

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 37099
)
 JEFFREY CROVITZ) **BOARD DECISION**
) (Precedential)
)
 From dismissal from the position) **NO. 96-19**
 of Associate Bridge Engineer)
 with the Department of)
 Transportation at Sacramento) December 3-4, 1996

Appearances: Dennis F. Moss, Esq., Professional Engineers in California Government on behalf of appellant, Jeffrey Crovitz; Milton B. Kane, Attorney, Department of Transportation, on behalf of respondent, Caltrans, Department of Corrections.

Before: Lorrie Ward, President; Floss Bos, Vice President; Ron Alvarado, Richard Carpenter and Alice Stoner, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Jeffrey Crovitz (appellant or Crovitz) from dismissal from the position of Associate Bridge Engineer with the Department of Transportation (Department or Caltrans). As cause for discipline, appellant was charged with using state time and state equipment to perform personal work.

After a hearing, the ALJ issued a Proposed Decision sustaining the dismissal. The Board rejected the ALJ's Proposed Decision and determined to decide the matter itself. After a review of the entire record, including the transcript, the exhibits and the written and oral arguments of the parties, the Board modifies

(Crovitz continued - Page 2)

appellant's dismissal to a 90 days' suspension for the following reasons.¹

SUMMARY OF FACTS

Appellant has been affiliated with Caltrans since he was a graduate student getting a Master's degree in Engineering from California Polytechnic State University - San Luis Obispo. At that time, appellant was under contract with Caltrans to provide training to Caltrans employees on computer-aided drafting and design (CADD) applications. During the contract period, no one from Caltrans informed appellant that there were restrictions on his use of Caltrans computers. Appellant used Caltrans computers to produce his Master's thesis.

After graduating, appellant was appointed to the position of Assistant Engineering Specialist (Civil) with Caltrans on May 26, 1987, and was reclassified to Civil Engineer on June 13, 1989. He promoted to Associate Transportation Engineer on January 26, 1990, and transferred to the position of Associate Bridge Engineer on August 30, 1991.

Mickey Horn, Supervising Bridge Engineer, supervised appellant from early 1992 through November 1992. In September, 1992, he authorized appellant to use a Caltrans computer at home to develop

¹The parties agreed to include the testimony of three witnesses (David Brubaker, Debra Boulter, M. Torres (SPB Case No. 33984) as part of the evidentiary record in this case.

(Crovitz continued - Page 3)

a training program for a CADD application. Appellant worked at home several days a week. Horn did not require appellant to maintain a specific schedule while he worked at home, as long as he worked the requisite number of hours each day.

By 1992, appellant was at the top salary step of his civil service classification. He started a private business, Crovitz Engineering Services (CES), to earn additional income. During the period September 30, 1992 through September 29, 1993, appellant routinely used the state computer he kept in his home for personal work. Appellant testified that no one from Caltrans told him that he was restricted to using the Caltrans computer for state work and appellant believed that he could use the computer for personal business, if he did so on his own time.

Horn testified that he did not inform appellant about restrictions on the use of the Caltrans computer. Horn did not know that appellant operated a private engineering consulting business from his home. Horn expected that appellant would use the computer only for Caltrans work. Horn did not believe it was necessary to tell appellant that he could not use the Caltrans computer for personal business. He believed that appellant understood this without being told. Horn testified that if he had known appellant was using the computer for his private business, he would have given appellant written instructions about the appropriate use of the Caltrans computer.

(Crovitz continued - Page 4)

In November 1992, Joe Esfandiary began supervising appellant. In April or May 1993, appellant asked Esfandiary if he could use a Caltrans computer to perform personal design projects. The record does not indicate what prompted appellant to make this inquiry. Esfandiary told appellant that he could not use the state computer to perform personal projects during work hours. Appellant asked if he could use the computer outside of work hours. Esfandiary gave appellant permission to use Caltrans computers for personal work on his own time.

