

BRIAN BURNS
v.
CALIFORNIA DEPARTMENT OF MOTOR
VEHICLES

Appeal from Demotion

SPB Case No. 24-01
Case No. 23-0554

**BOARD RESOLUTION AND
ORDER ADOPTING AND
DESIGNATING PROPOSED
DECISION AS A PRECEDENTIAL
DECISION**

BEFORE: Shawnda Westly, President; Kathy Baldree, Vice President; Gail Willis, Kimiko Burton, and Ana Matosantos, Members

The State Personnel Board has reviewed the Proposed Decision filed by the Administrative Law Judge in the appeal by Brian Burns (Appellant), from demotion imposed by California Department of Motor Vehicles. After careful consideration,

IT IS RESOLVED AND ORDERED THAT:

1. The attached Proposed Decision of the Administrative Law Judge is **ADOPTED** in full;
2. The Board designates the adopted Proposed Decision as a precedential decision under Government Code section 19582.5;
3. The precedential decision shall be designated as SPB Dec. No. 24-01 in the Board's precedential decision numbering system; and
4. The precedential decision shall be uploaded and maintained in the Board's records, website, and other legal online publications as may be available or applicable.

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STATE PERSONNEL BOARD

The foregoing Board Resolution and Order was made and adopted by the State Personnel Board during its meeting on January 11, 2024, as reflected in the record of the meeting and Board minutes.

Suzanne M. Ambrose

SUZANNE M. AMBROSE
Executive Officer

BRIAN BURNS
v.
DEPARTMENT OF MOTOR VEHICLES

Appeal from Demotion

Case No. 23-0554

Proposed Decision

STATEMENT OF THE CASE

This matter came on regularly for an Evidentiary Hearing via Webex videoconference before Teri L. Block, Administrative Law Judge, State Personnel Board (SPB or Board), on October 26 and 27, 2023. The case was submitted following oral closing arguments on October 27, 2023.

Appellant, Brian Burns (Appellant), was present and was represented by Sarah Doan-Minh, Staff Counsel, Service Employees International Union, Local 1000.

Respondent, Department of Motor Vehicles (Respondent, Department or DMV), was present and was represented by Kate Rinne, Attorney III, DMV. Veronica Bowie, Branch Chief, DMV, appeared on behalf of Respondent.

Respondent demoted Appellant from the position of Driver Safety Hearing Officer (Hearing Officer) to Licensing Registration Examiner, effective May 15, 2023. The Notice of Adverse Action (Notice) alleged that Appellant repeatedly failed to timely complete decisions in his cases, maintained an unacceptable backlog of cases for more than a year, failed to issue decisions altogether in multiple cases, lost essential evidence in 11 cases, did not follow his supervisor's directives on multiple occasions, refused to report to work as assigned, and returned approximately 55 case files to the Van Nuys DMV office in a state of disarray. The Notice also alleged that Appellant was chronically absent

without leave and failed to provide requested medical substantiation for his absences on numerous occasions.

Appellant asserts the charges in the Notice are overstated, maintains that his absences were due to bona fide medical conditions, and argues his demotion was unwarranted. Appellant seeks reinstatement to his former position as a Hearing Officer.

ISSUES

The issues to be resolved are:

1. Did Respondent prove the factual allegations by a preponderance of the evidence?
2. If Respondent proved the factual allegations by a preponderance of the evidence, did Appellant's conduct constitute grounds for discipline under Government Code section 19572, subdivisions (b) incompetency, (c) inefficiency, (d) inexcusable neglect of duty, (e) insubordination, (j) inexcusable absence without leave, (m) discourteous treatment of the public or other employees, (o) willful disobedience, and/or (t) other failure of good behavior?
3. If Appellant's conduct constituted grounds for discipline under Government Code section 19572, what is the appropriate penalty?

FINDINGS OF FACT

A preponderance of the evidence proved the following facts:

1. Appellant began his career with the DMV in 2014 and worked various positions in the Field Office Division until 2017, when he was promoted to Hearing Officer. At all relevant times he worked in the Van Nuys Driver Safety Office. Appellant has no prior history of formal discipline.

2. As a Hearing Officer, Appellant was a trier of facts. His duties included reviewing financial and driver records, and conducting interviews, reexaminations, and hearings that resulted in modification, reinstatement, granting, or withdrawal of driving privileges. His cases involved drivers with physical or mental problems; driving under the influence (DUI) charges; and allegations of negligent vehicle operation and/or fraudulent activity.
3. Respondent's Driver Safety Reporting Policy (Reporting Policy) required Hearing Officers to complete and file a final written hearing report or decision (Decision) within 15 calendar days of the hearing,¹ unless some additional information (hereafter "suspense item"), such as medical records or the results of a blood alcohol content (BAC) test, was required to make a final determination. In those instances, the 15-day timeframe was suspended, but a Decision was required to be filed within seven calendar days of receiving the suspense item or notification that the suspense item was not available. (DMV Driver Safety Procedure, DS 2001-02; DS 2021-01.)
4. At all relevant times, Appellant was familiar with the Reporting Policy timeframes and his duty to comply with them.
5. Hearing Officers were normally assigned 24 hearings per week. Hearings were relatively short (an hour or less). Decisions averaged one to four pages in length, and typically could be written in 15 to 45 minutes, depending on the issues involved.

