K[redacted] R[redacted] v. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION Appeal from Demotion	SPB Case No. 24-03 Case No. 24-0403 **BOARD ADOPTING AND DESIGNATING 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 K[redacted] R[redacted] (Appellant), from demotion imposed by California Department of Corrections and Rehabilitation. 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 December 9, 2024, as reflected in the record of the meeting and Board minutes.

Suzanne M. Ambrose
SUZANNE M. AMBROSE
Executive Officer

K[redacted] R[redacted] v. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION Appeal from Demotion	Case No. 24-0403 Proposed Decision

STATEMENT OF THE CASE

This matter came on regularly for hearing before Anthony J. Musante, Administrative Law Judge (ALJ), State Personnel Board (SPB or Board), August 27 – August 30, 2024, by Webex videoconference. The matter was submitted after oral closing arguments on August 30, 2024.

Appellant, K[redacted] R[redacted] (Appellant), was present and represented by J.R. Oviedo, Oviedo Law Group, Inc.

Respondent, California Department of Corrections and Rehabilitation (Respondent, Department or CDCR), was present and represented by Nechelle Bixby, Assistant Chief Counsel, CDCR, and co-counsel Stephanie Lewis, Attorney, CDCR.

By Notice of Adverse Action (Notice) effective March 29, 2024, and issued pursuant to Government Code section 19590, Respondent demoted Appellant from a Correctional Administrator to a Correctional Lieutenant.[1] In the Notice, Respondent alleged that Appellant retaliated against an employee for filing a grievance; retaliated against and harassed a subordinate after she took a Workers' Compensation leave of absence; failed to ensure that a subordinate received overtime pay in contravention of

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[1] As a result of the two-step demotion, Appellant was also transferred from the Central Region Office to California State Prison, Los Angeles County (LAC).

the bargaining unit agreement; and was rude and hostile during a staff meeting, sharing the confidential medical information of several employees.

Appellant acknowledges that most of the facts asserted in the Notice occurred. Appellant disputes, however, that any of his conduct constitutes harassment, retaliation, or discourteous treatment of his subordinates. Appellant further denies that he withheld overtime pay; and denies that he shared confidential medical information at a meeting. Consequently, Appellant contends that the Notice lacks substantial evidence supporting the charges and seeks to have his demotion revoked.

ISSUES

The issues to be resolved are:

1. Did Appellant prove that there was no substantial evidence that he committed the conduct alleged in the Notice?
2. If Appellant did not prove that there is no substantial evidence that he committed the alleged conduct, does Appellant's conduct constitute cause for discipline under one or more of the following subdivisions of Government Code section 19572: (d) inexcusable neglect of duty, (m) discourteous treatment of the public or other employees, (o) willful disobedience, (t) other failure of good behavior, (w) unlawful discrimination, including harassment, or (x) unlawful retaliation?
3. Is the penalty of demotion appropriate?

JURISDICTIONAL ISSUE

At the outset of the proceedings, Appellant asserted that SPB lacked jurisdiction to decide three allegations in the Notice. In the Notice, Respondent alleged that Appellant

violated the Bargaining Unit 6 Memorandum of Understanding and the SEIU Contract. More specifically, the Notice alleged that Appellant retaliated against [redacted] when he asked for a doctor's note "in violation of the CCPOA Unit 6 bargaining contract." And Appellant, through his actions, was alleged to have "violated the CCPOA Unit 6 bargaining contract that protects employees who file a grievance." The Notice also alleged that Appellant "violated the SEIU Union Contract" when he directed [redacted] to flex her time and did not approve her overtime.

The Ralph C. Dills Act (Dills Act) (Govt. Code, §§ 3512 et seq.) governs the collective bargaining process between state appointing authorities and employee bargaining representatives. Pursuant to the Dills Act, the Public Employees Relations Board (PERB), not the SPB, has exclusive jurisdiction over issues governed by the Dills Act. (Govt. Code, § 3514.5.) As the court observed in *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168:

> [The Public Employment Relations Board] has been given a somewhat more specialized and more focused task: to protect both employees and the state employer from violations of the organizational and collective bargaining rights guaranteed by [the Dills Act]. Although disciplinary actions taken in violation of [the Dills Act] would transgress the merit principle as well, the Legislature evidently thought it important to assign the task of investigating potential violations of [the Dills Act] to an agency which possesses and can further develop specialized expertise in the labor relations field. (Cf., e.g., *Tex–Cal Land Management, Inc. v. Agricultural Labor Relations Bd.* (1979) 24 Cal.3d 335, 346; *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 11, 13–14; *Garner v. Teamsters Union* (1953) 346 U.S. 485, 490.)

(*Id.* at p. 198.)

Pursuant to *Pacific Legal Foundation v. Brown*, PERB, not the SPB, possesses exclusive jurisdiction to determine whether Respondent violated the terms of the

applicable collective bargaining agreements. Because the SPB lacks the requisite jurisdiction to determine whether Appellant violated the terms of the collective bargaining agreements at issue here, Respondent's contention that Appellant retaliated against [redacted] when he asked for a doctor's note, and in contravention of the contract must be dismissed.

Similarly, Respondent alleged that Appellant mandated that [redacted] stay late on March 16 and March 17, 2023, in violation of the "SEIU Contract." As with the allegations that Appellant retaliated against [redacted] in violation of the bargaining agreement, so too here, SPB lacks jurisdiction to decide whether Appellant required [redacted] to stay late in violation of the SEIU Contract. PERB has exclusive jurisdiction over this allegation, and it is therefore dismissed.

FINDINGS OF FACT

The following facts are part of the statement of reasons in the Notice found to be true pursuant to Government Code section 19590 or, where not alleged in the Notice, were proven by a preponderance of the evidence:

1. Appellant began his state service in 1999 when he was appointed to the Correctional Officer classification. Appellant was subsequently promoted to Correctional Sergeant in 2007, Correctional Lieutenant in 2014, and Correctional Captain in 2019. At each promotional rank, Appellant supervised CDCR employees. On January 10, 2022, Appellant was appointed to the Correctional Administrator classification.

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2. As a Correctional Administrator, Appellant was designated a managerial employee pursuant to Government Code section 3513, subdivision (e).[2]

Relevant Policies and Directives

3. On November 2, 2022, the Chief of the Allegations Investigation Unit (AIU) and Appellant's supervisor, [redacted] sent Appellant a Memorandum of Expectations. The Memorandum of Expectations described [redacted] expectations with respect to communications and noted that everyone is "to be treated with courtesy and consideration at all times."

4. CDCR's policies governing employee conduct in the workplace are contained in its Department Operations Manual (DOM).

5. DOM section 31040.3.4.3 requires CDCR employees to "Act professional, courteous, and responsible at all times."

6. DOM section 31040.3.4.1 defines "Harassment" as "unwelcome verbal or physical conduct which creates a hostile or intimidating work environment, not resulting in physical harm; disparaging or derogatory comments, slurs or profanity."

7. DOM section 31010.3 defines retaliation as "An adverse employment action taken against an individual due to his/her protected activity (including one's opposition to a discriminatory practice or participation in the discrimination complaint process)."

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[2] "'Managerial employee' means any employee having significant responsibilities for formulating or administering agency or departmental policies and programs or administering an agency or department."

8. Appellant received copies of these policies and knew that he had to comply with them at all relevant times.

Allegation Inquiry Management Services

9. Allegation Inquiry Management Services (AIMS) was an Office of Internal Affairs (OIA) program. It was created as part of a resolution to an incarcerated person's lawsuit. AIMS was not part of CDCR's Division of Adult Institutions. AIMS was tasked with independently reviewing incarcerated persons' grievances and then making a referral to OIA, or back to the institution the grievance originated from.

10. In March 2020, [redacted] and [redacted] began the nascent AIMS program in CDCR's Central Region.

11. From 2020 to 2022, [redacted] shared responsibilities as the highest-ranking officers in the AIMS Central Region Office. [redacted] organized the AIMS Central Region based primarily on geography, with institution assignments based on the location of the employees' residences. [redacted] oversaw the Investigators in the Central Valley, who were assigned to the institutions located there, while [redacted] oversaw those assigned to the institutions located along the Central Coast. During this time, [redacted] regularly reassigned investigators from one institution to another as joint heads of AIMS Central Region.

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[3] [redacted] first name was not established on the record.

Allegation Investigation Unit

12. Beginning in 2022, AIMS was reorganized, tasked with greater responsibilities, and renamed the AIU.

13. Like AIMS, AIU was created to comply with a court order stemming from an incarcerated person's lawsuit against CDCR. As part of the resolution of the lawsuit, AIU was created as a separate and impartial unit tasked with investigating incarcerated persons' complaints and grievances against CDCR staff.

14. Unlike AIMS, rather than referring the case back to the institution or to OIA for resolution, AIU investigators were required to complete the investigation. When an incarcerated person made an allegation against a CDCR employee, an AIU case file was opened, and an investigator was assigned. When the investigation was completed, the case file was closed by AIU staff. Given the additional time and resources needed to close cases, there were significantly more cases opened in AIU than AIMS.

15. When Appellant promoted to Correctional Administrator in January 2022, he was assigned to work as the Associate Warden overseeing AIU's Central Region.

16. As the Associate Warden over AIU Central Region, Appellant had the discretion to control employee assignments. He was responsible for staffing AIU throughout the Central Region and could decide where Captains, Lieutenants, and Sergeants were assigned based on what he considered best for meeting AIU's goals.

17. When Appellant began his tenure, there was a large case backlog, with thousands of inquiries that had to be processed, and more appeals than AIU Central had resources to handle. Incarcerated persons' complaints were governed by a statute of limitations. The timely processing of cases was therefore crucial for AIU to meet its obligations. In overseeing AIU Central Region, Appellant was under pressure to ensure that the backlog was reduced and to implement a system of timely case closure. To reduce the backlog and ensure the timely closing of cases, a monthly case closure quota was implemented. Investigators were required to close six cases a month when Appellant started working as the Associate Warden over the AIU Central Region.

18. Because of the backlog, Sergeants and Lieutenants from the Division of Adult Institutions were temporarily reassigned from working in institutions to assist with AIU investigations. The Lieutenants and Sergeants who were pulled from the Division of Adult Institutions and temporarily reassigned to AIU Central were referred to as the "Strike Team." Before the Strike Team could work for AIU, they needed to be trained on how to conduct an AIU investigation. From January 17 to January 20, 2023, AIU held a training academy for the Sergeants and Lieutenants from the Division of Adult Institutions who would form the Strike Team.