Esfandiary believed that he could not monitor equipment usage after work hours. He did not know of and did not inform appellant about Caltrans policies concerning incompatible activities and/or the appropriate use of department computers and equipment.

In early October 1993, Esfandiary observed on the screen of appellant's computer structural design work for a personal project of appellant's called "Strawberry Lodge." Strawberry Lodge was a private ski lodge that hired appellant to do design work. Esfandiary informed appellant that it was not acceptable for appellant to be performing private work. Appellant explained that he was doing the work during his break. Esfandiary testified that he "discouraged" Crovitz from doing any work with the state computer on state time. When he was asked at the hearing, "Was it only on state time you told him not to use the computer?" Esfandiary answered that he did not remember. In a memorandum

(Crovitz continued - Page 5)

written about the same time, Esfandiary noted that he "strongly discouraged" Crovitz from working on his private job.

Esfandiary also testified that, after this discussion, he expected that appellant would not perform any personal work on Caltrans computers at any time. It was Esfandiary's understanding that appellant would purchase his own computer and software and, although appellant would continue to manage the project, appellant would hire someone else to do the structural engineering work. After his conversation with appellant, Esfandiary believed that appellant was no longer performing personal business on Caltrans computers.

Appellant's account of the conversation with Esfandiary is only slightly different. Appellant testified that, a few days after the first conversation about the Strawberry Lodge project, he again spoke to Esfandiary. They discussed the project in greater detail. Esfandiary told him that it would be good for appellant to quit the project, and suggested he turn it over to a structural engineer. Appellant told Esfandiary that he intended to get out of the project as soon as possible, and was purchasing computer equipment for his home.

Appellant further testified that their conversation was limited to Strawberry Lodge, and did not include any discussion of CES or appellant's volunteer work for the El Dorado Nordic Ski Patrol. Appellant denied that Esfandiary ordered him to stop

(Crovitz continued - Page 6)

performing any personal business on Caltrans equipment.

Appellant purchased a computer in October 1993; a printer in November 1993; MicroStation, a CADD application, in March 1994; and a plotter in August 1994.

In March 1994, Thomas Pollock, Chief of the Office of Structure and Design, learned from another employee that appellant might be engaged in performing non-state work on state time and other employees might be involved. He issued a memorandum dated March 24, 1994 to all employees in the office that the use of state time and resources must be limited to state business, and non-state work shall not be performed during work hours nor through use of state equipment. Pollock sent the memo to all staff because he believed that there was a need to disseminate information about the appropriate use of Caltrans equipment.

During the hearing, Pollock testified that a first-level supervisor was not authorized to permit an employee to use Caltrans equipment for personal business outside of work hours.

On March 25, 1994, Esfandiary and Design Supervisor Charles Pearson informed appellant that he was not to use Caltrans equipment for personal business. Appellant asserted that this was the first time he learned about the Caltrans policy.

Appellant admitted that, after the meeting with Esfandiary and Pearson, during a lunch period he prepared two letters on his Caltrans computer connected to his volunteer work with the El

(Crovitz continued - Page 7)

Dorado Nordic Ski Patrol. Appellant believed that using the computer to manage the ski patrol was all right since it was his understanding that Esfandiary was using his computer to manage a soccer team.

Appellant testified that he made restitution to Caltrans. He estimated the direct cost to Caltrans from his use of its computers, including the cost of paper, toner and electricity. He testified that he had submitted a personal check for \$85.00 to Caltrans to cover these costs. Appellant believed that if he provided Caltrans with a good day's work, it was appropriate to use state equipment, since he was not devaluing it or using a non-renewable resource. Appellant testified that other Caltrans employees regularly used state equipment for personal business.

Appellant was a capable employee who performed his job well and showed initiative. He received favorable evaluations of his work from Esfandiary, including one in August 1994. In January and February 1995, appellant was commended for training staff on CADD applications on the Caltrans computer.