¹ The record established that a "hearing" could consist of an interview, a reexamination (driver test), the taking of evidence, or a combination of all three.

6. Cases not completed within the Reporting Policy timeframes were designated as “invalid” and were tracked on a weekly report (15-Day Report). Each week the 15-Day Report was distributed to Hearing Officers who had invalid cases on their caseload.
7. Most invalid cases listed on the 15-Day Report were one to two days late and were quickly completed by the assigned Hearing Officer after receiving notice that a case was late. At all relevant times, Appellant was the only Hearing Officer in the Van Nuys office who repeatedly had a large number of invalid cases listed on the 15-Day Report. At one point, Appellant had 60 invalid cases listed, ranging from 16 to 105 days late. (See discussion, *infra*, at p.10)

Prior Notice of Performance Issues

8. From October 2017 through December 2018, Appellant developed a significant backlog of cases on his calendar. During this period, Appellant’s supervisors issued him an Incident Report, two Records of Discussion (Discussion Record(s)), and two Corrective Memoranda (Corrective Memo(s)), instructing Appellant to reduce his case backlog and timely complete his Decisions, as follows.
9. On November 20, 2017, Appellant received and signed an Incident Report from management, stating that he had 52 invalid cases on his caseload. The Incident Report reiterated the timeframes set forth in the Reporting Policy, noted that Appellant was not assigned cases from October 30, 2017, through November 9, 2017, to provide him additional time to complete his outstanding

- cases, and documented that Appellant stated he had no reason for his failure to timely complete his cases.²
10. On February 8, 2018, Driver Safety Manager II Gladys Hampton (Hampton), issued a Discussion Record memorializing her discussion with Appellant advising him that he had 15 invalid cases listed on the 15-Day Report. Hampton noted that from February 5 – 8, 2018, Appellant's hearing schedule was reduced to one case to provide him additional time to complete his invalid cases.
 11. On August 22, 2018, Driver Safety Manager I Ramin Rafailzadeh (Rafailzadeh) issued a Discussion Record memorializing his discussion advising Appellant that he had 12 invalid cases on the 15-Day Report, and noting that on August 20, 2018, Appellant's cases were assigned to other staff to allow him time to complete his backlogged cases.
 12. Both Discussion Records informed Appellant that his performance would be monitored for 90 days, and that he was expected to timely complete his work, citing the Reporting Policy. Appellant received and signed both Discussion Records on the dates they were issued.
 13. On October 2, 2018, Rafailzadeh issued a Corrective Memo documenting that Appellant had 18 invalid cases listed on the 15-Day Report, and that he had 13 invalid cases listed on the prior week's report. Rafailzadeh also noted that on September 24, 2018, Appellant's cases were assigned to other Hearing

² The record did not establish the name of the manager who issued the Incident Report.

- Officers, and on September 28, 2018, Appellant was given additional time from 8:15 a.m. to 2:15 p.m. to catch up on his backlogged cases.
14. On December 17, 2018, Hampton issued a Corrective Memo documenting that Appellant had 16 invalid cases listed on the 15-Day Report.³ The invalid cases ranged from 8 to 27 days overdue.
 15. Both Corrective Memos again instructed Appellant to timely complete his work, citing the Reporting Policy, and advised Appellant that his performance would be monitored for an additional 90 days. Both Corrective Memos also contained the following admonishment:

Your conduct on this occasion was unacceptable and will not be tolerated by this department. If you engage in similar or other misconduct in the future, the department may take adverse action against you based on the incident cited in this memorandum, as well as any future incidents.
 16. Appellant received and signed both Corrective Memos on the dates they were issued.
 17. All the Discussion Records and Corrective Memos noted above advised Appellant that DMV's Employee Assistance Program (EAP) was available to him and provided phone numbers and contact information for EAP services.
 18. In the spring of 2019, Appellant's annual Merit Salary Adjustment was denied. On March 4, 2019, Rafailzadeh memorialized the reasons for recommending the denial, citing four Discussion Records and four Corrective Memos that

³ This Corrective Memo was originally issued on December 17, 2018; however, for reasons not established on the record, it was amended and reissued on February 12, 2019.

- Appellant had received between August 22, 2018, and February 22, 2019.⁴
- Appellant received and signed Rafailzadeh's memorandum on March 4, 2019.
19. In October 2019, Respondent medically demoted Appellant based on an examination report prepared by a psychologist who found Appellant not fit for duty as a Hearing Officer. Appellant appealed the demotion to the SPB, and subsequently moved to dismiss the medical action on the ground that Government Code section 19253.5 required such examinations to be conducted by a physician, and that Respondent was precluded from taking the medical action based solely on a psychologist's examination. The Board granted Appellant's motion and Appellant was subsequently reinstated as a Hearing Officer in 2021.⁵

Appellant's Backlog – September 2022 through January 2023

20. In October 2021, Christopher Pitchford (Pitchford) was designated as Acting Driver Safety Manager II in the Van Nuys office and was permanently promoted to that position the following year. From October 2021 until Appellant's demotion in May 2023, Pitchford oversaw operations in the Van Nuys office and directly supervised approximately 10 Hearing Officers, including Appellant.⁶

⁴ In addition to the Discussion and Corrective Memos referenced above in Paragraphs 10 through 17, Rafailzadeh's memorandum documented that from August 2018 through February 2019, Appellant received two Discussion Memos regarding attendance issues, and two Corrective Memos and one Discussion Memo regarding rude, discourteous, and insubordinate behavior towards management.