19. In the AIU Central Region Office, there is a calendar that contains employees' schedules and whether they are working or out on leave. The calendar can be seen and accessed by all AIU Central Region employees. The calendar is

maintained by the employees who work in the AIU Central Region Office, and they are expected to update the calendar to reflect their schedules, noting when they are on vacation, out for a medical appointment, or working.

20. When Appellant started as the Associate Warden overseeing AIU Central Region, he supervised several non-peace officer staff members, such as Office Technicians and Staff Services Analysts. He also directly supervised four Captains. The Captains, in turn, supervised Lieutenants and the Lieutenants supervised Sergeants. [redacted] was one of the Captains Appellant supervised. [redacted] supervised [redacted].

Appellant Rescinds [redacted] Vacation Approval

21. On December 16, 2022, [redacted] sent an email to [redacted] requesting two weeks off work to take a vacation from January 9 through January 20, 2023. [redacted] approved the request on December 20, 2022.

22. On January 5, 2023, [redacted] sent an email to [redacted] and others informing them that they had been selected to conduct the four-day Strike Team Training Academy beginning on January 17, 2023. [redacted] replied to the email the next morning, informing [redacted] that he could not attend the training because he would be on vacation. [redacted] acknowledged [redacted] email and bid him to “enjoy” his time off.

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23. Appellant thought that granting vacations to investigators like [redacted], particularly while the Strike Team was deployed to assist with AIU Central's case backlog, would be inappropriate, and would cause those at Headquarters who approved the reallocation of resources to reconsider their decision. Consequently, Appellant determined that [redacted] vacation should be rescinded, and he should assist with the Strike Team training.

24. On January 6, 2023, [redacted] was working from home. He stopped working before the conclusion of his regular shift, using four hours of Informal Time Off to begin his vacation early. While at home packing for his vacation, [redacted] received a telephone call from [redacted] on his personal cell phone. [redacted] apologized and told [redacted] that his previously approved vacation had been rescinded by Appellant for operational needs. Later that same day, [redacted] followed up the telephone call with an email. In the email, [redacted] again apologized to [redacted] and explained that "your two-week vacation which was previously approved … has been rescinded due to operational needs." [redacted] was looking forward to his vacation and had made plans to spend it out of town with his family. Consequently, the cancellation of his vacation angered [redacted].

25. [redacted] told Appellant that [redacted] was "pissed" and that he had a trip planned during the vacation. Appellant then reconsidered his decision to rescind the entirety of [redacted] vacation. Appellant

thought a compromise was appropriate and determined that a one-week vacation struck the proper balance of allowing [redacted] his time off, while ensuring AIU Central appeared appreciative of the additional Strike Team resources. After discussing the issue with [redacted], Appellant determined that one week of [redacted] pre-approved vacation could be reinstated.

26. Later that same day, [redacted] telephoned [redacted] and told him that he was permitted to take one week of his previously scheduled two-week vacation. [redacted] was still required to conduct the Strike Team training on January 17, 2023, in Bakersfield.

27. On January 17, 2023, when [redacted] arrived to assist with the Strike Team training, he was informed that he was no longer needed, that another instructor was there in his place. Consequently, [redacted] was ordered to return to his office and to work on his regular case assignments.

28. [redacted] believed that his vacation was rescinded and then partially reinstated because he had only closed two cases in the month of December, well below the case closure quota. Consequently, on January 20, 2023, [redacted], through his union, filed an Excluded Employee Grievance. The Excluded Employee Grievance alleged that [redacted] pre-approved vacation had been unfairly and improperly rescinded.

29. Appellant learned that [redacted] had filed the Excluded Employee Grievance when he was interviewed by a Labor Relations Department employee about the circumstances surrounding [redacted] vacation

rescission. Appellant informed the Labor Relations Department employee that he rescinded and then reinstated part of [redacted] vacation because of the negative "optics" surrounding granting vacation time to investigators when the Strike Team resources were provided to address the case backlog.

30. On the morning of February 7, 2023, approximately two weeks after his vacation was rescinded, [redacted] walked down the hallway of the AIU Office and saw Appellant walking the other way. Appellant greeted [redacted] with a "good morning." [redacted], still miffed about the vacation cancellation, deliberately did not respond. Instead, he curtly nodded his head in acknowledgement of the greeting. Appellant did not see [redacted] nod his head and assumed that he had not heard Appellant. Appellant repeated himself, this time saying in a louder tone, "good morning, [redacted]." In response, [redacted] begrudgingly responded with a "good morning" of his own.

31. [redacted] was upset about this interaction with Appellant. Soon after, [redacted] complained to [redacted] about how Appellant had compelled him to say, "good morning." Appellant was unaware that [redacted] had complained to [redacted].

32. The next morning, on February 8, 2023, Appellant and [redacted] were speaking in the hallway of the AIU Office when [redacted] walked by on his way to the restroom. As he walked past Appellant, Appellant said, "good morning." [redacted] shrugged, did not verbally respond to the greeting, and continued walking. After he had used the restroom, as [redacted]

[redacted] passed through the building's foyer, Appellant called out to him from where he remained in the hallway. Appellant called out in a stern voice that [redacted] should come back and speak with him, saying [redacted] [redacted]. Let me talk to you." [redacted] [redacted], who was working as a receptionist in the foyer, heard Appellant call [redacted] back and thought to herself that given Appellant's tone, someone was in trouble. [redacted] made his way back to the hallway, and he and Appellant walked together towards Appellant's office. Before they reached Appellant's office, Appellant turned into the breakroom, and [redacted] [redacted] followed close behind.

33. The two stood alone in the breakroom, [redacted] stood three to four feet from the door of the breakroom, and Appellant stood near the breakroom sink and refrigerator, six to eight feet from the door. No other employees were in the breakroom, in the adjacent hallway, or within earshot of their conversation. Appellant asked [redacted] if he was okay. Appellant questioned [redacted] because he was worried about [redacted] [redacted] behavior, since he had ignored his greeting two days in a row. Appellant, at the time, did not realize that [redacted] was angry, and that the snubs were because of the vacation recission. Appellant thought that [redacted] could be having personal issues that distracted him from engaging in workplace niceties, but wanted to ensure that the issue did not continue. [redacted] responded that he was fine and maintained that he had nodded his head in response to Appellant's greetings. Appellant told

[redacted] that he had not seen the head nods and was concerned that [redacted] was deliberately ignoring him. Appellant then admonished [redacted], instructing him that verbal greetings should be returned with verbal greetings as a sign of respect and common courtesy in the workplace. [redacted] told Appellant that he had to use the restroom and left the breakroom. As [redacted] left the breakroom, Appellant stated that [redacted], "Better watch his attitude."

34. Following the interaction with Appellant, [redacted] once again met with [redacted] to complain. The two were discussing the issue in [redacted] office, when Appellant opened the office door and asked [redacted] to meet with him when he was done speaking with [redacted].

35. Later that day, [redacted] left work ill before the conclusion of his shift. When Appellant learned from [redacted] that [redacted] had left work ill, he instructed [redacted] to get a doctor's note from [redacted], verifying that he had seen a doctor. [redacted] had reservations about insisting on a doctor's note because he believed the union contract prohibited it. He told Appellant as much. Consequently, Appellant rescinded his instruction and told [redacted] that [redacted] did not need to provide a doctor's note. [redacted] did not require a doctor's note from [redacted], and [redacted] did not know that Appellant contemplated requiring a doctor's note from him.

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36. On February 9, 2023, CDCR, through its Labor Relations Department, responded to [redacted] Excluded Employee Grievance stemming from the rescinded vacation. The response from the Labor Relations Department laid out CDCR's position that [redacted] vacation was cancelled for the operational needs of the department, and that Appellant had the authority to do so. The response concluded by denying the grievance because "no violation has occurred." Appellant was copied on the letter responding to [redacted] grievance.

37. On February 14, 2023, [redacted] filed a Workplace Violence Incident Report alleging that Appellant spoke to him in a "raised and stern voice" and reprimanded him for failing to verbally greet Appellant on February 7 and February 8, 2023. [redacted] also claimed that Appellant had implied that [redacted] was "less than truthful" because Appellant told [redacted] that he did not see [redacted] nod his head in greeting.

38. Appellant characterized his interaction in the breakroom with [redacted] on February 8, 2023, as informal verbal discipline intended to correct [redacted] disrespectful and discourteous snubs. Appellant did not issue any written or formal discipline to [redacted] at any time.

Appellant Reassigns [redacted].

39. In 2022, [redacted] had worked for CDCR for over 20 years and was over the age of 50. She often spoke with her colleagues about her plans to retire. Colleagues of [redacted] often told her that if she could afford to retire, she

should. And during her tenure at AIMS Central Region, Appellant regularly discussed with [redacted] the option of returning to AIMS Central Region as a retired annuitant after she retired.

40. Beginning in mid-November 2022, [redacted] took a Workers' Compensation leave of absence. While [redacted] was out of work on Workers' Compensation leave, three other Captains assigned to AIMS Central Region were also out on leave.

41. Prior to her Workers' Compensation leave, [redacted] was assigned to two institutions: Wasco State Prison and North Kern State Prison. Wasco State Prison and North Kern State Prison were located near [redacted] home. Her assignment to those institutions began as early as 2020, when she and [redacted] created the assignments for AIMS Central Region.

42. When [redacted] went on her leave, Appellant was responsible for reassigning Wasco State Prison and North Kern State Prison to a different Captain or Captains.

43. While [redacted] was on leave, Appellant reorganized assignments in the AIU Central Region. Appellant based his reassignment decisions on how he thought specific Captains would best perform their duties given their differing levels of experience and particular skills. Appellant had the discretion as the Correctional Administrator overseeing the AIU Central Office to make changes to Captain assignments and responsibilities. While [redacted] was on her Workers' Compensation leave, [redacted] was assigned to oversee AIU operations at Wasco State Prison.

44. On March 14, 2023, while still on her leave, [redacted] and her friend, Southern Region Correctional Administrator [redacted]t), were driving together to Rancho Cucamonga. [redacted] had arranged the ride with [redacted] to the Regional Office so she could meet another friend for lunch. While [redacted] was driving, Appellant telephoned her, and the two discussed their work as Correctional Administrators overseeing AIU operations in two different regions. [redacted] telephone was connected to her car's audio system, so the discussion was broadcast throughout [redacted] car for [redacted] to hear. Neither [redacted] nor [redacted] informed Appellant that [redacted] was in the car or could hear the conversation, but Appellant knew that [redacted] and [redacted] were good friends.

