for transporting State prison inmates (by bus) throughout the State and for extradition of State prison inmates throughout the United States.

When serving as a Transportation Officer, the appellant worked with a Sergeant and another officer on an inmate bus and was responsible for maintaining a constant vigil of the prisoners and safely transporting them between facilities.

V

On May 19, 1989, the appellant was assigned along with a male Sergeant and a male Transportation Officer to transport inmates on a bus traveling from Richard J. Donovan Prison in South San Diego County to Folsom State Prison at Repressa. The bus was scheduled to make facilities' stops at Fillmore, Santa Maria, California Men's Colony (San Luis Obispo), Morgan Hill and California Medical Facility (Vacaville).

One of the inmates loaded onto the bus at Richard J. Donovan Prison in San Diego was an inmate Carter.

(D [REDACTED] continued - Page 4)

Inmate Carter was considered extremely dangerous (Class J or psychotic). Prior to leaving Richard J. Donovan it was noted on the Transportation Duty Log that he had to be forcibly removed from his cell. However, he was not placed in a security cage, he was put with the rest of the inmates in the bus.

Throughout the trip, the Sergeant and the male officer sat in the front of the bus, alternately driving and riding in the seat opposite the driver. The appellant was assigned to the security vestibule or "shotgun" seat in the back of the bus by the Sergeant.

After the inmates were on the bus, she was not rotated to either of the front positions throughout the bus. (The Department of Corrections policies provide that all driving assignments shall be rotational and that the officers shall rotate when appropriate.)

VI

Shortly after the bus got on the road, inmate Carter started to become noisy and verbally disruptive. As a result, the appellant directed him to "keep it down."

He responded with, "Fuck you, bitch!" The other inmates laughed at the exchange.

The appellant then asked Carter to identify himself. He responded again with, "Fuck you, bitch!"

He would not quiet down. As a result, the appellant called forward on the phone to the Sergeant who was driving and advised him that one of the inmates was being disruptive and needed to be placed in the security cage.

(D [REDACTED] continued - Page 5)

The Sergeant responded by telling the appellant he would be stopping for fuel in a few minutes, and they would do it then.

The Sergeant continued to drive for another hour and one-half before he stopped for fuel.

VII

In the interim, Carter remained noisy and disruptive. He made remarks out loud including, "Don't worry, the bitch can't do anything," and "Fuck her down the throat."

The inmates were a captive and amused audience riding in the back with the appellant and Carter. The Sergeant and male Officer, riding in the front of the bus, were apparently oblivious to the remarks. They did not recall hearing any of the remarks made.

VIII

Carter got up to use the rest room. The appellant again requested his name. He responded with another obscenity. He did not give her his name.

IX

When the Sergeant stopped the bus for fuel, the appellant stood guard in the front of the bus at the Sergeant's direction while he and the male officer stepped outside for a few minutes.

They returned after the bus was fueled up and the Sergeant directed the appellant back to the shotgun seat. She again asked to move the inmate to the security cage. He responded something to the effect of, "If you want to move

(D [REDACTED] continued - Page 6)

him, move him."

Both the male officer and the appellant removed their weapons and stepped into the first gated secured area of the bus, pursuant to standard procedure. The Sergeant remained at the front of the bus.

The appellant moved towards the second secured area where the inmates were seated. The second gate was opened.

She called the inmate forward. He sat a few minutes. Then he got up and slowly sauntered forward towards her.

The appellant made a remark to the effect of "Smart move; what's your name."

The inmate stopped at the security gate within inches of the appellant and flexed his arms so he could not clear the gate. He responded with, "Fuck you, bitch; I'm not doing shit for you or anyone else."

The inmates were laughing at the appellant's predicament. The male officer just stood behind the appellant facing her back. The Sergeant was at the front of the bus, his vision obscured by the grill gates.

X

At that point, the appellant reached for the waist chain and top portion of inmate Carter's jump suit to pull him through the door and place him in the security cage. He grabbed her right wrist, even though he was secured by a waist chain. The force of his grip as he pinned her arm against the grill gate was such that she thought he would break it.