⁵ See SPB Case No. 19-1597.

⁶ Normally, the Driver Safety Manager II has only two direct reports – a Driver Safety Manager I, who supervises the Hearing Officers, and a Manager I, who supervises the clerical staff. However, the Driver Safety Manager I position in Van Nuys was vacant in 2021 and 2022, so during this period, Pitchford directly supervised the Hearing Officers.

21. After becoming Acting Driver Safety Manager II, Pitchford noted that Appellant consistently carried a significant backlog of cases listed on the 15-day Report, particularly when compared to other Hearing Officers. Accordingly, Pitchford repeatedly counseled Appellant to reduce his backlog for several months.
22. On September 30, 2022, Pitchford issued a Discussion Record memorializing his discussion with Appellant noting that Appellant had 28 invalid cases listed on the 15-Day Report, ranging from 1 to 16 days late. The Discussion Record advised Appellant that he was expected to comply with the Reporting Policy, including “identifying/reviewing cases that have a suspense date, adjusting suspense dates to correspond with the reason for the suspense date, and closing cases according to the guidelines implemented by the branch.” Pitchford also advised Appellant that support staff had informed him that two attorneys called to inquire about the status of their cases, which were overdue.
23. Additionally, Pitchford noted that when Appellant was asked why he had 28 invalid cases, Appellant responded, “I don’t know. It’s a long explanation, but I have no excuse,” or words to that effect. The Discussion Record concluded by referencing the availability of EAP. Appellant received and signed the Discussion Record on October 4, 2022.
24. On October 10, 2022, Pitchford issued a Discussion Record memorializing his discussion with Appellant that day, following Appellant’s absence on October 6, 2022. Due to Appellant’s absence, Pitchford had to search Appellant’s office to locate files pertaining to hearings that Appellant was scheduled to conduct that day. Pitchford noted, in relevant part:

Based on my review of approximately 62 files in your office, for upcoming [driver safety] contacts, the files did not appear to have been reviewed and/or commented as reviewed in [the Driver Safety Automation Program]. In addition, there were files and correspondences on your desk, computer desk and Respondent's table with no arranged order or case comments.⁷ While most files for [driver safety] contacts scheduled for 10/6/22 had been located, the file for case #VNY222570214 (Lapse of Consciousness Interview), could not be located.

25. Pitchford also cited an Employee Expectations Memorandum that Appellant had received and signed the year prior, which stated that employees were expected to keep their desks clean and free of excessive clutter to “[e]nsure that important work items ...that managers may need to use or access in your absences are clearly labeled for easy access.” Additionally, Pitchford referenced DMV's EAP as a resource. Appellant received and signed the Discussion Record on October 11, 2022.
26. On October 18, 2022, Appellant was scheduled to report to work at the office pursuant to his prearranged telework schedule. However, at 7:30 a.m. that day, Appellant telephoned and advised Pitchford that he intended to telework. Pitchford informed Appellant he was not scheduled to telework and directed him to report to the office because he had three hearings on calendar that day. Notwithstanding, Appellant did not report to the office. Consequently, Pitchford had to reassign Appellant's hearings to other Hearing Officers.
27. At all relevant times, Manager I Lara Gonzalez (Gonzalez) supervised the clerical staff in the Van Nuys office and reported directly to Pitchford. In the fall

⁷ “Respondent” in this context refers to the driver whose driving privileges are in question.

of 2022, Pitchford became aware that Appellant frequently brought managerial issues to Gonzalez rather than to Pitchford. Accordingly, on October 24, 2022, Pitchford directed Appellant to bring managerial concerns to him (Pitchford) rather than Gonzalez until a Driver Safety Manager I could be hired at the Van Nuys office.

28. On October 25, 2022, Pitchford issued a Corrective Memo documenting that Appellant had 60 invalid cases listed on the 15-Day Report, ranging from 16 to 105 days late, as follows:

Number of Invalid Cases	Days Overdue
15	16 – 29
22	30 – 39
8	40 – 49
7	50 – 69
8	70 – 105

29. Pitchford noted in the Corrective Memo that these invalid cases involved high-risk drivers whose driving privileges were in question due to a medical condition or driving under the influence of alcohol, or reexamination of drivers who failed their driving test or failed to appear for their driving test. Pitchford further noted that many of these high-risk drivers were still driving pending review of their driving privileges, and admonished Appellant, as follows:

As you know, the Driver Safety Branch is responsible for ensuring the safety of the motoring public and providing timely customer service. Failure to timely render hearing decisions poses a serious threat to traffic safety due to unsafe drivers who remain on the road. Alternatively, untimely hearing decisions may also create undue hardships to those drivers who have demonstrated an ability to drive safely and are waiting to have their driving privilege restored.

30. Pitchford also documented Appellant's failure to report to the office on October 18, 2022, and the subsequent reassignment of his cases to other Hearing Officers.
31. The Corrective Memo instructed Appellant to close his backlogged cases and to timely complete his cases going forward, citing the Reporting Policy. Additionally, the Corrective Memo directed Appellant to inform Pitchford immediately if he was unable to timely complete his cases in the future. The Corrective Memo concluded with an admonishment about potential formal discipline based on Appellant's noted performance issues, and the availability of EAP.
32. Appellant received and signed the Corrective Memo on October 26, 2022. On the same day, Pitchford directed Appellant to complete 21 cases listed on the first page of the 15-Day Report, dated October 20, 2022, by close of business on October 28, 2022.
33. As of November 1, 2022, Appellant had completed only three of the 21 cases, and the updated 15-Day Report listed seven additional invalid cases on Appellant's caseload.