45. During the call, Appellant and [redacted] discussed staffing issues they were having in their respective regions. Appellant expressed frustration to [redacted] with the situation he was "experiencing with several Captains being out" on leave. While discussing these staffing issues, Appellant explained to [redacted] his belief that, "if [redacted] was able to retire, and the money was right, she should retire."

46. A week later, on March 21, 2023, [redacted] spoke with [redacted] on the telephone. During the telephone call, [redacted] asked [redacted] why she was returning to work, and she responded that she could return because her work restrictions had changed. During the call, [redacted] told [redacted] that instead of returning to work, she should retire.

47. Soon after, Appellant signed off on the paperwork approving [redacted] return to work with various work restrictions and medical accommodations related to her Workers' Compensation injury.

48. On Monday, March 27, 2023, [redacted] returned to work following her Workers' Compensation leave of absence. On her first day back, while attending an AIU Central region all-staff meeting off site, [redacted] approached her while she was chatting with colleagues. [redacted] told [redacted] that he was leaving AIU Central, and that she would be assigned his team; and that she would no longer be assigned to Wasco State Prison. [redacted] was taken aback by this revelation. She had assumed she would return to the same institutions following her leave of absence because she had seniority.

49. Following the all-staff custody meeting, [redacted] approached Appellant to speak with him about her return. Appellant asked to meet with [redacted] the next day, to go over expectations, update her on new processes, and discuss her new assignment. [redacted] sought clarification, stating "I'm not being reassigned to the team?" Appellant said, "No." [redacted] was upset by the reassignment and did not think it was fair because she had seniority, so she asked to be returned to her previous assignment. Appellant told [redacted] that Wasco State Prison was now assigned to [redacted]. [redacted] proposed a swap with [redacted], if [redacted] agreed to a trade. But Appellant denied the proposal. Appellant stated that he "had made numerous changes while" [redacted]

"was gone, and all the teams had been moved around." [redacted] persisted, asking again if she could be returned to her old assignment. Appellant again denied the request.

50. [redacted] continued to argue, stating "I'm still unsure why as the senior Captain in the office, I am not returned to my original assignment." Appellant reiterated that he had made the changes to assignments because as Regional Administrator, he "could make any change that" he "deemed necessary to run the region" and that he "did not have to explain to her why" he "made the changes and that" he "would place her where" he "thought best." [redacted] voiced her belief that as the senior Captain she should be given the choice to go back to her previous assignment. In response, Appellant explained that "seniority would get her a choice between three institutions:" Salinas Valley Prison, Valley State Prison, or North Kern State Prison. Finally resigned to the reassignment, [redacted] said, "go ahead and place" me "where you wanted if I'm not being returned to my original team."

51. [redacted] then informed Appellant that earlier in the day [redacted] had told her that she was getting his team. She believed the conversation was inappropriate because [redacted] was not her supervisor. Appellant did not respond to [redacted] concerns about [redacted] saying she was going to get his team. Appellant assumed that [redacted] had reasoned that since he was leaving AIU Central, and [redacted] was returning from a leave of absence, [redacted] would get his team.

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52. During their discussion on March 27, 2023, [redacted] informed Appellant that she could not attend the March 29, 2023, managers' meeting because she had a previously scheduled follow-up medical appointment. Because of her medical appointment, [redacted] told Appellant she would return to work at noon on March 29, 2023.

53. The next day, on March 28, 2023, Appellant met with [redacted] again. This time the two met in Appellant's office so that Appellant could reacquaint [redacted] with policies and procedures and inform her of any changes that took place while she was on leave. Appellant provided [redacted] with job expectations, some of which he read out loud to her; instructed her that she had to turn on her Outlook out-of-office when on an extended leave; and informed [redacted] of changes that had been made in AIU Central, such as the use of the Strike Team. Appellant provided [redacted] with various memoranda and documents reflecting the changes. At the conclusion of the meeting, Appellant explained his rationale for constructing the various institution teams in the way he did and provided [redacted] with an institutional assignment roster. [redacted] was not listed on the roster. Appellant then told [redacted] that she was free to choose which institution she wanted to be assigned to: Valley State Prison, California Men's Colony, or North Kern State Prison. [redacted] chose North Kern State Prison to reduce travel to and from her home.

54. The next morning, on March 29, 2023, the AIU Central Region captains met with Appellant as part of a regularly scheduled managers' meeting. [redacted]

[redacted] was not present at the beginning of the meeting. Instead, she was at her follow-up medical appointment. Appellant forgot that [redacted] had told him that she would not be at the meeting. At the outset of the meeting, Appellant asked the attendees if anyone had seen [redacted]. [redacted] indicated that he had not, excused himself from the room, and telephoned [redacted] to tell her Appellant was looking for her. While [redacted] was out of the room, Appellant also telephoned [redacted], using his personal cell phone. The call was on speaker phone and heard by the captains attending the meeting. Appellant asked [redacted] where she was, and she informed him she was at her follow-up medical appointment. Appellant thought that [redacted] appointment was not until noon and questioned her about it. She clarified that the appointment was in the morning, and she was returning to the office at noon. Appellant then asked [redacted] if she had placed her appointment on the AIU Central calendar, or if she had informed him in person. [redacted] reminded Appellant that she told him about the appointment on March 27, 2023, when they met in person on her first day back to work.

55. On April 4, 2023, Respondent issued Appellant a Cease-and-Desist Letter informing him that [redacted] had complained that he had subjected her to "discourteous treatment and EEO discrimination/retaliation related to disability or medical conditions."

56. On April 10, 2023, Appellant was informed that [redacted] would no longer report to him, that going forward she would report to the Northern Regional

Administrator. Appellant requested a meeting with [redacted] and [redacted] to discuss [redacted] reassignment.

57. On April 11, 2023, Appellant met via Microsoft Teams with [redacted] and [redacted]. During the meeting, Appellant sought clarification regarding [redacted] reporting to the Northern Region Administrator.

58. On May 25, 2023, [redacted] filed a Workplace Violence Incident Report alleging that Appellant had reassigned her away from Wasco State Prison and removed duties she had previously been assigned. [redacted] believed that she was entitled to return to Wasco State Prison because she had seniority, and there was no reason for Appellant to reassign her. [redacted] also believed that [redacted] was working on Appellant's behalf when he telephoned her and spoke to her about her assignments upon her return from leave.

59. While [redacted] was on Workers' Compensation leave there were three Captains, other than [redacted], in the AIU Central Region who were also out on medical-related leaves of absence. During their absences, these Captains' assigned institutions were reassigned to others who were not on leave. Upon their return, two of these Captains returned to their assigned institutions, but one was reassigned by Appellant. There were no policies or procedures dictating how institutional assignments were administered, and there were no policies or procedures allowing for the right of return or priority assignments for Captains based on seniority.

60. Appellant never disciplined [redacted], formally or otherwise, while she was employed at AIU Central Region.

Appellant Hosts an All-Staff Meeting

61. Beginning in 2023, Appellant received instructions from CDCR executive leadership to increase AIU Central's case closure quota for investigators from six cases to eight cases per month. In addition, investigators' mandatory overtime assignments were increased from 16 hours per month to 32 hours per month.

62. Appellant knew that the AIU Central team was already stretched thin with the six per month case closure requirement. Prior to the increase, Appellant believed that the AIU Central staff was overworked and thought that the increase in case closure quota could be detrimental to staff morale. Appellant also knew that there were rumors among AIU Central staff that vacations were prohibited, and employees would be disciplined for failing to meet case closure quotas.

63. On April 12, 2023, at 3:00 p.m. Appellant hosted an all-staff meeting on Microsoft Teams. The meeting was intended to quell staff concerns about the increase in the case closure quota; dispel rumors and gossip regarding vacation cancellations; address workplace issues raised by staff; and allow for a question-and-answer session to address staff concerns. Because the meeting was held via Microsoft Teams, in addition to employees voicing their questions or concerns verbally, they could also type them in the comments section.

64. Appellant began the meeting by discussing what the meeting was about, and in doing so described himself as managing from the helm of the AIU ship. During the meeting, Appellant explained that "excessive time off from work would not be approved." Appellant did not explain what "excessive" meant in this context, and the prohibition left some staff members confused. In this context, Appellant meant that successive weeks of vacation would not be approved because it would lead to a significant reduction in monthly case closures. Appellant believed that to maintain the case closure quota, two-, three-, and four-week vacations had to be discouraged. Appellant then went on to illustrate, by way of example, specific staff members, who had taken time off from work, who faced no negative repercussions. The staff members that Appellant identified had taken time off for various reasons, such as vacation, and medical leaves. Appellant did not, however, specifically link employees to the type of time off they took. He only noted, to dispel gossip about how taking time off was going to be punished, that they did not face any negative consequences after taking time off.

65. During the meeting, staff members raised concerns about staff burnout, unreasonable expectations, and being overworked. In response, Appellant noted the employees' concerns and reminded them that they could access the Employee Assistance Program (EAP). Appellant had no discretion to modify the case closure quota or overtime requirements; he was instructed by Headquarters to increase both.

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66. [redacted] attended the meeting. During the meeting, she voiced a concern about the lack of a cutoff time for investigators to turn in cases to support staff for closure. Without a cutoff, [redacted] was worried that investigators would turn in cases late in the day, and support staff would be required to work past their scheduled shift to close out the cases prior to the mandated same day closure requirement. Employing hyperbole, [redacted] noted that "she didn't want to work until midnight." Appellant interpreted her comment literally and responded by asking [redacted], "how many times she had ever been required to stay until midnight?" [redacted] responded that she had to stay late before, sometimes until 8:30 p.m., but that the statement about staying until midnight was an exaggeration to make a point. Appellant persisted and sought to determine whether [redacted] supervisor knew she was staying so late to close cases. [redacted] felt that Appellant was publicly berating her for bringing up the fact that she had to occasionally stay late to close cases.

67. Later during the meeting, [redacted] expressed concerns about the lack of sufficient storage space for the closed cases. [redacted] responded to [redacted] concerns by explaining that there was sufficient space in the filing room for the additional case files. An argument between [redacted] and [redacted] ensued regarding the storage space for files.