Managing and Storing Documents

Appellant was charged with storing 90 business documents and correspondence on a Caltrans computer. The parties stipulated that during the period July 1992 through March 1994, appellant used a Caltrans computer and resources to store 90 business documents and

(Crovitz continued - Page 8)

correspondence pertaining to CES.² According to appellant, the personal documents stored on Caltrans computers used 5.1 megabytes of storage on the hard drive. These personal documents could have been stored on four floppy disks, which cost \$3.00 each for a total of \$12.00.

Accessing Personal Business Documents on State Time

The Department charged appellant with using his Caltrans computer to access more than 50 personal business documents on state time. The parties stipulated that more than 50 documents were found on appellant's Caltrans computer having a "last modified" date between October 1992 through February 8, 1994, and time within appellant's regular working hours of Monday through Friday, 7:00 a.m. to 4:30 p.m.

To demonstrate that appellant accessed personal documents on state time, the Department used a computer summary which indicated when each document was "last modified." The time and date on which a document was "last modified" is the time and date on the computer's internal clock when the document was closed after any changes were made to it.

Of 62 documents appellant created at home from September 30,

²The remainder of the charges relate to different groupings of these same 90 documents. For state time. These 50 documents are included in the 90 documents appellant is charged with s

(Crovitz continued - Page 9)

1992 through September 29, 1993, almost one-half had a "last modified" date during appellant's regular work hours, 7:00 a.m. to 4:15 p.m., excluding the time that appellant would have taken for lunch. Appellant testified, and his supervisor agreed, however, that during the time he worked at home, appellant had no set work hours. Appellant could structure his day any way he liked.

Twenty-two documents were created between September 29, 1993, when appellant was no longer working at home on a Caltrans computer, and February 8, 1994. Over one-half of these showed a "last modified" date and time during appellant's regular work hours, excluding lunch. There was testimony, however, from the Department's witness, Ben Waidhofer, that indicated that the "last modified" times were inconclusive. Waidhofer testified that, if a document is opened and closed without any changes, the "last modified" date and time remain unchanged. If, however, a document is opened, changes are made and the document is closed, the "last modified" date and time is the date and time the document was closed, not the date and time the changes were made. In addition, the particular software used by Caltrans allowed a user to keep up to five documents open at any one time and then close all these documents at once. Thus, while the last modified *dates* are probably accurate, the last modified *times* are less reliable.

While appellant admitted accessing more than 50 personal documents, appellant testified that he only worked on personal

(Crovitz continued - Page 10)

documents outside of work hours. He worked on personal documents before and after work, during morning, afternoon and lunch breaks, or on weekends. He adjusted his break and lunch periods to accommodate work on CES documents. No supervisor or other Caltrans employee testified to the contrary. Thus, Caltrans failed to demonstrate that appellant conducted his personal business at any time other than lunch, breaks or outside of working hours.

Drafting and Developing Personal Business for Strawberry Lodge
on Caltrans Computers

Appellant was charged with using the state-owned CADD system and MicroStation software to draft and develop documents related to the remodeling of a privately owned ski lodge, Strawberry Lodge. The parties stipulated that appellant's Caltrans computer contained 31 documents pertaining to the Strawberry Lodge project that were "last modified" between June 3, 1993 and February 8, 1994.

Appellant testified that October 15, 1993 was the last date on which he utilized a CADD application at Caltrans for his private business. There were, however, ten CADD documents "last modified" on his computer after that date.

Appellant testified that nine of the CADD documents for Strawberry Lodge were electrical and mechanical drawings he received from a private engineer and architect. He brought them to work on a floppy disk, and copied them onto his computer

(Crovitz continued - Page 11)

before work started so that two other Caltrans employees helping him with the project, Torres and Lacey could copy them.

The final CADD document was accessed in connection with a letter appellant wrote to a structural engineer responding to questions about the exterior deck of Strawberry Lodge. On November 3, 1993, he accessed one of the CADD documents to retrieve a measurement that the structural engineer needed.

Appellant admitted that, prior to purchasing his own computer, he used Caltrans computers to create CADD documents. There was no showing that after October 15, 1993 appellant continued to use Caltrans computers to draft and develop CADD documents.