Backdating Incident

34. That same day, Appellant requested Gonzalez to finalize a Decision and close the file on an overdue case that he had heard on September 14, 2022.⁸ The case involved a driver whose license was suspended on June 16, 2022, due to

⁸ Finalizing a Decision and closing a file was a data entry function that the clerical staff typically performed.

- a medical condition. At the September 14th hearing, Appellant advised the driver's attorney, Anthony Scott (Scott), that the driver's license would be restored, and the driver would be placed on medical probation if the driver's doctor could provide favorable medical documentation.
35. Appellant received favorable medical documentation regarding the driver's medical condition within two or three days. Accordingly, Appellant should have issued a Decision restoring the driver's driving privileges by September 30, 2022, per the Reporting Policy. However, he did not. Instead, the case languished and was placed on the 15-Day Report.
 36. On October 12, 2022, Scott sent an email to Appellant requesting that he send the Notice of Decision to Scott's email address. Appellant responded by email, "Got it;" however, he did not email the Decision to Scott. In fact, the Decision had not been finalized and processed, and so, unbeknownst to the driver, the driver's license remained suspended. In the interim, the driver received a moving violation ticket while driving on a suspended license.
 37. When Scott advised Appellant of this circumstance, Appellant contacted Gonzalez on November 1, 2022, and requested that she backdate the Decision and file closure date to September 30, 2022, so that on the date the driver received a moving violation, her driving privileges would have been restored.
 38. Gonzalez had never been asked to backdate a Decision. When she attempted to do so, her computer system repeatedly issued an error message and rejected the Decision. So, Gonzalez advised Appellant to address the issue with Pitchford. Later that day, Appellant advised Pitchford of the situation.

Pitchford informed Appellant that backdating a Decision was inappropriate and impermissible.

Invalid and Mishandled Files from November 2022 through February 2023

39. On November 14, 2022, Pitchford directed Appellant to complete six specific invalid cases before leaving the office that day. Appellant completed one case and did not address the remaining five, which ranged from 26 to 130 days overdue.⁹ Appellant did not update Pitchford on the five remaining incomplete cases, as instructed on October 25, 2022.
40. On November 18, 2022, Pitchford issued a Corrective Memo documenting Appellant's failure to complete the 21 cases he was tasked to complete by October 28, 2022; the increase in Appellant's backlog by seven cases; Appellant's failure to follow Pitchford's directive to bring managerial issues to him rather than Gonzalez; Appellant's inappropriate attempt to backdate an overdue Decision; Appellant's failure to comply with Pitchford's directive to complete six specific cases by November 14, 2022; and Appellant's failure to update Pitchford on the five cases he did not complete.
41. In addition to warning Appellant that these performance issues could result in formal discipline, Pitchford concluded the Corrective Memo with an offer to assist, as follows:

In an effort to assist you, I will meet with you on a regular basis to help prioritize the backlogged cases. I will identify cases for you to complete and provide a completion date and further instructions.

⁹ Only one case was 26 days late. The remaining four cases respectively were 96, 109, 117, and 130 days late.

42. Appellant received this Corrective Memo but refused to sign it.
43. In early December 2022, Pitchford identified several invalid files on Appellant's caseload and instructed Appellant to close them. On December 16, 2022, Appellant emailed Pitchford to advise him that nearly all the identified files were either closed or suspended, but that he could not locate five of the files. Appellant assured Pitchford that he would "tear [his] house apart" over the weekend looking for them.
44. Appellant's email concerned Pitchford because case files contain confidential information, including driver's license numbers, social security numbers, home addresses, driver records, and medical records.
45. The five files went missing for a month. On January 17, 2023, Appellant advised Pitchford that he located two of the lost files. Pitchford located the remaining three in a file cabinet at the office.
46. On the morning of January 26, 2023, Appellant telephoned Pitchford, stated that he was not coming to work that day, and asked whether Pitchford had received a note from his doctor. At the time, Appellant had 55 case files at his home.
47. During this phone conversation, Pitchford directed Appellant to bring all 55 case files back to the office because attorneys had been inquiring about the status of Appellant's cases and staff could not respond because the files were unavailable. Appellant responded, "Good luck with that," and hung up.
48. On February 1, 2023, Appellant brought a pile of files to the Van Nuys office and dumped them into a cart in his office. The files were disorganized and

disheveled. Many documents were not in folders, and there were numerous loose papers, exhibits, and unlabeled or broken CD's (which contain the audio recordings of hearings) in disarray. Appellant left the office without advising Pitchford that he had returned the files.

49. Because the files were in a state of complete disarray, Pitchford had to assign other staff to go through the pile and reconstruct the files. Appellant's Decisions in all 55 files were overdue. Of the files that could be reconstructed, 14 were reassigned to other Hearing Officers; however, 11 DUI cases had to be set aside/dismissed because the CD audio recording of the hearing was either missing or destroyed.