68. On April 17, 2023, [redacted] filed a Workplace Violence Incident Report alleging a "hostile work environment" and that Appellant engaged in "abusive

conduct." [redacted] alleged, among other things, that Appellant was "curt" and "short" in responding to staff concerns during the April 12 all-staff meeting, and that he made [redacted] "uncomfortable" when he spoke to [redacted] "in a harsh tone" during the all-staff meeting.

69. On April 21, 2023, Respondent issued Appellant an Order to Cease and Desist. The order informed Appellant that allegations had been made against him, and that if he was engaging in inappropriate behavior it must immediately stop.

70. On May 2, 2023, [redacted] filed a Workplace Violence Incident Report alleging "Verbal abuse, humiliation, intimidation, retaliation" based on Appellant's and [redacted] behavior during the April 12, 2023, all-staff meeting. [redacted] described Appellant's reference to leading from the helm of the ship as a "constant reminder" that he "is the authority figure and the one in charge." By referring to himself as the helm of the ship, Appellant made [redacted] "uncomfortable and intimidated." [redacted] also interpreted Appellant's comment questioning whether she had worked until midnight as derisive and condescending. Given the public nature of the comment, she felt humiliated. [redacted] also interpreted Appellant's reference to EAP as insincere and mocking.

71. On May 31, 2023, Appellant was temporarily reassigned from AIU to the Office of Appeals.

Appellant's Performance as a Correctional Administrator

72. On June 12, 2023, [redacted] reviewed the preceding 18 months of Appellant's job performance and issued Appellant an Individual Development

Plan (IDP) for Future Job Performance of Permanent Employees. The IDP contained nine different job performance categories and [redacted] rated Appellant in each. Appellant received an "Exceeds" rating in four of the job performance categories: quality of work, quantity of work, taking action independently, and analyzing situations and materials. Appellant received a "Meets" rating in the other five job performance categories: work habits, relationships with people, meeting work commitments, supervising the work of others, and personnel management practices. [redacted] wrote that Appellant, demonstrated his "capability as a Regional Administrator by ensuring" that his "subordinates know what your expectations are." And Appellant "set clear and concise expectations for [his] staff, thus creating accountability." [redacted] also praised Appellant's personnel management practices, writing that Appellant understood and applied "good personnel management practices" and contributed "effectively to EEO and affirmative action goals by promoting a workplace free of discrimination."

73. On February 12, 2024, Respondent issued Appellant a Letter of Intent. The Letter of Intent notified Appellant that Respondent had completed its investigation and he would be demoted and transferred.

74. On February 21, 2024, Respondent served Appellant with the Notice demoting him from his position as a Correctional Administrator to a Correctional Lieutenant. Appellant was transferred, in conjunction with the demotion, to the Division of Adult Institutions with an assignment to California State Prison, Los Angeles County (LAC).

PRINCIPLES OF LAW AND ANALYSIS

Appellant is a managerial employee subject to Government Code section 19590. Government Code section 19590, subdivision (a) authorizes an appointing power to discipline a managerial employee for any of the causes specified in Government Code section 19572. As to demotions, Government Code section 19590, subdivision (c) states that the Board shall, after the hearing, "affirm or reduce the action, [or] restore the employee to the position from which he or she was demoted."

The Notice is presumed to be free from fraud and bad faith, and the statement of reasons in the Notice is presumed true. (Gov. Code, § 19590, subd. (c).) The managerial employee bears the burden of proof, and the Board shall modify the demotion only if the Board determines "that there is no substantial evidence to support the reason or reasons for disciplinary action, or that the disciplinary action was made in fraud or bad faith." (Gov. Code, § 19590, subd. (c).)

When applying the substantial evidence rule, courts merely determine whether there is substantial evidence, contradicted or not contradicted, to support the decision. (*Associated Builders and Contractors, Inc. v. San Francisco Airport Com.* (1999) 21 Cal.4th 352, 374.) Use of the term "substantial evidence" generally means that the evidence must be "reasonable…, credible, and of solid value…." (*See*, *e.g.*, *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633, quoting *Estate of Teed* (1952) 112 Cal.App.2d 638, 644.) In other words, substantial evidence is relevant evidence that a reasonable mind might accept to support a conclusion. (*Hosford v. State Personnel Bd.* (1977) 74 Cal.App.3d 302, 307.) Disputed facts are viewed in the light most favorable to the appointing power, giving it every reasonable inference and resolving

all conflicts in favor of the adverse action. (*California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 584.) Accordingly, the Board will affirm a demotion under Government Code section 19590 if there is reasonable and credible evidence supporting the action and may consider reasonably drawn inferences based on the evidence.

NO SUBSTANTIAL EVIDENCE

Appellant proved "that there is no substantial evidence to support the reason or reasons for" the following allegations contained within the Notice. (Gov. Code, § 19590, subd. (c).)

Retaliating Against and Harassing [redacted]

The Notice alleged that Appellant retaliated against and harassed [redacted] when he publicly reprimanded [redacted] for failing to greet Appellant on February 8, 2023; and publicly suggested [redacted] was not being honest about greeting him.

Publicly Reprimanding [redacted] for Failing to Greet Appellant

"Public" means to be generally known, or "open to the view of all; existing or conducted in public."[4] There was no substantial evidence that Appellant publicly reprimanded [redacted] for failing to greet him on February 7 or February 8, 2023. Appellant called to [redacted] when [redacted] made his way across the foyer after returning from the restroom. [redacted] overheard Appellant calling [redacted] and thought that Appellant used a "stern" voice when he called out and thought, "someone was probably in trouble." This is not evidence that Appellant

[4] https://www.dictionary.com/browse/public

publicly reprimanded [redacted], and there is no substantial evidence that any reprimand that occurred took place anywhere other than discreetly in the breakroom.

Publicly Suggesting [redacted] Was Dishonest

There was no evidence, let alone substantial evidence, that Appellant publicly suggested that [redacted] was dishonest. First, as discussed, there was no evidence that the interaction between Appellant and [redacted] was public. The two met and discussed [redacted] refusal to greet Appellant in an empty breakroom. Both Appellant and [redacted] testified that no one was present to overhear the conversation, and no one testified that they heard or were made aware of the conversation. Next, there was no evidence that Appellant suggested [redacted] was dishonest. Rather, Appellant merely noted that he had not seen [redacted] nod his head in greeting. By explaining that he did not see the head nod, Appellant was not suggesting that [redacted] lied about the morning greeting. Appellant was merely explaining that he thought that [redacted] had ignored his greeting, when he did not respond in kind.

Disclosing Confidential Medical Information

In the Notice, Respondent alleged that during the all-staff meeting Appellant "divulged private, confidential personnel information that some staff members were off due to medical appointments."

Appellant proved that he did not reveal confidential personnel information during the all-staff meeting. There was no evidence that Appellant disclosed any medical information when he explained during the meeting that employees had not faced repercussions for taking time off, and then offered specific employees as examples.

Merely stating that an employee is off work for an undisclosed reason in no way constitutes disclosure of private or confidential personnel information. And even if Appellant had identified a particular employee who was off work for a medical condition, Appellant did not link the employee to a medically related leave. Simply stating that an employee was out of the office for an undisclosed reason, without disclosing a medical diagnosis or treatment, is not confidential personnel information. In any event, there is a calendar in the AIU Central Office that shows when employees are out of the office, whether on vacation or for a medical appointment or leave of absence, so the information would have been readily available to all employees at the meeting. Any comments from Appellant about medical appointments could not, therefore, be "divulged."

Given the foregoing, Appellant proved that there was no substantial evidence that Appellant committed the foregoing conduct as alleged in the Notice.

CAUSES FOR DISCIPLINE

Any discipline imposed under Government Code section 19590 (section 19590) must be for the causes for discipline specified in Government Code section 19572. (Gov. Code, § 19590, subd. (a). Respondent alleged in the Notice that based on the statement of reasons put forth in the Notice, Appellant violated the following provisions of Government Code section 19572: (d) inexcusable neglect of duty; (m) discourteous treatment of the public or other employees; (o) willful disobedience; (t) other failure of good behavior; (w) unlawful discrimination, including harassment, on any basis listed in subdivision (a) of section 12940; and (x) unlawful retaliation against an employee who reports a suspected violation of the law occurring on the job. Consistent with Appellant's

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burden of proof, the charged causes for discipline are sustained upon substantial evidence, or dismissed, as follows:

Inexcusable Neglect of Duty

Inexcusable neglect of duty is the intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty. (*E.W.* (1999) SPB Dec. No. 99-09.) In determining whether conduct constitutes inexcusable neglect of duty for violating a policy, the employer must establish that (1) it had a clear policy, (2) the employee had notice of such a policy, and (3) it intended to enforce that policy. (*E.D.* (1993) SPB Dec. No. 93-32, p. 9.)

Respondent alleged that Appellant neglected a known duty when he was discourteous to, harassed, and retaliated against [redacted], [redacted], [redacted], and [redacted] in contravention of known policies.

Discourteous Treatment

Appellant had a known duty to act professionally and treat his subordinates with courtesy and consideration. Appellant's use of a "stern" voice to call to [redacted] was not necessarily discourteous, particularly where, as here, a subordinate is being addressed by a superior. Appellant's comment to [redacted] that he "better watch his attitude" was, given its vaguely hostile undertones, discourteous. Appellant had just admonished [redacted] for failing to say good morning to him two days in a row, and while [redacted] did indeed need to consider how he was acting in the workplace, the use of the colloquial expression by Appellant was neither professional nor courteous.

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There was no evidence that Appellant spoke to [redacted] in a rude or disrespectful manner. Appellant informed [redacted] that she was not being returned to her pre-leave assignment, but that in and of itself is not discourteous. Similarly, mentioning to [redacted] that if the money was "right" [redacted] should retire under the circumstances—while discussing staffing with a peer and unaware that [redacted] was listening in—does not suggest Appellant was discourteous or treated [redacted] without due consideration.

Giving Respondent every reasonable inference, Appellant was discourteous during the all-staff meeting. Appellant questioned [redacted] in a condescending tone about staying until midnight. Patronizingly addressing [redacted] about her reference to staying until midnight was discourteous and was not a considerate way to address a subordinate, particularly in front of her colleagues.