Producing Files for Strawberry Lodge on Caltrans Plotter

Caltrans charged appellant with using a state-owned plotter to draft and produce approximately 50 plots. The parties stipulated that between April and October 1993, appellant used the state-owned plotter to draft and produce 50 documents.

Misusing State Telephones

The Department alleged that appellant misused state telephones by providing his Caltrans telephone number on three CES documents. In a letter dated July 30, 1993 to Mike Walker of Youngdahl Associates, concerning work on Strawberry Lodge, appellant included his Caltrans telephone number as a daytime number. In a letter dated November 3, 1993 to Neil Moore &

(Crovitz continued - Page 12)

Associates about the design of a wooden deck for Strawberry Lodge, appellant also listed his Caltrans phone number. Both letters were prepared on CES letterhead stationery. A document titled, "Strawberry Lodge Remodle [sic]," lists appellant's Caltrans telephone number as his work number.

According to Caltrans policies regarding personal use of state telephones, the telephones are provided to conduct state business. Although personal calls are not forbidden, the policy provides that personal calls should not interfere with state business, and the frequency and duration of personal calls should be kept to a minimum. Appellant was aware of these policies. He testified that no one from Caltrans instructed him not to provide his Caltrans telephone number for personal calls.

Thomas Pollock, appellant's unit chief, testified that it was not improper for a Caltrans employee to provide his or her state telephone number as a daytime phone number. According to Pollock, it is the employee's use of the telephone, not the act of listing a state phone number, that must be examined. Personal phone calls that do not interfere with state business are acceptable. By contrast, Horn testified that it was not appropriate for an employee to list a state telephone as a daytime phone number for his/her private business.

(Crovitz continued - Page 13)

Performing Work for Whitehall Owners Association

The Department alleged that, through his private engineering firm, appellant performed engineering functions and inspections for a private homeowners association, Whitehall Owners Association. The Department alleged these functions to be incompatible with appellant's job duties. Appellant's company, CES, assessed damage on the Whitehall property caused by the Cleveland fire of October 1992. On October 5, 1992, appellant provided advice to Jim Coate, one of the Whitehall property owners, concerning erosion control. On October 10 and 11, and again on November 2, appellant inspected the Whitehall property, and prepared a report of his findings. Appellant identified CES and Caltrans as organizations with an immediate or peripheral interest in the Whitehall property. CES' interest was identified as that of a general engineering firm and consultant, while Caltrans was described as responsible for the Highway 50 corridor. Highway 50 is north of the American River Canyon and the Whitehall property is south of it. Appellant's report also described the re-seeding of the highway right-of-way performed by Caltrans.

Appellant testified that including Caltrans' responsibility for the Highway 50 corridor in the CES report simply mentioned a matter of common knowledge. He received the information about Caltrans' re-seeding of the right-of-way from personal

(Crovitz continued - Page 14)

observation, the United States Forest Service, and general knowledge about re-seeding acquired in the course of his duties.

There was no showing that appellant used any proprietary information to prepare the report, or that he identified himself as a Caltrans employee to secure work with Whitehall. The work performed by appellant's assigned work section did not include the Caltrans district in which the Whitehall property was located. This charge is dismissed.

Falsifying Time Sheets

The Department alleged that appellant falsely reported that he worked nine hours on July 23 and 27, and September 25, 1992, when he was actually performing work in Southern California for CES. To prove these allegations, the Department relied on appellant's own business documents that indicated appellant was working for CES on the alleged dates.

At the hearing, appellant established that the CES documents were incorrect and that appellant had either worked for Caltrans as reported or, consistent with accepted practice in the office, used informal time off.

The ALJ found, and we agree, that the Department presented insufficient evidence that appellant did not work for Caltrans on July 23 and 27, and September 25, 1992.