Attendance Issues

50. On November 17, 2021, Appellant received and signed a DMV Licensing Operations Division Employee Expectations Memorandum (Expectations Memo) that set forth, among other things, the following expectation regarding scheduled absences:

A request for time off for an absence must be given to the employee's manager/supervisor as far in advance as possible. Prior permission should be obtained for time off for medical, dental, vacation, religious observances, and other absences.

51. Requests for scheduled absences were required to be made in writing on a DMV I form.
52. Regarding unscheduled absences, the Expectations Memo required employees to contact their supervisor 30 minutes before the start of their work shift, and to provide medical substantiation for all absences, when requested

- by management. If an employee failed to provide medical substantiation when requested, management could deem the absence unapproved and report it as an unpaid unauthorized absence without leave (AWOL). (Expectations Memo, p. 5.)
53. On June 22, 2022, Pitchford issued an Attendance Review and Expectations Memorandum (Attendance Memo) documenting that Appellant had 33 unscheduled absences from April 11, 2022, to June 10, 2022. In the Attendance Memo, Pitchford advised Appellant that future unscheduled absences might not be approved and could be designated as AWOL. Pitchford also reiterated DMV's expectations for scheduled and unscheduled absences and medical substantiation when requested, and advised Appellant that five consecutive AWOL days could result in an automatic resignation pursuant to Government Code section 19996.2.¹⁰ Appellant received, but refused to sign the Attendance Memo.
54. On February 6, 2023, Pitchford issued a Corrective Memo documenting seven and a half days on which Appellant was deemed AWOL, and seven absences for which Appellant failed to provide requested medical substantiation from January 10, 2023, through February 2, 2023. The Corrective Memo also included the following admonishment, in relevant part:

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¹⁰ Absence without leave, whether voluntary or involuntary, for five consecutive working days is an automatic resignation from state service, as of the last date on which the employee worked. (Gov. Code, § 19996.2, subd. (a).)

As previously discussed, when you are not at work, it negatively impacts the level of customer service and affects the workload and morale of other staff. In addition, your absenteeism creates inefficiency at the Van Nuys Driver Safety office, additional workload for your coworkers, and it is not representative of a driver Safety Hearing Officer with the Legal Affairs Division.

55. Pitchford's Corrective Memo also cited DMV's expectations for unscheduled absences, warned that Appellant's poor attendance could result in formal discipline, and referred Appellant to the EAP. Appellant received and signed the Corrective Memo on February 7, 2023.
56. Respondent demoted Appellant from Hearing Officer to Licensing Registration Examiner, effective May 15, 2023.

PRINCIPLES OF LAW AND ANALYSIS

In a disciplinary appeal, the appointing power must prove the charges against the employee by a preponderance of the evidence. (Evid. Code, § 115; *Lyle Q. Guidry* (1995) SPB Dec. No. 95-09.) A preponderance of evidence means "evidence that has more convincing force than that opposed to it." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314; *Lyle Guidry, supra*, at pp. 8-9.) Respondent has met this burden as to all eight legal charges against Appellant.

Incompetency

Incompetency is established when an employee fails to perform his or her duties adequately within an acceptable range of performance. (*Fortunato Jose* (1993) SPB Dec. No. 93-34.) The term "incompetency" is "generally used in a variety of factual contexts to indicate an absence of qualification, ability or fitness to perform a prescribed duty or function." (*Pollack v. Kinder* (1978) 85 Cal.App.3d 833, 839.)

The evidence established that Appellant repeatedly failed to timely complete his Decisions from October 2021 through February 2023, despite management's ongoing efforts to help him improve. During this period, Appellant received weekly copies of the 15-Day Report notifying him that he had a significant backlog of invalid cases, and Pitchford repeatedly counseled Appellant to reduce his backlog.

As of September 2022, Appellant had 28 invalid cases ranging from 1 to 16 days late. By October 2022, the backlog had worsened; Appellant had 60 invalid cases ranging from 16 to 105 days late. From October 2021 through October 2022, Pitchford repeatedly counseled Appellant to timely complete his Decisions; assigned several of Appellant's cases to other Hearing Officers; and issued two Discussion Records directing Appellant to clear his backlog and maintain his files in an orderly fashion. Despite these efforts, Appellant never caught up. He continued to maintain a significant backlog of invalid cases and offered management no reasonable explanation for his inability to timely complete his Decisions.

In October and November 2022, Pitchford issued two Corrective Memos to Appellant, advising him that his work would be monitored for 90 days, and that if he failed to improve, his performance issues could result in formal discipline. At that time, Appellant had 60 invalid cases, some up to 105 days late. But Appellant's performance did not improve.

By November 14, 2022, not only had Appellant failed to complete 21 seriously late cases that Pitchford had directed him to complete by late October, but his backlog had also increased by seven. During this period, Pitchford offered to assist Appellant with prioritizing his caseload. In early December 2022, Appellant misplaced five case files that

were not recovered for a month. By January 2023, Appellant had 55 invalid cases, all of which were in a state of complete and utter disarray. In February 2022, Pitchford discovered that Appellant had lost or destroyed the audio recording for 11 DUI hearings, and those cases were consequently dismissed or set aside. Fourteen of Appellant's cases had to be reassigned to other Hearing Officers because they were significantly overdue.