Appellant intentionally failed to exercise due diligence in the performance of a known duty when he made the discourteous statements to [redacted] and [redacted]

Harassment

Respondent's anti-harassment policy prohibits unwelcome verbal conduct which creates a hostile or intimidating work environment. Respondent proved that Appellant's verbal conduct was unwelcome—[redacted] and [redacted] all testified as much. The question then is whether Appellant's comments created a "hostile or intimidating work environment."

Appellant instructed [redacted] to say good morning in response to his morning greetings and concluded their interaction by exclaiming that [redacted]

had "Better watch his attitude." Appellant had the discretion to verbally admonish [redacted] for his rude slights and did so in a reasonable manner. There was no evidence that Appellant's reprimand created a hostile or intimidating work environment. To the contrary, Appellant spoke to [redacted] in the breakroom to ensure that common courtesies were exchanged in the workplace, reducing any perceived hostility from [redacted] that was the result of his morning snubs.

Appellant made a comment that [redacted] overheard about her retiring, exclaiming to [redacted] that, "if [redacted] was able to retire, and the money was right, she should retire." This statement did not create a hostile or intimidating work environment. Merely suggesting, without more, that if [redacted] financial situation was suitable, she should retire does not create a hostile or intimidating work environment. Indeed, comments such as these were commonplace, as coworkers wondered whether [redacted] would continue to work at CDCR or retire. Those inquiries did not create a hostile work environment, and neither did Appellant's statement.

Both [redacted] reported that Appellant's comments made during the all-staff meeting constituted harassment and created a hostile work environment. Appellant was alleged to have harassed his staff members when he did not define the term "excessive" when discussing leave requests; questioned [redacted] about staying past midnight; did not adequately address employee concerns, and instead referred them to EAP.

Appellant's behavior at the all-staff meeting did not create a hostile or intimidating work environment. First, Appellant's failure to adequately define the term excessive in the context of taking excessive leaves, while perhaps difficult for certain staff members to

come to terms with, was in no way hostile or intimidating. Appellant clearly did not want staff taking long vacations until AIU Central's case backlog was addressed, so he sought to limit the length of vacations by noting that "excessive" leave would not be approved. In any event, a failure to define the term, without more, does not evidence hostility or a desire to intimidate on Appellant's part. Next, while questioning [redacted] about staying past midnight showed a lack of respect, particularly the use of a condescending tone, it does not rise to the level of hostility constituting harassing conduct, and certainly does not appear to be an effort by Appellant to intimidate [redacted]. [redacted] acknowledged that she used staying past midnight in a hyperbolic manner to emphasize a point how Appellant addressed her comment lacked professionalism but does not appear overly hostile. Finally, by stating in response to concerns raised by staff that their concerns were "noted" and referring them to EAP, Appellant did not exhibit hostility or seek to intimidate. Appellant was fielding questions from staff during the Microsoft Teams meeting raised both verbally and in writing. Many of the questions were duplicative. Appellant allowed staff members to raise concerns, explained that he heard them, and when he was unable to practically address the concern, referred the employee to EAP. This does not exhibit hostility or an attempt to intimidate. EAP, under the circumstances, was likely better suited to handling the employees' claims of stress and anxiety stemming from their work responsibilities.

Appellant's conduct was neither hostile nor an effort to intimidate. As such, while unwelcome, Appellant's statements to [redacted] and [redacted] did not violate Respondent's anti-harassment policy.

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Retaliation

Respondent alleged that Appellant retaliated against [redacted] and [redacted] in contravention of its anti-retaliation policy. Respondent's anti-retaliation policy defines retaliation as an adverse employment action taken against an employee due to his or her protected activity.

[redacted] filed a grievance against Appellant. The filing of a grievance can constitute protected activity. After [redacted] filed the grievance, Appellant reprimanded [redacted] for failing to say good morning to him and told him he "better watch his attitude." Even giving Respondent every reasonable inference and resolving all conflicts in favor of the Notice, Appellant's verbal admonishment to [redacted] for failing to say good morning to him does not constitute an adverse employment action. An adverse employment action is one that materially affects the terms, conditions, or privileges of employment. (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1051.) The terms or conditions of employment "must be interpreted liberally and with a reasonable appreciation of the realities of the workplace." (*Ibid.*; see also *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387.)

Even interpreted liberally, giving Respondent every reasonable inference, and considering the realities of the workplace, telling [redacted] that he should exchange morning pleasantries is not an adverse employment action. Appellant did not document [redacted] rude behavior, place anything in [redacted] personnel file, or take any action that materially affected [redacted] employment. Appellant simply admonished him for failing to partake in a common courtesy.

Respondent alleged that Appellant retaliated against [redacted] because she took a Workers' Compensation leave of absence. More specifically, the Notice alleged that Appellant's comment to [redacted] that [redacted] should retire; [redacted] telephone call to [redacted] asking why she was returning; the denial of [redacted] ability "to have meaningful input into her work assignment upon returning to work"; and calling [redacted] during the managers' meeting to ask where she was when she was at a medical appointment constitutes retaliation.

Taking a Workers' Compensation leave of absence can be a protected activity. Even giving Respondent every reasonable inference, however, the actions taken by Appellant were not all adverse employment actions. First, suggesting to [redacted] that [redacted] should retire if the "money was right" is not an adverse employment action, as it does not affect the terms, conditions, or privileges of [redacted] employment. Likewise, the telephone call from [redacted] asking [redacted] why she was coming back, even if made at Appellant's direction, does not constitute an adverse employment action. And finally, asking [redacted] why she was not at the managers' meeting, even if the discussion took place within earshot of other Captains, does not constitute an adverse employment action.

Appellant's refusal to place [redacted] back in her pre-Workers' Compensation leave assignment, however, can constitute an adverse employment action. (See *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387 [a lateral transfer was an adverse employment action.].) The issue then is whether Appellant refused to return [redacted] to her pre-leave assignment because she went on Workers' Compensation leave of absence.

Even giving Respondent every reasonable inference and resolving all conflicts in favor of the Notice, Appellant's post-leave removal of [redacted] from her Wasco State Prison assignment does not appear to be motivated by her taking a Workers' Compensation leave of absence. Appellant had the discretion to assign Captains to any institution in AIU Central he thought most beneficial to AIU Central's mission. He moved [redacted] to Wasco State Prison when [redacted] was on leave. And as he explained to [redacted], he did so for operational needs. While [redacted] believed that her seniority should allow her to return to the institution of her choosing, there was no policy or practice that supported her belief. And there was no evidence, substantial or otherwise, that Appellant was motivated to not return [redacted] to Wasco State Prison because she had taken her Workers' Compensation leave of absence. On the contrary, Appellant moved several AIU Central's Captains' institutional assignments while [redacted] was on leave, suggesting that changing Captains' assignments was a regular practice, not one limited to [redacted]. And there was no evidence of animus towards [redacted]. Again, on the contrary, Appellant wanted [redacted] to return to work, and when she returned, he gave her the choice of several institutions to return to; he did not just unilaterally move her to another institution. Furthermore, Appellant offered [redacted] the ability to return to AIU Central as a retired annuitant in the event she retired. This certainly suggests that Appellant appreciated her work and was not motivated by her Workers' Compensation leave of absence to reassign her. Even giving Respondent every reasonable inference and resolving all conflicts in favor of the Notice, Appellant's alteration of [redacted]

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institutional assignment was not because she took Workers' Compensation leave and thus was not retaliatory.

In sum, Appellant did not violate CDCR's prohibitions against harassment or retaliation. However, given that Appellant neglected his known duty to comport with policy when he was discourteous to [redacted] and [redacted], the charge brought under Government Code section 19572, subdivision (d) is sustained.

Discourteous Treatment of the Public or Other Employees

Legal cause for discipline under Government Code section 19572, subdivision (m), discourteous treatment of the public or other employees, is established where a person displays hostility toward others, speaks in an abrasive tone, or has a brusque demeanor. (*G.M.* (2003) SPB Dec. No. 03-06.) Discourteous treatment can include a flippant attitude, as well as rude, demeaning, and sarcastic comments. (*Michael Prudell* (1993) SPB Dec. No. 93-30.)

Respondent charged Appellant with the discourteous treatment of [redacted], and [redacted].

[redacted]

Appellant spoke to [redacted] in a discourteous manner when he told him he "better watch his attitude." Speaking to [redacted] in this kind of hostile tone, even though he was admonishing [redacted] for himself being rude, constitutes discourteous treatment.

[redacted]

Appellant was not rude or discourteous to [redacted]. Appellant informed her that she was not returning to her pre-leave assignment, and this upset [redacted],

but there was nothing in the manner or way that Appellant addressed [redacted] to suggest he was hostile or abusive. Likewise, making a reference to [redacted] about [redacted] ability to retire, without more, is not discourteous treatment. Appellant did not know that [redacted] was listening in, so he was not intending to insult her or be rude, and even if he had known, other employees regularly discussed retirement options with [redacted] and it was not deemed discourteous. Appellant was merely discussing staffing issues with a peer and offered his opinion that if she could afford retirement, she should retire.

[redacted]

As discussed, Appellant's interaction with [redacted] during the all-staff meeting was discourteous. The all-staff meeting was fraught, employees were upset and overworked and concerned that with the additional quota they would be working more. Appellant sought to reassure them but appears to have let the situation get the better of him when he rudely addressed [redacted]. [redacted] indicated that she did not want to stay past midnight when closing cases, and Appellant harshly responded challenging her to identify how late she had stayed in the past to close cases. This condescending interrogation, particularly in front of other employees, was rude and disrespectful. And in responding to [redacted] in that manner, Appellant was discourteous.

Giving Respondent every reasonable inference and resolving all conflicts in favor of the Notice, as discussed above, and for the reasons stated, Appellant's conduct constitutes discourteous treatment and the charge brought under Government Code section 19572, subdivision (m) is sustained.

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Willful Disobedience

In order to establish willful disobedience under Government Code section 19572, subdivision (o), Respondent must show that Appellant knowingly and intentionally violated a direct command or prohibition. (*Jeffrey Crovitz* (1996) SPB Dec. No. 96-19, p. 22; *Coomes v. State Personnel Bd.* (1963) 215 Cal.App.2d 770, 775.)