(Croovitz continued - Page 15)

Attempting to Intimidate Sherril Berexa

The Department charged appellant with attempting to intimidate Civil Engineer Sherril Berexa for reporting his personal engineering work to management by blocking her means of egress from her office. Berexa was rotating through appellant's section as part of ongoing training. Berexa learned from several other co-workers that appellant was engaged in personal business on state time. She informed Pollock that appellant worked on the Strawberry Lodge project during state time.

On March 25, 1994, soon after her conversation with Pollock, Berexa was working in her cubicle at about 7:30 a.m. Berexa's cubicle is next to appellant's. Berexa was not working at her computer, which is located near the cubicle door; she was working at her drafting table, which is further into the room. There is only one entrance to the cubicle.

Appellant came in and sat at Berexa's computer. Appellant pressed the computer keys. He told Berexa that he was checking her computer to see if she had any personal files on it. Appellant told her that he had not worked on Strawberry Lodge in the past six months and that he had spent four thousand dollars of his own money to purchase equipment and software to complete the project.

Appellant testified that he knew Berexa had informed Pollock that he was performing personal business on Caltrans computers.

(Crovitz continued - Page 16)

He wanted her to know the facts. Appellant told Berexa that he believed each employee had to protect his or her own interests. Appellant explained that he had developed outside business prospects to augment his income, and provide opportunities for future employment.

At the hearing, appellant denied he was looking for personal documents on Berexa's computer but admitted he was angry and hurt. Appellant believed that Berexa violated a bond of trust when she informed Pollock about his activities. He denied, however, that he intended to intimidate Berexa.

Berexa testified that if she had wanted to leave the office, it would have been hard to leave unless appellant moved out of the way. At the time, however, Berexa did not indicate that she wanted to leave the office or that she wanted appellant to leave the office. While Berexa testified that she felt intimidated by appellant's presence in her cubicle, she also testified that appellant used a regular tone of voice and was congenial as usual.

Berexa admitted to feeling uneasy for reporting appellant. Berexa had not herself seen appellant work on his personal business documents. She had been told by other employees that appellant worked on his personal business at work. Berexa was worried that the people who told her that appellant was doing

(Crovitz continued - Page 17)

private work on the state computer might feel that she had betrayed their trust by reporting appellant.

Caltrans Policies

Caltrans policy states that the use of computer equipment and programs must be directly related to a work function and that the use of state computer resources for non-state work is cause for disciplinary action. Appellant asserted that before he received the Notice of Adverse Action, he was not aware of this policy.

Caltrans policy on ethics requires that all employees treat their jobs as a public trust, avoid real and apparent conflicts of interest, and set a good example of public service. No evidence was presented that appellant was aware of this policy prior to receiving the Notice of Adverse Action.

Caltrans policy on incompatible activities and conflicts of interest states that employees must use state resources and information only for Caltrans work, and not for private gain. It also states that engaging in outside employment that involves any use of the Department's time, facilities, equipment, supplies, or telephones is inconsistent, incompatible, or in conflict with an employee's duties. No evidence was introduced that appellant knew about these policies on incompatible activities and conflicts of interest.

Allegations

Appellant is charged with using state time, equipment and resources for personal business projects and continuing to do so after being ordered to cease, attempting to intimidate a co-worker who reported his conduct, engaging in incompatible activities by representing a homeowners association, and falsifying his time sheets. The Department asserts that this conduct violated Government Code section 19572, subdivisions (d) inexcusable neglect of duty; (e) insubordination; (f) dishonesty; (o) willful disobedience; (p) misuse of state property; (q) violation of SPB rule 172;³ (r) violating the prohibitions of Government Code section 19990 (incompatible activities); (t) other failure of good behavior, on or off duty, that discredits the agency; and (x) unlawful retaliation against an employee.⁴

ISSUES

This case presents two primary issues for our determination:

1. Whether appellant's use of state computer equipment constituted cause for discipline under Government Code § 19572.

³This charge is stricken pursuant to D [REDACTED] ■. M [REDACTED] (1993) SPB Dec. No. 93-06, p. 1, fn. 1.