Notably, Appellant's chronic inability to timely complete his Decisions became apparent almost immediately after he promoted to his position as a Hearing Officer in 2017. The totality of these facts clearly establishes that Appellant was incapable of performing his duty to timely complete his Decisions and maintain his files in an orderly fashion in accordance with Respondent's employee expectations and Reporting Policy. The charge of incompetency is sustained.

Inefficiency

Inefficiency generally connotes a continuous failure by an employee to meet a level of productivity set by other employees in the same or similar position or failure to produce an intended result with a minimum of waste, expense or unnecessary effort. (*R.B. (1993) SPB Dec. No. 93-21.*) However, a repeated failure to meet deadlines, or complete work in a timely manner, even without a comparator, can also constitute inefficiency. (See *Mercedes C. Manayao (1993) SPB Dec. No. 93-14.*)

As previously noted, Appellant repeatedly failed to meet deadlines and timely complete his work, despite management's significant efforts to assist him. Furthermore, from October 2021 through February 2023, Pitchford noted that Appellant consistently carried a significant backlog of cases, at one point up to 60 cases between 16 and 105

days late. By comparison, other Hearing Officers during this period had 1 or 2 invalid cases, if any, most of which were only one or two days late, and all of which were typically completed shortly after notifying the Hearing Officer that a Decision was overdue. The charge of inefficiency is sustained.

Inexcusable Neglect of Duty

Inexcusable neglect of duty has been defined to mean an intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty. (*Jack Tolchin* (1996) SPB Dec. No. 96-04.) In assessing whether negligent conduct is “simple” or “gross,” the degree of seriousness of the harm to the public that could result from the negligence is considered. (*J.A.* (1996) SPB Dec. No. 96-17.)

At all relevant times, Appellant was aware of his duty to timely complete his Decisions and maintain his files in an orderly, secure fashion. Yet, Appellant repeatedly failed to timely complete his work, and maintained his files in a disheveled heap such that files were lost or misplaced, exhibits were misfiled or missing altogether, evidence was destroyed, numerous cases had to be reassigned to other Hearing Officers, and 11 DUI cases were ultimately dismissed because Appellant lost or destroyed crucial hearing transcripts. Notably, Appellant could not offer management any reasonable explanation for his negligence.

The resulting harm to the public was substantial; dangerous drivers were permitted to continue driving, and drivers entitled to have their driving privileges restored suffered undue hardship while their files languished on Appellant’s backlog. Appellant’s negligence also created significant and unnecessary work for management and his coworkers, who were forced to clean up and finish the job that Appellant failed or refused

to do. Appellant's negligent failure to timely complete his Decisions and properly maintain his files thus rises to a grossly negligent failure to perform his known duty.

Appellant was also aware of his duty to request time off as far in advance as possible and provide medical documentation when requested by management. Notwithstanding, between January 10, 2023, and February 2, 2023, Appellant had seven unscheduled absences for which he failed to provide requested medical substantiation. Appellant's excessive, unscheduled and unsubstantiated absences negatively impacted customer service to the motoring public, unduly increased his colleagues' workloads, and created unnecessary staffing and scheduling headaches for management. These facts, too, support the charge of inexcusable neglect of duty and that charge is sustained.

Insubordination

To support a charge of insubordination, an employer must show mutinous, disrespectful or contumacious conduct by an employee, under circumstances where the employee has intentionally or willfully refused to obey an order the supervisor is entitled to give and have obeyed. (*Richard Stanton* (1995) SPB Dec. No. 95-02, p. 10; *Coomes v. State Personnel Bd.* (1963) 215 Cal.App.2d 770, 775; *Fortunato Jose* (1993) SPB Dec. No. 93-34.) A "flagrant and intentional violation of ... explicit instructions," particularly when the violation follows shortly after the instructions, also constitutes insubordination. (K.S. (2017) SPB Dec. No. 17-02, p. 19.)

Appellant willfully refused to follow Pitchford's lawful directives on several occasions, as follows:

- October 18, 2022: Pitchford directed Appellant to report to the office, but Appellant refused and insisted on teleworking instead. Pitchford was forced to reassign Appellant's hearings that day to other Hearing Officers.

- October 24, 2022: Pitchford directed Appellant to bring managerial issues to Pitchford, not Gonzales. On November 1, 2022, Appellant ignored this directive and improperly requested Gonzalez to backdate one of his Decisions to cover up his failure to timely complete the Decision.
- October 25, 2022: Pitchford instructed Appellant to close 21 cases listed on the first page of the 15-Day Report by October 28, 2022, and to inform him immediately if Appellant was unable to timely complete his Decisions in the future. As of November 1, 2022, Appellant had completed only three of the 21 cases and did not inform Pitchford that he failed to complete the remaining 18 cases.
- November 14, 2022: Pitchford directed Appellant to complete six specific cases before leaving the office that day. Appellant completed only one case that day and did not inform Pitchford that he failed to complete the remaining five.

The charge of insubordination is sustained.

Inexcusable Absence Without Leave

Legal cause for discipline under Government Code section 19572, subdivision (j), is found where the employee's absence from work is without prior authorization and is not excused because of illness or other legitimate reason. (*Jerome G. Wendt* (1995) SPB Dec. No. 95-16, p. 18.) A Department can deny authorization for leave when a request for proof of illness is warranted and an employee refuses to provide proof that the absence is justified. (*T.W.* (1992) SPB Dec. No. 92-03, p.6.)