Appellant knew that he was prohibited, pursuant to DOM section 31040.3.4.1, DOM section 31010.3, DOM section 31040.3.4.3, and the Memorandum of Expectations from harassing, retaliating against, and treating his subordinates with discourtesy. As explained above, Appellant did not harass or retaliate against his subordinates in contravention of the DOM. Appellant did, however, intentionally violate the prohibition against discourteous treatment when he told [redacted] to watch his attitude, and rudely questioned [redacted] during the all-staff meeting.

Given that he knowingly violated this direct prohibition, Appellant's conduct constitutes willful disobedience, and the charge under Government Code section 19572, subdivision (o) is sustained.

Other Failure of Good Behavior

Other failure of good behavior is misconduct that can easily impair or disrupt the public service, or discredit the appointing authority or appellant's employment, so long as there is a rational relationship between the misconduct and the appellant's employment. (*D.M.* (1995) SPB Dec. No. 95-10.)

Appellant's conduct was rationally related to his employment—all of it took place while performing his duties as a Correctional Administrator. And rudely addressing subordinates, particularly in front of their colleagues, can disrupt the public service.

Appellant rudely told [redacted] to "watch his attitude." Speaking to his subordinate in this manner could easily impair or disrupt the public service. Further, on April 12, 2023, Appellant condescendingly questioned [redacted] about her concerns regarding staying late. By doing so, Appellant impaired his ability to oversee AIU Central, damaging his relationship with [redacted], and discrediting CDCR. The charge brought under Government Code section 19572, subdivision (t), is therefore sustained.

Unlawful Discrimination or Harassment

When determining whether an employee's conduct constitutes grounds for discipline for unlawful discrimination or harassment under Government Code section 19572, subdivision (w), the SPB follows the legal standards used by federal and state courts to review claims under Title VII of the Civil Rights Act of 1964 and the Fair Employment and Housing Act (FEHA). (*Charles Cook* (1999) SPB Dec. No. 99-03.)

The federal courts have recognized that not all harassing workplace conduct is sufficient to state a claim of discrimination under Title VII. To be actionable, the harassment must be "sufficiently severe or pervasive" to alter the conditions of the victim's employment and create an abusive working environment. (*Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, at p. 67, quoting from *Rogers v. Equal Employment Opportunity Com'n* (5th Cir. 1971) 454 F.2d 238; *Beyda v. City of Los* Angeles (1998) 65 Cal.App.4th 511, 517; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609; see also *Pereira v. Schlage Electronics* (N.D.Cal. 1995) 902 F.Supp. 1095, 1101-1102.)

Indeed, "harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of

meanness or bigotry, or for other personal motives." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 707.) Harassment is "generally concerned with the *message* conveyed to an employee, and therefore with the social environment of the workplace, whereas discrimination is concerned with explicit changes in the terms or conditions of employment." (*Id.* (emphasis in original).) Put another way, discrimination "refers to bias in the exercise of official actions," while harassment "refers to bias that is expressed or communicated through interpersonal relations in the workplace." (*Id.*) While the two may overlap, "[c]ommonly necessary personnel management actions" made by "employees exercising their employer-delegated authority" are not sufficient to show harassment unless while engaging in those actions the employer also conveys the hostile message constituting harassment. (See *Id.* at p. 708-09.) In determining whether the conduct is harassing conduct, the court must consider whether the employee's complaints were based on truly severe or pervasive conduct or were merely the product of the "idiosyncratic concerns of the rare hypersensitive employee." (*Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 879-80; see also, *Cagle Moore* (1993) SPB Dec. No. 96-12, at p. 11.)

Respondent alleged that Appellant engaged in the unlawful harassment of [redacted], and [redacted].

[redacted]

Appellant admonished [redacted] for failing to say good morning in response to his greetings and concluded their interaction by exclaiming that [redacted] had "Better watch his attitude."

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There was no evidence that any of Appellant's conduct with respect to [redacted] was attributable to bias or [redacted]' protected FEHA status. To the extent Respondent argued that Appellant's actions were because [redacted] filed a grievance, the filing of a grievance is not covered by the FEHA. Appellant, frustrated by [redacted] childlike refusal to greet him, rudely admonished him, this alone, however, does not constitute unlawful harassing conduct.

[redacted]

Respondent asserted that the following conduct constituted harassment by Appellant: his comment to [redacted] that [redacted] should retire; [redacted] telephone call to [redacted] asking why she was returning; the denial of [redacted] ability "to have meaningful input into her work assignment upon returning to work"; and calling [redacted] during the managers' meeting to ask where she was when she was at a medical appointment.

In *Roby*, the court held that there was sufficient evidence to support a jury verdict in favor of an employee alleging harassment based on a medical condition. In doing so, the court noted that the evidence included rude comments and behavior by the supervisor that occurred daily; the weekly shunning of the employee from staff meetings; the belittling of the employee's job; and the supervisor reprimanding the employee in front of the employee's coworkers. (*Roby v. McKesson Corp.*, *supra,* 47 Cal. 4th 686 at p. 710.) Ultimately, this "evidence was sufficient to allow the jury to conclude that the hostility was pervasive and effectively changed the conditions of [the employee's] employment. (*Id.* [citing *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 278–279.])

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Here, the comment that [redacted] overheard about her retiring did not create a hostile or intimidating work environment. Appellant merely suggested that if [redacted] financial situation was suitable, she should retire. Taken in conjunction with Appellant's desire to bring [redacted] back to work after she retired as an annuitant, suggests that there was neither meanness nor bigotry in Appellant's comment. Indeed, given that Appellant knew that [redacted] and Appellant were friends, it makes little sense for Appellant to call [redacted] to disparage her friend. Thus, any inference that the call suggested animus, or Appellant's desire to not have [redacted] return to work, is misplaced. Likewise, [redacted] telephone call to [redacted], inquiring as to why she would return to work, even if attributed to Appellant, was innocuous. There was no evidence that [redacted] made the call to bother [redacted] or pressure her into not returning to work. Similarly unavailing is the allegation that [redacted] was not allowed "meaningful input into her work assignment." While [redacted] was not returned to Wasco State Prison, and that is where she wanted to be assigned, she returned to North Kern State Prison, at her choosing. Thus, the claim is belied by the fact that she was able to choose which institution she returned to, from the available institutions. In any event, at least one other Captain was reassigned while on a medical leave of absence, suggesting that [redacted] was not singled-out for harassment. Finally, by calling [redacted] during the managers' meeting to ask where she was when she was at a medical appointment, Appellant was merely reaching out to determine if she was coming to the meeting. Appellant had forgot that [redacted] was at a medical appointment and was just trying to determine her whereabouts. There was nothing untoward about placing the call on speaker phone during the meeting and

allowing the other Captains to hear [redacted] say she was at a medical appointment and would be in later. No confidential medical information was shared, and there was no conduct by Appellant suggesting nefarious intent.

Even taken together, the allegations of harassment do not amount to the type of severe or pervasive conduct described by the court in *Roby*. There was no evidence of Appellant making rude comments daily. There was nothing suggesting that Appellant shunned [redacted] from meetings—quite the opposite, he sought out her presence at the managers' meeting. There was no evidence that Appellant belittled the work [redacted] did or reprimanded [redacted] in front of her coworkers—he appreciated her work and was agreeable to bringing her back as a retired annuitant. Ultimately, [redacted] was upset that she was no longer assigned to Wasco State Prison and did not have the authority to control her own assignment. Her personal idiosyncratic concerns regarding her reassignment led to the allegation of harassment - an allegation that lacked any evidence of bias. Indeed instead, the evidence supported the conclusion that Appellant was just engaging in necessary personnel management actions by reassigning Captains to the institutions Appellant thought best for AIU Central.

[redacted] *and* [redacted]

Appellant was alleged to have harassed [redacted] and [redacted] during the all-staff meeting. More specifically, Appellant was alleged to have harassed his staff members when he did not define the term "excessive" when discussing leave requests; questioned [redacted] about staying past midnight; and did not adequately address employee concerns, and instead referred them to EAP.

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As discussed previously, none of Appellant's conduct during the all-staff meeting rises to the level of severity that effectively changed the conditions of the workplace. And given that the conduct was not pervasive, only occurring on the one day, it was insufficient to constitute unlawful harassment.

Even if the conduct Appellant engaged in was deemed severe or pervasive, there was no evidence that Appellant's conduct during the all-staff meeting was because of bias towards a FEHA-protected category. Unlawful harassment "refers to bias that is expressed or communicated through interpersonal relations in the workplace." (*Roby, supra*, 47 Cal.4th 686 at p. 707.) There were no allegations or evidence that Appellant's purported harassment towards [redacted] or [redacted] was motivated by anything more than a desire to address concerns during the all-staff meeting. While Appellant's manner was rude when he questioned [redacted], there was nothing suggesting bias towards any employees.

Ultimately, Appellant's personnel management decisions, made while exercising his employer-delegated authority, are not sufficient to show unlawful harassment. The alleged harassing conduct does not constitute unlawful harassment under Government Code section 19572, subdivision (w), and this cause is dismissed.

Unlawful Retaliation

Legal cause for discipline under Section 19572, subdivision (x) occurs when an employee "unlawfully retaliates" against a member of the public or another employee who reports information to an appropriate authority concerning an actual or suspected violation of any law occurring on the job. (*Jeffrey Crovitz* (1996) SPB Dec. No. 96-19; see also *J.A.* (1995) SPB Dec. No. 95-17, p. 15 [giving false information to a law enforcement

agency to get revenge against a member of the public constitutes a cause for discipline under subdivision (x).].) Generally, to establish a prima facie case of retaliation, the moving party must demonstrate that: 1) an employee made a protected disclosure; 2) Appellant thereafter subjected the employee to an adverse employment action; and 3) a causal link exists between the protected disclosure and the adverse employment action. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69.) An adverse employment action is one that materially affects the terms, conditions, or privileges of employment. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1051.)

Respondent alleged that Appellant retaliated against [redacted] and [redacted].

[redacted]

Respondent alleged that Appellant retaliated against [redacted] when he insisted that [redacted] verbally greet him; publicly reprimanded [redacted] for failing to greet him and told him to "watch his attitude"; and initially ordered [redacted] to request a doctor's note from [redacted].

[redacted] filed a grievance against Appellant. Giving Respondent every reasonable inference, the filing of a grievance constitutes the making of a protected disclosure. After [redacted] filed the grievance, Appellant reprimanded [redacted] for failing to say good morning to him and told him he "better watch his attitude." Even giving Respondent every reasonable inference and resolving all conflicts in favor of the Notice, Appellant's verbal admonishment to [redacted] for failing to say good morning to him does not constitute an adverse employment action.