⁴The Department also asserted that appellant's conduct violated various specified Caltrans policies and directives. Government Code § 19572 provides the only causes for which discipline may be taken against a state employee. Thus, violations of specific Caltrans policies cannot provide separate causes for discipline but can be subsumed within the enumerated causes for discipline.

(Crovitz continued - Page 19)

2. If cause for discipline exists, what is the appropriate penalty?

DISCUSSION

There is no question that appellant used Caltrans computer equipment to conduct personal business. Appellant argues, however, that his conduct constituted neither misuse of state property nor any other cause for discipline because appellant did not use the equipment on state time; had no knowledge of Caltrans' prohibition against using state-owned equipment for personal use; had, in fact, been given permission to use the equipment; and, in any event, is a good worker and a credit to his employment.

Use of State Equipment for Personal Business

The charge of misuse of state property was discussed in R [REDACTED] (1993) SPB Dec. No. 93-21 as follows:

"[M]isuse of state property" under Government Code section 19572, subdivision (p) generally implies either the theft of state property or the intentional use of state property or state time for an improper or non-state purpose often, but not always, involving personal gain . . . "Misuse of state property" may also connote improper or incorrect use, or mistreatment or abuse of state property. Id. at 11-12.

Appellant is charged with misusing state equipment by using a Caltrans computer to manage and store personal business documents, using the state plotter to create personal business documents and using his state telephone number as the daytime business number for his personal business activities.

(Crovitz continued - Page 20)

Appellant argues that his use of the state-owned computer to manage and store documents is not misuse of state property because the use does not devalue the computer in any way. He argues that using the computer to manage and store personal documents is equivalent to storing a personal letter in an office desk drawer. We disagree. Just because appellant's use of the state-owned computer did not devalue the computer, does not mean that appellant had carte blanche to use state equipment for his own purposes. The use of state equipment for a personal business purpose is clearly wrong. Appellant implicitly admitted as much in April or May of 1993 when he asked his supervisor if he could use the state's computer for his personal business.

In addition, the use of the state plotter to create personal business documents is clearly wrong, as is using a state telephone number as a daytime business number. These instances of intentional use of state equipment for an improper or non-state purpose for personal gain constitute misuse of state property under Government Code section 19572, subdivision (p). This conduct also constitutes inexcusable neglect of duty under Government Code section 19572, subdivision (d) in that appellant violated a known duty to use state equipment only for the state purpose for which it was provided. In addition, this conduct constitutes other failure of good behavior under subdivision (t) in that use of the state

(Crovitz continued - Page 21)

equipment for non-work purposes brings discredit on the Department and on appellant's employment.

Accessing Personal Documents on State Time

The misuse of state property also includes the intentional use of state *time* for an improper or non-state purpose. B [REDACTED], SPB Dec. No. 93-21 at pp. 11-12. During the period appellant was authorized to work at home, he was also authorized to set his own hours. Thus, the fact that appellant may have worked on his personal business during what might normally be regular work hours does not establish that appellant misused state time. Neither did Caltrans demonstrate that, after appellant returned to work full-time at the Caltrans office, he conducted his personal business at any times other than lunch, breaks or outside of working hours.

The ALJ did find, however, that appellant misused state time when he worked on his personal projects during his break time. The ALJ reasoned that since the Department not only pays an employee for break time but may determine when, or even if, an employee is given break time (See Tit. 2, Cal. Code Regs., § 599.780), the Department has control of break time. Thus, the ALJ concluded, break time must be state time for purposes of Government Code section 19572 (p). We disagree.

The Department has the option of determining when, and if, break time will be allowed and may prohibit the employee from leaving the premises during break time. Once break time has been

(Crovitz continued - Page 22)

allotted, however, an employee generally has discretion as to how the employee will use the break time, so long as the employee's use of break time is not inconsistent with established state or departmental policy. Only a misuse of state time, i.e., time an employee is supposed to be working, constitutes misuse of state property.

In summary, the Department failed to prove that appellant misused state time.