The Expectations Memo that Appellant received and signed on November 17, 2021, required employees to request time off as far in advance as possible and provide medical substantiation for any absence when requested by management. If an employee failed to provide medical substantiation, management could report the absence as AWOL. Pitchford reiterated these requirements in an Attendance Memo that Appellant received and signed on June 22, 2022.

From January 10, 2023, through February 2, 2023, Appellant was absent seven times. Although Pitchford requested medical substantiation for all seven absences, Appellant failed to provide medical substantiation for any of them. Accordingly, the charge of inexcusable absence without leave is sustained.

Discourteous Treatment of the Public or Other Employees

Discourteous treatment of the public or other employees generally involves conduct where a person displays hostility towards others, uses vulgar language, speaks in an abrasive tone of voice, or has a brusque demeanor. (See *Walker v. State Personnel Bd.* (1971) 16 Cal.App.3d 550, 553; *G.M.* (2003) SPB Dec. No. 03-06, p. 17.) Discourteous treatment can include a flippant attitude, as well as rude, demeaning, and sarcastic comments. (*Michael Prudell* (1993) SPB Dec. No. 93-30.)

On January 26, 2023, Appellant telephoned Pitchford to advise him that he was not coming to work that day. At the time, Appellant had 55 overdue case files at home. Pitchford directed Appellant to bring the files back to the office because the Decisions were overdue and lawyers were inquiring about the status of the cases. In response, Appellant said, "Good luck with that," and hung up.

This remark was patently flippant and rude, particularly since Appellant was responding to his supervisor's legitimate request to return state property to the office. Additionally, Appellant's act of dumping 55 case files at the Van Nuys office in a disheveled heap without advising Pitchford or anyone, leaving others to clean up his mess, was unquestionably intentional, rude, passive aggressive, and petulant. The charge of discourteous treatment of the public or other employees is therefore sustained.

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Willful Disobedience

To establish willful disobedience an employer must show that an employee knowingly and intentionally violated a direct command or prohibition. (*E.W.* (1999) SPB Dec. No. 99-09, p. 10; *Jeffrey Crovitz* (1996) SPB Dec. No. 96-19.) In *Anthony M. Beatrici* (1995) SPB Dec. No. 95-11, the Board also found that the intentional failure to follow known department policy constituted willful disobedience under Government Code section 19572, subdivision (o).

As previously discussed, Appellant knowingly and intentionally ignored Pitchford's direct commands to report to the office on October 18, 2022; bring managerial issues to Pitchford instead of Gonzales; complete 21 cases listed on the 15-Day report by October 28, 2022; inform Pitchford immediately if he was unable to timely complete his Decisions; and complete six specific cases before leaving the office on November 14, 2022.

In 2021, Appellant received and signed an Employee Expectations Memorandum that required employees to maintain case files in an orderly fashion. On February 1, 2023, Appellant knowingly and intentionally violated this memorandum when he dumped 55 overdue case files at the Van Nuys office in a state of utter disarray.

Based on these facts, the charge of willful disobedience is sustained.

Other Failure of Good Behavior

Other failure of good behavior under Government Code section 19572, subdivision (t) requires more than mere misconduct. 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 [the employee's] employment and must be of such character that it can

easily result in the impairment or disruption of the public service." (*D.M.* (1995) SPB Dec. No. 95-10 at p. 4, citing *Yancey v. State Personnel Bd.* (1985) 167 Cal. App.3d 478, 483.)

The evidence established that from October 2021 through February 2023, Appellant repeatedly failed to timely complete his Decisions; maintained his case files in a disorderly, unsecure fashion; irresponsibly lost or destroyed critical evidence; was chronically and inexcusably absent from work; and repeatedly refused to follow his supervisor's directives.

The resulting disruption of the public service was palpable. Unsafe drivers remained on the road, endangering the motoring public. Drivers entitled to have their driving privileges restored were forced to wait needlessly while their cases languished. Other Hearing Officers were burdened with additional cases that Appellant failed or refused to complete. Pitchford was forced to spend inordinate time addressing Appellant's ongoing performance and attendance issues. Frustrated lawyers inquiring about the status of Appellant's seriously overdue Decisions taxed the office staff. Customer service to the motoring public suffered as a direct result of Appellant's inadequate performance, which unquestionably reflected poorly on Appellant and Respondent. Accordingly, the charge of other failure of good behavior is sustained.

Penalty

The SPB is the ultimate authority delegated by law to fix the level of appropriate disciplinary action in the State civil service. (*Ng v. State Personnel Bd.* (1977) 68 Cal.App.3d 600, 605). Under this authority, the Board independently reviews the facts of each case to determine whether the penalty imposed by the appointing power is "just and proper." (*R.N.* (1992) SPB Dec. No. 92-07).

In *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 218, the court identified the factors to be considered by SPB in the determination of penalty, as follows:

[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in "[h]arm to the public service." [Citations.] Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence.

Harm to the public service occurs when an employee ignores or refuses to obey a clear department policy. (*W.M.* (1994) SPB Dec. No. 94-26.) As previously noted, Appellant's poor performance and misconduct unquestionably harmed the public service. He ignored department policy and his supervisor's lawful directives, and irresponsibly foisted his derelict work on his colleagues. As a direct result of Appellant's lack of performance, unsafe drivers remained on the road, and the rights of drivers entitled to restored driving privileges were unfairly and significantly delayed.