(D [REDACTED] continued - Page 7)

Fearing for her safety, the appellant looked towards the male officer. He was making no move to assist her. She lunged towards Carter trying to grab him by the groin and verbally threatened Carter saying, "You want to lose them; I'll tear them off."

XI

At approximately that point, the male Officer moved in to assist the appellant. He grabbed Carter's waist chain and dragged him towards the security cage, saying, "Let's go" or something to that effect.

The two officers together managed to get Carter into the security cage and Carter released the appellant's wrist. The male officer closed the cage door and they exited through the first security gate.

After they had secured their weapons back on their persons, the Sergeant again directed the appellant back to the shotgun seat.

Carter continued to mouth obscenities for approximately 10 to 15 minutes and then settled down.

XII

At the next bathroom stop, the appellant stood guard in front while the male staff members exited the bus for a few minutes.

During that time, Carter started mouthing off from the security cage. He said, among other threats, "I'm going to cut your head off and fuck you."

When the Sergeant returned to the bus, the appellant

(D [REDACTED] continued - Page 8)

advised him that Carter had threatened her. He did not respond but directed her to "get in shotgun."

The appellant returned to the shotgun seat.

XIII

They stopped at the California Men's Colony in San Luis Obispo at approximately 12:30 p.m., the appellant left the bus to use the rest room. The Sergeant got off to use the telephone.

When the appellant returned ten minutes later, the male officer was handing out the lunches to the inmates. She assisted the male officer by distributing the rest of the lunches while he held the box. They did not give a lunch to Carter who was in the security cage.

When the Sergeant returned to the bus, Carter told him he didn't get a lunch. The Sergeant directed the appellant to get Carter a lunch, which she did.

XIV

The bus arrived at Vacaville at approximately 7:30 p.m. Both the appellant and Carter were examined by the Medical Technician Assistant. The appellant had contusions to her right forearm and left arm and was referred to her own physician for examination. Carter had a superficial laceration to his right forearm. There was no other injury.

XV

The Sergeant and the two officers returned to the bus and drove it up to Folsom State Prison. During the trip, neither of the male staff members spoke to the appellant.

XVI

A few days after the incident, the Sergeant filed a report in which he claimed the appellant acted improperly in that she addressed inmate Carter with the remark "Smart move, asshole," when he was approaching her on the bus at the security gate. The Sergeant also stated that he saw the appellant inappropriately grab the groin of Carter during the altercation.

A few weeks later the male officer changed an earlier report of the incident he had filed, and stated he also heard the appellant make the remark and grab the inmates groin area.

XVII

The appellant contends that neither the Sergeant nor the male officer was in a position to see her hands given their positions and the tight quarters of the bus. She also contends that she did not use the term "asshole" and that she did not actually connect with the appellant such that she grabbed his groin.

XVIII

The appellant also defended her actions of yelling a threat at Carter and attempting to grab him in the groin area as consistent with policies regarding use of force. At the time of the incident she was facing an inmate who was over 6 feet tall and weighed approximately 240 pounds. She is very slight and is 5 foot 6 inches tall. Prior to her action, the inmate had grabbed her wrist and was pressing it

(D [REDACTED] continued - Page 10)

against the grill gate. She reasonably feared that he would break her arm or do other severe physical injury to her person.

She also testified she had looked at the male Officer and it was clear from his position and non-action that he was not going to intervene to assist her.

XIX

The appellant acknowledged that she and the male officer had not given Carter a lunch in the cage when Carter complained to the Sergeant. However, she denied that she ever disobeyed any order. The evidence was consistent that when ordered to go get a lunch for Carter she complied.

XX

The appellant also testified in mitigation that she was not treated as a member of the team by the Sergeant and male officer. She was not permitted to drive after leaving San Diego. She was not rotated; her requests were ignored (such as her request to put the inmate in a security cage); the inmates were permitted to demean and belittle her without any intervention or reporting by the Sergeant; and she even had to ask approximately 3 times to go see an MTA at Vacaville. As a result, an incident arose with a dangerous inmate where she felt isolated, unprotected and alone.