Disobedience of a Direct Order

Willful disobedience under Government Code § 19572, subdivision (o) requires that one knowingly and intentionally violate a direct command or prohibition. R. H. (1993) SPB Dec. No. 93-22, p.6.; Coomes v. State Personnel Board (1963) 215 Cal.App.2d 770, 775. Prior to October 15, 1993, appellant had his supervisor's permission to work on personal business documents during his off-work hours. Thus, appellant did not knowingly and intentionally violate a direct command or prohibition prior to October 15.

On or about October 15, 1993, appellant's supervisor discussed the use of Caltrans computer equipment with appellant. The Department claims that, during this discussion, appellant was ordered to cease using Caltrans' equipment. We disagree. Esfandiary testified that he "discouraged" appellant from doing further work on the non-state project. Mr. Esfandiary may have

(Crovitz continued - Page 23)

understood himself to have been ordering appellant to cease his activities but we will not read a direct order into the term "discouraged."

On March 25, 1994, in response to Pollack's policy memo, Esfandiary and Pearson informed appellant of Caltrans policy and ordered appellant not to use Caltrans equipment for personal business. Appellant admittedly disobeyed this order when he prepared two letters in connection with his volunteer work with the El Dorado Nordic Ski Patrol. We reject appellant's attempt to excuse his conduct by pointing to Esfandiary's alleged use of his Caltrans computer to manage a soccer team. First, there was no showing that Esfandiary used his computer for this purpose. Second, even if Esfandiary did misuse state property, Esfandiary's conduct would not excuse appellant's disobedience of known Caltrans policy.

Appellant was willfully disobedient when he continued to use his state computer for personal business after being informed by his supervisor of a policy against such usage.

Activities Incompatible with State Service

Government Code section 19572, subdivision (r) provides that an employee may be disciplined for violating the prohibitions against incompatible activities set forth in Government Code § 19990. Section 19990 provides that a state employee shall not engage in any activity which is inconsistent, incompatible, in

(Crovitz continued - Page 24)

conflict with, or inimical to, his or her job duties as a state employee. It also grants each appointing power the right to determine which employee activities are incompatible with state employment.

The Caltrans policy concerning incompatible activities and conflicts of interest states that an employee must use state resources and information, and his position generally, only for Caltrans work, and not for private gain or the private gain of another. This policy paraphrases the provisions of Government Code section 19990, subdivision (b).

Appellant received financial compensation for his work on the Strawberry Lodge project. His personal engineering work was performed for his own private gain and is in clear violation of Caltrans policy. But, according to Government Code § 19990, subdivision (g), for this code section to be enforced against an employee, the employee must be given notice of the proscribed behavior. No evidence was presented that appellant had been given notice of Caltran's policy on incompatible activities. The charge that appellant's conduct violated Government Code § 19990, incompatible activities, is therefore dismissed.

Falsification of Timesheets

A finding of dishonesty under Government Code section 19572, subdivision (f) requires an intentional misrepresentation of known facts. M S (1994) SPB Dec. No. 94-19, p. 20. The

(Crovitz continued - Page 25)

Department alleged that appellant was dishonest in falsifying his time sheets but presented insufficient evidence to prove this charge. This charge is dismissed.

Retaliation

Government Code section 19572, subdivision (x) provides that an employee may be disciplined for unlawfully retaliating against another employee who reports information to an appropriate authority concerning an actual or suspected violation of any law occurring on the job. In support of the charge of retaliation, Caltrans alleged that appellant attempted to intimidate Berexa for reporting to appellant's supervisors that he was using Caltrans equipment for personal gain. The Department failed to prove by a preponderance of evidence, however, that Berexa was, in fact, intimidated by appellant. Berexa testified to being uncomfortable with appellant being in her cubicle but acknowledged that appellant was congenial as usual. The charge of retaliation is dismissed.