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In *Yanowitz*, the Supreme Court determined that an adverse employment action is one that that materially affects the terms, conditions, or privileges of employment. (*Yanowitz v. L'Oreal USA, Inc., supra,* 36 Cal.4th at p. 1051.) The court reasoned:

> Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim.

(*Ibid*.) *Yanowitz* rejected the arguably broader "deterrence" test adopted by the federal courts, but emphasized that the "materiality" test is not to be read miserly. (*Id.* at pp. 1036, 1050–1051, 1053–1054.) The "materiality" test encompasses not only ultimate employment decisions, "but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Id.* at p. 1054.)

By verbally reprimanding [redacted] about his refusal to greet Appellant, Appellant did not take any action that materially affected [redacted] job performance or opportunity for advancement in his career. There was no record made of [redacted] discourtesy or the actions Appellant took to correct it; Appellant did not document it or place any materials in [redacted] personnel file. There was therefore no record that [redacted] was verbally admonished, and there was nothing from the February 8 interaction with Appellant that could impact his career advancement.

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[redacted]

Respondent alleged that Appellant retaliated against [redacted] because she took a Workers' Compensation leave of absence. More specifically, the Notice alleged that Appellant's comment to [redacted] that [redacted] should retire; [redacted] telephone call to [redacted] asking why she was returning; the denial of [redacted] ability "to have meaningful input into her work assignment upon returning to work"; and calling [redacted] during the managers' meeting to ask where she was when she was at a medical appointment constitutes retaliation.

There was no evidence that [redacted] made a protected disclosure before Appellant took the alleged adverse employment actions. Taking a Workers' Compensation leave of absence does not constitute a protected disclosure. It is not a report of information to an appropriate authority concerning an actual or suspected violation of a law occurring on the job.[5] The only protected disclosure [redacted] arguably made was on May 25, 2023, when she filed a Workplace Violence Incident Report. That report, however, was filed after the actions taken by Appellant that are alleged to have been retaliatory. As such, there is no causal link between the purported adverse employment action taken by Appellant and the filing of the report.

In the end, Appellant's personnel management decisions, made while exercising his employer-delegated authority, were not retaliatory. Appellant's conduct does not

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[5] The law prohibits an employer from discharging an employee because she filed a claim for workers' compensation. (Cal. Labor Code, § 132a, subd. (1).) But, the SPB does not have jurisdiction over Labor Code section 132a claims; those claims are heard by the Workers' Compensation Appeals Board. (Cal. Labor Code, § 132a, subd. (4) ["The appeals board is vested with full power, authority, and jurisdiction to try and determine finally all matters specified in this section."].)

constitute unlawful retaliation under Government Code section 19572, subdivision (x), and this cause is dismissed.

DISPOSITION

Appellant was demoted two classifications, from a Correctional Administrator to a Correctional Lieutenant. At hearing, Respondent argued that the demotion out of the managerial classification was warranted because Appellant's discourtesy, harassment, and retaliation of his subordinates showed that he was unfit to perform his managerial duties.

Two-Step Demotion

As an initial matter, Respondent did not have the authority under section 19590 to demote Appellant two steps out of a managerial classification. An employee demoted pursuant to Government Code section 19590 "shall, as specified by Section 19140.5, have the right to be reinstated to his or her former civil service position." (Gov. Code, §19590.) "Former position" is broadly defined to include "[a] position in the classification to which an employee was last appointed as a probationer, permanent employee, or career executive, under the same appointing power where the position was held." (Gov. Code, §18522, subd. (a).) "It can also mean a position in a different classification where the employee and the appointing power agree." (Gov. Code, §18522, subd. (b); *Hulings v. State Dept. of Health Care Servs.* (2008) 159 Cal.App.4th 1114, 1122.)

Given the definition of "former position" in Government Code section 18522, following his demotion, Appellant had the right to be reinstated to Correctional Captain. It was the position Appellant was "last appointed" to under CDCR prior to his promotion to Correctional Administrator. Accordingly, Appellant's two-step demotion to Correctional

Lieutenant does not comply with the dictates of section 19590. Pursuant to section 19590, Respondent could only demote Appellant to his former position, Correctional Captain.[6]

Modification of the Demotion

It is unclear what authority the Board has to modify a demotion taken pursuant to section 19590. Non-managerial and managerial employees are governed by different statutory frameworks when the Board analyzes the appropriateness of discipline. In the non-managerial context, Government Code section 19583 provides that if the Board, after a hearing, "finds that the cause or causes for which the adverse action was imposed were insufficient or not sustained, or that the employee was justified in the course of conduct upon which the causes were based, it may modify or revoke the adverse action." (Gov. Code, § 19583; see *Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 827; *Tely M. Cayaban* (1992) SPB Dec. No. 92-16.)

If the adverse action taken against the managerial employee is a demotion taken pursuant to Government Code section 19590, subdivision (c), the Board shall, after a hearing, "affirm or reduce the action, [or] restore the employee to a position from which he or she was demoted." (Gov. Code, §19590, subd. (c).) And "modification" of the demotion is only appropriate, if the Board determines "there is no substantial evidence to support the reason or reasons for the disciplinary action." (*Id*.)

This reference to "reason or reasons for the disciplinary action" in Government Code section 19590 is ambiguous. There are two plausible interpretations of the meaning

[6] Respondent could have properly demoted Appellant two-steps had it issued the demotion pursuant to Government Code section 19570. If Respondent had done so, however, the burden of proof would have been on Respondent to prove, by a preponderance of the evidence, the causes for the demotion.

of the phrase: either (1) modification is appropriate where any of the reasons lack substantial support for the disciplinary action; or (2) modification is only appropriate when all of the reasons lack substantial evidence for the disciplinary action. Put another way, it is unclear whether the Board has the authority to modify the demotion of a managerial employee to a lesser penalty when there was no substantial evidence to support some, but not all, of the reasons for the disciplinary action.

When faced with a statutory ambiguity such as this, courts first seek to ascertain the intent of the drafters. (*Uber Techs. Pricing Cases* (2020) 46 Cal.App.5th 963, 973.) The best way to do so is to examine the words themselves, "giving them their usual and ordinary meaning and construing them in context." (*Id.*) Here, the ambiguity arises when examining what was meant by the phrase "to support the reason or reasons for the disciplinary action." Use of "reason" in the singular could refer to an action with only a singular cause. Or, by referring to both the singular and plural the drafters could have intended to allow for modification when there was no substantial evidence to support one or more of the reasons given in an action with multiple causes. Either interpretation is reasonable. "If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." (*Id*. at pp. 973-74, quoting *Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 582–583.)

The Legislature enacted Government Code section 19590 as part of an article entitled "Tenure of Managerial Employees" in 1982. Section 19590 created an exception to the ordinary tenure and disciplinary rules for state employees by codifying a separate procedure to apply in disciplinary actions against managerial employees. As originally

enacted, section 19590 only applied to demotions. Then, in 1983, changes were made to Article 4, making section 19590 applicable to all disciplinary actions taken against managerial employees. (See *Cagle Moore* (1993) SPB Dec. No. 96-12, p. 4.) The Legislature made it clear through the enactment of section 19590 that managerial employees were governed by different standards during an appeal than non-managerial employees; the burden of proof was on the managerial employee to show that there was no substantial evidence in support of the cause or causes for discipline, or that the action was taken was made in fraud or bad faith. However, in enacting section 19590, the Legislature did not indicate specifically one way or the other whether modification of a managerial employee's demotion was appropriate when any, or all, of the reasons lacked substantial evidence.

Where, as here, the meaning of the statute remains unclear after looking at both its plain language and the legislative history, then "we proceed cautiously to the third and final step of the interpretive process." (*Uber Techs. Pricing Cases*, *supra*, 46 Cal.App.5th 963 at p. 973.) At this final stage of the process, "reason, practicality, and common sense" are applied to the language. (*Id.* at p. 974, quoting *Ailanto Properties, supra*, 142 Cal.App.4th at p. 583.) The words of the statute should be interpreted to make them workable and reasonable, the interpretation should consider the consequences that will flow from the statutory interpretation, and in doing so, be bound not just to the words, but other matters like "context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy and contemporaneous construction." (*Id.*)

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Case law interpreting similar statutory language suggests that the Board is not authorized to modify a demotion when some, but not all, causes are unsubstantiated. In *Carrasco v. SPB* (2021) 70 Cal.App.5th 117, the court was asked to determine whether a rejected probationer should be returned to his position when several, but not all, of the reasons for the rejection were not supported by substantial evidence. After analyzing the legislative history of section 19175, the Court concluded that "a single substantiated reason will legally suffice to uphold the rejection (absent fraud or bad faith), regardless of how many reasons were given in the notice or how many are found to not be supported by substantial evidence." (*Id.* at pp. 139-40.) Despite the disjunctive meaning of "reason or reasons" in the statute, the Court was not persuaded by the argument that there were two categories of rejections—those based on a single reason and those based on multiple reasons. (*Id.* at pp. 140-141.) Instead, a "reason" for rejecting a probationer "remains a 'reason' regardless of how many are set forth in the notice." (*Id.*)

The same logic could be applied to determining whether modification of a demoted managerial employee pursuant to Government Code section 19590 is appropriate where some, but not all, of the reasons are substantiated. The two statutes have nearly identical language, and the ambiguity in section 19590 was addressed and rejected by the court in *Carrasco*. And yet, the two statutes serve fundamentally different purposes. given the differences with rejecting a probationer and demoting a permanent employee, the Legislature is unlikely to have intended for section 19590 and 19175 to operate in precisely the same manner.

First, a rejection during probation issued pursuant to section 19175 is non-punitive. Probationary employees do not have permanent civil service status, and do not have a

vested interest in their employment. (*Wendylin Donald* (2002) SPB Dec. No. 02-10, p. 8.) Instead, the probationary period is considered an extension of the examination process. (*Dona v. State Personnel Bd.* (1951) 103 Cal.App.2d 49, 51.) And the appointing power is dutybound to reject a probationer whose conduct, capacity, moral responsibility, or integrity is found to be unsatisfactory. (Cal. Code of Regs., tit. 2, §324.) Because the appointing power is in the best position to form a conclusion as to whether the probationer has exhibited the proper qualifications to attain permanent status in the position, it must be allowed to exercise discretion and personal judgment in reaching that conclusion. (*Dona v. State Personnel Bd.*, *supra*, 103 Cal.App.2d at pp. 51-52; *David Rodriguez* (1994) SPB Dec. No. 94-29, p. 10.)