Her evidence in mitigation was bolstered by the testimony of the male officer who described what happened when he eventually did intervene. He said "He was cooperative when I grabbed him by the waist chain". . . Some

(D [REDACTED] continued - Page 11)

guys have a problem being told what to do by a female CO".

* * * * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT THE ADMINISTRATIVE LAW JUDGE MAKES THE FOLLOWING DETERMINATION OF ISSUES:

The respondent proved by the preponderance of the evidence that the appellant verbally and physically threatened an inmate on a Transportation Unit bus by stating, "You want to lose them; I'll tear them off" and grabbing for his groin. The respondent did not prove any of the other allegations charged relating to the altercation.

It was clear from the size of the bus, the tight quarters and the location of all of the parties on the bus, that the Sergeant and male officer's views of the altercation between the appellant and Carter were obstructed. Also, the Sergeant and male officer were inconsistent and unconvincing in their testimony of the events. The Sergeant said she held the inmate by the groin after he was through the grill gate and she pulled him along towards the cage. The male officer said he was the one who pulled him through the gate and down the aisle to the cage but that he thought she grabbed the inmate by the groin before pulling him through the cage (when he was behind her). Both the Sergeant and the male officer recalled the inmate had the appellant by the wrist but could be sure of when.

The rules and regulations of the Department of Corrections provide at section 3279 (Use of Force) that,

"No employee will use physical force on an inmate or parolee unless it is in the employee's defense or the defense of others, or unless it is necessary to prevent escape or serious injury to persons or property. . ."

The appellant defended her actions on the basis that she was reasonably required to use physical force on the inmate because she was acting in her own defense and believed it was necessary to prevent serious injury to her person. She was correct. A polite "Please let go" was not going to do it. She was unarmed, half the inmate's size and severely provoked by the inmate's actions and words. She also perceived that she was not getting support from her back up.

It is therefore concluded that the appellant's conduct did not constitute a violation of the rule on use of force and did not constitute actionable misconduct under Government Code section 19572.

The respondent failed to prove that the appellant disobeyed any orders or instructions by initially failing to provide a lunch to Carter in the security cage. She did provide him one, as directed by the Sergeant, when told to do so. The rules of the transportation unit place the responsibility for lunches with the Transportation Sergeant as follows:

"It is the Transportation Sergeant's responsibility to ensure there are enough inmate lunches on board the CDC bus for each inmate during the course of the scheduled run.

Therefore, it is concluded that the appellant was not willfully disobedient in the performance of her duties.

For the reasons set forth above, the adverse action should be revoked.

It is also recommended that the appellant be immediately reassigned to the Transportation Unit.⁴ At the time of the incident, the appellant was transferred out of the unit solely for the reasons charged in this adverse action. Since that time she has consistently requested to be return to that unit, should she succeed in her appeal. Hopefully, if she is reassigned to that unit, the lack of team spirit and lack of support previously demonstrated to her by male counterparts, will have dissipated through the efforts of the Department of Corrections to integrate women fully into each program.

* * * * *

WHEREFORE IT IS DETERMINED that the 1 step reduction in salary for 6 months taken by respondent against C [REDACTED] D [REDACTED] effective July 30, 1989, is hereby revoked.

Said 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, if any, due appellant under the provisions of Government Code section 19584.

* * * * *

⁴The reassignment of the appellant was made part of the adverse action, however no formal appeal was taken to the Department of Personnel Administration. The time for appeal has passed and the Administrative Law Judge cannot assume jurisdiction in that area. She has not been directed to do so by the Department of Personnel Administration.

(D [REDACTED] continued - Page 14)

I hereby certify that the foregoing constitutes my Proposed Decision in the above-entitled matter and I recommend its adoption by the State Personnel Board as its decision in the case.

DATED: June 29, 1993.

MARY C. BOWMAN

Mary C. Bowman, Administrative Law
Judge, State Personnel Board.
State Personnel Board