Additionally, Appellant's repeated, unexcused absences burdened the office staff, other Hearing Officers, the motoring public, and management. An employer has the right to expect its employees to report for work on the day and at the time agreed, and may discipline employees for their failure to meet that expectation. (*Frances P. Gonzales* (1993) SPB Dec. No. 93-13, p. 4.) "[A]n employee's failure to meet the employer's legitimate expectation regarding attendance results in inherent harm to the public service." (*Carla Bazemore* (1996) SPB Dec. No. 96-02, p. 15.)

At hearing, Appellant insisted that his absences were due to legitimate medical conditions, yet he failed to produce any documentation or corroborating evidence to support this claim. He testified that he could not afford to see a doctor because his absences were deemed AWOL and consequently, his pay had been docked. He

repeatedly gave long, rambling excuses for his misconduct and derelict performance, and claimed that he did not recall the precise contents of various Discussion Records and Counseling Memos because he did not actually read them when they were issued. He acknowledged, nonetheless, that he did receive and sign nearly all of them. Appellant's long excuses and evasive responses at hearing were consistent with the import of the charges in the Notice; he simply refused to take any responsibility for his poor performance. Appellant's lack of remorse or appreciation for his actions weighs in favor of a harsh penalty and suggests a high likelihood of recurrence. (*Robert T. Watson* (1994) SPB Dec. No. 94-10.) Notably, DMV management had documented Appellant's pattern of similar poor performance since 2017. This is further evidence of the significant likelihood of recurrence.

In light of all the foregoing, Appellant's demotion from Hearing Officer to Licensing Registration Examiner is a just and proper penalty.

CONCLUSIONS OF LAW

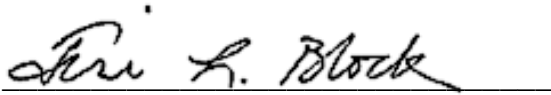
1. Respondent proved all the factual allegations by a preponderance of evidence.
2. Appellant's conduct constituted grounds for discipline under Government Code section 19572, subdivisions, (b) incompetency, (c) inefficiency, (d) inexcusable neglect of duty, (e) insubordination, (j) inexcusable absence without leave, (m) discourteous treatment of the public or other employees, (o) willful disobedience, and (t) other failure of good behavior.
3. Respondent's demotion of Appellant from Driver Safety Hearing Officer to Licensing Registration Examiner was just and proper.

///

ORDER

Appellant Brian Burns's demotion from Driver Safety hearing Officer to Licensing
Registration Examiner is **SUSTAINED**.

DATED: November 28, 2023

A handwritten signature in black ink, reading "Teri L. Block", written over a horizontal line.

Teri L. Block
Senior Administrative Law Judge
State Personnel Board

Brian Burns
2589 La Paloma Circle
Thousand Oaks, CA 91360

PROOF OF SERVICE BY FIRST-CLASS MAIL

**Re: Appeal from Demotion
Brian Burns; SPB Case No.: 23-0554**

I, Natalie Bradburn, declare:

I am over the age of 18 years and not a party to this action. I declare that I am employed by the California State Personnel Board, 801 Capitol Mall, Sacramento, California 95814.

BOARD RESOLUTION AND ORDER ADOPTING AND DESIGNATING PROPOSED DECISION AS A PRECEDENTIAL DECISION/ PROPOSED DECISION

On January 23, 2024, I served the above document(s) on the addressee by placing the same for collection and mailing following our ordinary business practices. I am readily familiar with the State Personnel Board's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business, in the United States Postal Service in a sealed envelope with postage fully prepaid.

Appellant:

Brian Burns
2589 La Paloma Circle
Thousand Oaks, CA 91360

Respondent:

Motor Vehicles
Attn: HRB
P.O. Box 932315, MS-A208
Sacramento, CA 94232-3150

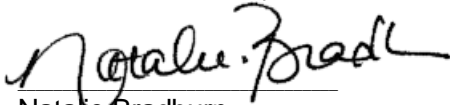
Appellant's Representative:

SEIU, Local 1000 - Sacramento
Attn: Sarah Doan-Minh
1808 14th Street
Sacramento, CA 95811

Respondent's Representative:

Motor Vehicles - Legal
Attn: Kate Rinne
P.O. Box 932382, MS-C128
Sacramento, CA 94232-3820

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on January 23, 2024, at Sacramento, California.



Natalie Bradburn
Appeals Division

SEIU, Local 1000 - Sacramento
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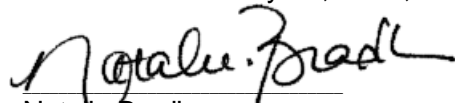
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<u>Appellant's Representative:</u> SEIU, Local 1000 - Sacramento Attn: Sarah Doan-Minh 1808 14th Street Sacramento, CA 95811	<u>Respondent's Representative:</u> Motor Vehicles - Legal Attn: Kate Rinne P.O. Box 932382, MS-C128 Sacramento, CA 94232-3820

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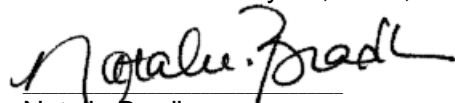
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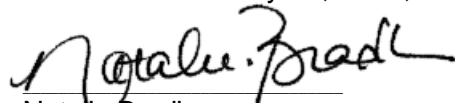
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