A demotion taken pursuant to section 19590, on the other hand, is a punitive action, more akin to discipline, as described in Government Code section 19570. (See (*R.N.* (1998) SPB Dec. No. 98-10 [distinguishing non-punitive termination from discipline taken pursuant to section 19570].) Fittingly then, Government Code section 19590, subdivision (a) only allows for discipline based on the specific causes identified in Government Code section 19572, while section 19175 allows for rejection based on the rather nebulous, “reasons relating to the probationer's qualifications, the good of the service, or failure to demonstrate merit, efficiency, fitness, and moral responsibility.” (Gov. Code, §19173.) And the causes alleged in section 19572, when used to support a demotion brought under section 19590, must still be plead and proven to meet the legal standards of each specific cause. (See *R.N., supra,* SPB Dec. No. 98-10 at p. 6 [facts did not support cause brought under Government Code section 19572, subdivision (k)]; *Cagle Moore* (1996) SPB Dec. No. 96-12, p. 13 [several legal causes not sustained.].)

Whereas the reasons given for the rejection taken pursuant to section 19175, can simply mirror the section 19173, subdivision (a) language allowing for a rejection from probation. (See *Carrasco, supra*, 70 Cal.App.5th at p. 137.)

Furthermore, following a rejection, the Board is empowered to restore the employee to the position from which he or she was rejected, if there is no substantial evidence to support the reason or reasons for the rejection. The Board's choice is binary. Either the employee is reinstated, or the rejection is affirmed.[7] Thus, the discretion of the Board, following a hearing on a rejection, whether the rejection was based on one or many causes, is limited. (Gov. Code, § 19175, subd. (d).) If the rejected probationer is not restored to his or her previous position, then the rejection is affirmed. Conversely, the choices presented to the Board when a managerial employee is demoted are not as limited. The Board is explicitly empowered to "affirm or reduce the action, restore the employee to the position from which he or she was demoted, or reinstate the employee to the position from which he or she was dismissed or to a position to which he or she could have transferred." (Gov. Code, §19590, subd. (c).) In sum, *Carrasco's* interpretation of Government Code section 19175 is inapplicable when assessing Government Code section 19590, given the significantly different purpose of the two statutes.

In light of the foregoing, the reference to both the singular and plural of the term "reason" in section 19590 suggests that modification is appropriate when there is no substantial evidence to support one or more of the reasons given in a Notice. Allowing

[7] While Government Code section 19175 refers to the Board's ability to "Modify the action", the clause is separate from the clause addressing the requirement that there be no substantial evidence in support of the rejection. (Gov. Code, § 19175, subds. (b) and (d).)

for modification when some, but not all reasons are supported by substantial evidence promotes the purpose of Board's mandate to render a decision that in its judgement is "just and proper" under a given set of circumstances. (SeeGov. Code, §19582, subd. (a).) This aligns with the non-managerial employee framework that allows for modification when the Board finds that the "cause or causes for which the adverse action was imposed were insufficient or not sustained." (Gov. Code, §19583.)

Further, interpreting section 19590 to only allow for modification when none of the causes were substantiated, would be illogical. If there is no substantial evidence for any of the allegations, the logical outcome would be revocation of the demotion, not modification of the demotion. Insisting that an appellant show that there is no substantial evidence in support of all the causes would essentially render any reference to modification in section 19590 moot.

And if all causes must be shown to have no substantial evidence, an action containing several serious allegations and one minor allegation would have to be affirmed, so long as the minor allegation was shown to be supported by substantial evidence, and even if the more serious allegations were not proven. A demotion is a serious penalty, often resulting in a significant reduction in the Appellant's salary, and career trajectory. Under this interpretation, a managerial employee who engages in the slightest instance of wrongdoing, while entitled to an evidentiary hearing, and while subject to the onerous evidentiary burdens of section 19590, would have no means to ensure a just and proper penalty. He or she, while perhaps deserving corrective action or progressive discipline, would be subject to the demotion, regardless of the significance of the misconduct. The Legislature is unlikely to have intended this incongruent outcome.

More likely then, the Legislature sought to allow for the modification of the demotion based on the entirety of the circumstances, while still allowing Departments to address managerial tenure with a demotion using the comparatively relaxed substantial evidence standard provided in section 19590.

This interpretation comports with two precedential decisions issued by the Board that discuss section 19590: *R.N.* and *Cagle Moore*. While neither explicitly address the issue, when read together, it appears that the Board endorses the modification of a demotion of a managerial employee when there was no substantial evidence in support of some of the causes.

In *R.N.*, the Board modified an action taken pursuant to section 19590 following a hearing where not all the charges were proven by substantial evidence. (*R.N.* (1998) SPB Dec. No. 98-10.)[8] The appellant in *R.N.*, a Correctional Administrator, was dismissed pursuant to section 19590, but the Board modified the dismissal to a six-month suspension, after only two of the three causes of discipline alleged were sustained. (*Id.* at p. 10–11.) In doing so, the Board employed the same reasoning it uses when modifying penalties brought in actions under Government Code section 19583 governing the discipline of non-managerial employees. (*Id.*) The Board considered the "circumstances surrounding" the proven misconduct and concluded that since Appellant had no history of misconduct, and a long history of exemplary service, the "dismissal would not be justified." (*Id.* at p. 11.)

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[8] The primary issue decided by the SPB in *R.N.* was whether a peace officer could be non-punitively dismissed pursuant to Government Code section 19585 and simultaneously dismissed pursuant to section 19590.

Likewise, in *Cagle Moore* (1996) SPB Dec. No. 96-12, the Board reinstated a managerial employee who was demoted pursuant to section 19590. There, the Department demoted a managerial employee for harassing his subordinates. (*Id.* at pp. 4-5.) The ALJ who heard the case determined that the harassing conduct was neither severe nor pervasive. (*Id.* at p. 13).[9] Instead, the employee who complained of harassment was "the kind of hypersensitive employee that the court had in mind when adopting the reasonable woman standard." (*Id.* at p. 5.) Nevertheless, some of the managerial employee's conduct was deemed sufficient grounds for discipline under Government Code section 19572, subdivisions (m) and (t). Given that some of the charges were sustained, the demotion was modified to a 30-day suspension, "to convince" Appellant to correct his behavior. (*Id.* p. 14.).[10]

Taken together, *R.N.* and *Cagle Moore* show a willingness by the Board to consider modification of a managerial employee's demotion where some, but not all, of the reasons for the demotion are supported by substantial evidence, and not all the charges are sustained. And when considering the modification of a dismissal of a Correctional Administrator (*R.N.*) and the demotion of a manager for allegedly harassing his subordinates (*Cagle Moore*), the Board employed the same reasoning as when

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[9] The case was heard by the ALJ under section 19570, even though the action was brought under section 19590, so the Department had to prove the charges by a preponderance of the evidence. Nevertheless, the Board explained that "after review of the evidence presented at hearing, we find that there is no substantial evidence in the record to demonstrate that appellant's actions … are cause for discipline. The charges of inappropriately disciplining three employees were groundless. Thus, even if these charges had been brought under section 19590, we would have dismissed them as being unsupported by substantial evidence in the record." (*Id.* at p. 5, fn. 6.)

[10] The Board did not modify the penalty imposed because it determined that there was not substantial evidence for any of the causes alleged, but the ALJ who originally heard the case modified the demotion to a 30-day suspension.

modifying non-managerial employee discipline. Given the circumstances, it is reasonable to do so here as well.

Here, Appellant successfully rebutted the presumption of truth as to several substantial allegations, and the two most significant legal causes for discipline, unlawful harassment and retaliation, were dismissed. And importantly, the allegations levied against Appellant that most clearly warranted a demotion from a managerial role, that he harassed and retaliated against his employees, were not proven. Appellant was shown to have discourteously interacted with his subordinates in contravention of Department policy on two occasions. And in both instances, there was nothing to suggest that Appellant did so in a deliberate attempt to belittle, mock, harm, or demean the employees. In both instances, Appellant rudely engaged a subordinate under stressful circumstances who challenged his authority as the Correctional Administrator.

Furthermore, Appellant was performing his duties as a Correctional Administrator overseeing AIU Central exceptionally well. He was lauded for his work and specifically for his personnel management practices. And prior to the instant Notice, Appellant had received no formal discipline in a sterling career, lasting nearly 25 years.

In the end, demotion is too severe a penalty for Appellant's proven misconduct, particularly since he excelled in his role as a Correctional Administrator. Yet, his discourteous conduct warrants a stern penalty to make clear the need to always act professionally and treat his subordinates with respect. Considering the factors discussed above, the just and proper penalty for Appellant's conduct is a salary reduction of 10 percent for 12 qualifying pay periods.

CONCLUSIONS OF LAW

1. As found herein, Appellant proved that there was no substantial evidence that he committed some of the conduct alleged in the Notice.
2. Appellant's conduct constitutes legal cause for discipline under Government Code section 19572, subdivisions (d) inexcusable neglect of duty, (m) discourteous treatment of the public or other employees, (o) willful disobedience, and (t) other failure of good behavior. Appellant's conduct does not constitute cause for discipline under Government Code section 19572, subdivisions (w) unlawful discrimination, including harassment, or (x) unlawful retaliation.
3. A two-step demotion is not the just and proper penalty for the proven misconduct.
4. A salary reduction of 10 percent for 12 qualifying pay periods is a just and proper penalty for the proven misconduct.

ORDER

1. The demotion of Appellant K[redacted] R[redacted] by Respondent CDCR is **MODIFIED** to a salary reduction of 10 percent for 12 qualifying pay periods.
2. Pursuant to Government Code Section 19584, Respondent shall pay to Appellant all back pay and benefits, if any, plus interest that would have accrued to him had he not been demoted.

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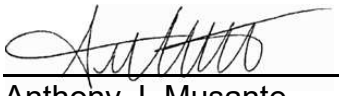
3. This matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing on written request of either party, filed within one year from the effective date of the SPB Decision in this matter, in the event the parties are unable to agree as to the salary, benefits, and interest owed to Appellant.

DATED: October 30, 2024



Anthony J. Musante
Administrative Law Judge
State Personnel Board