Other Failure of Good Behavior

Although, as noted above, we do not find that appellant's conduct towards Berexa constituted retaliation under the Government Code, we do find that his conduct towards her constitutes other failure of good behavior which is of such a nature that it causes discredit to the employer or to appellant's employment pursuant to Government Code § 19572, subdivision (t). Appellant's interaction with Berexa was calculated to make Berexa feel that appellant's

(Crovitz continued - Page 26)

conduct was somehow justified and that she was in the wrong for reporting him.

Penalty

When performing its constitutional responsibility to review disciplinary actions [Cal. Const. Art. VII, section 3(a)], the Board is charged with rendering a decision which is "just and proper". Government Code § 19582. To render a decision that is "just and proper," the Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board considers are those specifically identified by the Court in Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194 as follows:

...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in [h]arm to the public service. (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (Id. at 217-218.)

The Department proved that appellant inappropriately used Caltrans equipment to conduct his personal business. In addition, appellant continued to use his state owned computer for personal business after being told to stop. The harm to the public service is evident when state property is being misused for a private purpose. The taxpayer has a right to insist that equipment purchased for state use is not used for other purposes.

Given the totality of our findings, however, we do not believe

(Crovitz continued - Page 27)

that dismissal is the appropriate penalty. The circumstances surrounding appellant's misuse of state property include evidence that Caltrans policies concerning the use of state equipment were not well promulgated. Appellant's own supervisor did not know that using Caltrans equipment for personal business was prohibited. The fact that his supervisor at one time approved appellant's personal use of the computer equipment also mitigates against appellant's dismissal. In addition, we note that there was also disagreement among the Caltrans managers over whether the use of the state's telephone number for personal business should be prohibited. Thus, while we do not doubt that appellant knew or should have known that using state equipment for these non-state purposes was wrong, we also believe that he was misled as to the seriousness of his offenses.

Appellant's employment history includes 8 years of unblemished service as an excellent employee. Given appellant's record, we find the likelihood of recurrence low.

While we agree with appellant that dismissal is unwarranted, under all the circumstances, we do not agree with his contention that, in keeping with the Board's decision in Alan Torres (1996) SPB Dec. No. 36984, a 30 day or less suspension is appropriate. Torres concerned appellant's co-worker who, while assisting appellant in his personal business, also used misused state computers. The Board imposed a 30 days' suspension on Torres.

(Crovitz continued - Page 28)

The situations are not completely parallel. In Torres, the Board was impressed that Torres, a 17-year employee, was extremely open and cooperative once his direct supervisor asked him if he had been performing personal work. Although we do not know how cooperative Crovitz was in his investigation, we do know from his interactions with Sherril Berexa that he sought to justify his conduct. In fact, while we did not find that his conduct toward Berexa was sufficiently egregious to constitute retaliation, we did find that the interaction was calculated to make Berexa feel that she was in the wrong for reporting appellant. The conduct of criticizing an employee for reporting misconduct should be judged seriously. In addition, while Torres was doing some personal work on state equipment, appellant was actually running a business. Thus, while the circumstances of this case mitigate against the original dismissal taken by the Department, they do not require that appellant be punished at exactly the same level as Torres.

A 90 days' suspension should serve to warn appellant that the unauthorized use of state property will be taken seriously.

CONCLUSION

For all of the above reasons, we find that the dismissal taken against appellant by Caltrans should be modified to a 90 days' suspension.

ORDER

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

1. The dismissal of Jeffrey Crovitz from position of Associate Bridge Engineer with the Department of Transportation at Sacramento is modified to a 90 days' suspension.

2. Caltrans shall pay to appellant all back pay and benefits that would have accrued to him had he been suspended for ninety days instead of dismissed.

3. This matter is hereby referred to the Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due appellant.

4. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

THE STATE PERSONNEL BOARD

Lorrie Ward, President

Floss Bos, Vice President
Ron Alvarado, Member
Richard Carpenter, Member
Alice Stoner, Member

* * * * *

(Crovitz continued - Page 30)

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on December 3-4, 1996

C. Lance Barnett, Ph.D.
Executive Officer
State Personnel Board