

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 29938
)
 JOHN D. LENG) **BOARD DECISION**
) (Precedential)
 From official reprimand from the)
 position of Office Technician with) **NO. 93-19**
 the Department of Motor Vehicles)
 at Sacramento) July 6, 1993
)

Appearances: Janusz Seramak, Attorney, California State Employees' Association, on behalf of appellant; Kaye Krumenacker, Staff Counsel, Department of Motor Vehicles, on behalf of respondent.

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

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of an Administrative Law Judge (ALJ) in the appeal of John D. Leng (appellant), Office Technician with the Department of Motor Vehicles (DMV or respondent), from an official reprimand. Appellant was reprimanded by the DMV for parking his car all day outside of the DMV's building in a one-hour parking zone while displaying a handicapped placard which did not belong to him.

The ALJ who heard the case found appellant's actions to constitute dishonesty, but revoked the official reprimand on the grounds that appellant had been sufficiently punished when he paid

¹ President Richard Carpenter was present via speaker-phone.

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a fine to the DMV for the contemporaneous violation of the Vehicle Code.

The Board rejected the ALJ's Proposed Decision and determined to decide the case itself, based upon the record. After a review of the entire record, including the transcript, the written briefs submitted by the parties, and the oral arguments presented to the Board, the Board sustains the penalty of an official reprimand.

FACTUAL SUMMARY

Appellant went to work for the DMV in February of 1985. He has no prior adverse actions. In May of 1990, he assumed the position of Office Technician. Prior to taking this position, appellant served for a number of years as a Field Representative for the DMV. The position of Field Representative required that he answer questions from the public about the DMV's laws and regulations. Thus, appellant should be knowledgeable about the DMV rules as they pertain to the parking of motor vehicles and the use of disabled person placards.

On or about May 13, 1991, a Special Investigator for the DMV, Ed Loveless, received a complaint that appellant was unlawfully parking his car outside the DMV building in time-restricted parking places using a disabled person placard. Mr. Loveless subsequently drove around the DMV building until he located appellant's car in a one-hour restricted parking space. Appellant's car had a disabled person placard prominently displayed on the dashboard.

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Placards of this type are issued by the DMV to persons who require special parking privileges due to physical limitations. A car bearing such a placard indicates to law enforcement officials that the driver of the vehicle has been approved by the DMV to use the placard. Vehicle Code section 4461(c) provides that no person shall display a disabled person placard that was not issued to him or her, except when transporting disabled persons.

The disabled person placard displayed by appellant was not issued to him, but to his wife. Since appellant's wife did not accompany the appellant to work, appellant was in violation of the law by displaying the placard on his vehicle while it was parked at his work. Appellant was subsequently cited by the DMV in its law enforcement capacity for violation of Vehicle Code section 4461(c), a misdemeanor. Appellant eventually settled the matter by pleading guilty to an infraction of the Vehicle Code and was fined \$104.²

The DMV subsequently served appellant with an official reprimand for violations of Government Code section 19572, subdivisions (f) dishonesty, and (q) violation of Board Rule 172.³

The ALJ who heard the case found appellant's actions constituted dishonesty under subdivision (f). The ALJ revoked the official

² It is not clear from the record as to which Vehicle Code section appellant plead guilty.

³ Pursuant to the Board's Precedential Decision in the matter of D. [REDACTED] . M. [REDACTED] (1993) SPB Dec. No. 93-06, the charge of violation of Board Rule 172 is dismissed.

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reprimand, however, on the ground that since appellant was both cited and disciplined, he was being punished twice for the same misconduct. Further, the ALJ concluded that appellant's payment of a \$104 fine was sufficient punishment under the circumstances.

ISSUES

1. Whether appellant's actions constituted actionable dishonesty?
2. Whether the fact that an employee was punished criminally under the Vehicle Code should preclude the employer from taking disciplinary action based on the same misconduct?
3. Whether the penalty of an official reprimand is appropriate under all of the circumstances?

DISCUSSION

Dishonesty

Appellant argues that the official reprimand is not warranted as he was not dishonest in his actions. He asserts that the hospital which took care of his wife during her illness instructed him to keep the placard in his car at all times. He claims that that is the reason he did not remove it from the windshield when he drove the car to work. Moreover, he contends that he did not use the placard with the intent to circumvent the parking laws because it was his understanding from the instructions on the back of the placard that it could only be used for three specific purposes: parking in disabled person zones, metered-parking zones and green zones. Appellant claims that because one-hour time zones were not

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specifically listed on the placard, he did not realize that he would avoid a ticket by its use. He claims he was not trying to be deceitful by parking in the one-hour zone with the placard.

The ALJ who heard the case considered all of these arguments which were raised at the hearing, but nevertheless found that Leng acted dishonestly with respect to the use of his wife's placard. The Board concurs with this finding.

It is difficult to believe that appellant, a former DMV Field Representative, thought he was supposed to display the disabled persons placard on his windshield when his wife was not with him. It is equally unbelievable given appellant's background, that appellant thought that the placard would not help him avoid a parking ticket when parked all day in a one-hour zone. Appellant's offering of multiple excuses for his actions only adds to the appearance of appellant's wrongdoing. We find sufficient evidence in the record that appellant was dishonest in his actions.

We further find that the dishonesty was reasonably related to appellant's position at the DMV. As a DMV employee, appellant had a special responsibility to respect the laws and obligations pertaining to vehicles and parking privileges. By misusing the disabled person placard, appellant was disregarding the very rules which his employer is charged with upholding, and with which he

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should be familiar as a DMV employee. Appellant's misconduct clearly related to his employment with the DMV.

"Double-Jeopardy"

Appellant contends that the DMV should not discipline him for the same conduct for which he was cited under the Vehicle Code. We disagree.

Departments may, and often do, impose adverse actions against employees based on conduct otherwise punishable outside the civil service system. Just as there need not be a criminal conviction for an employee to be disciplined for misconduct (M ██████████ M ██████████ (1993) SPB Dec. No. 93-11, p. 5, fn. 3), conversely an employee can not avoid discipline merely because he or she was convicted or fined under the criminal laws for the same misconduct. See Szmaciarcz v. State Personnel Board (1979) 79 Cal.App.3d 904, 921.

Appellant, in fact, concedes that under certain circumstances a state department may take disciplinary action against an employee for the same conduct for which the employee was previously criminally punished. He argues, however, that the Board has no right or precedent to allow an adverse action to stand against an employee, who has committed only an infraction of the Vehicle Code.

We find that the fact that appellant plead guilty to an infraction of the Vehicle Code, rather than to a criminal misdemeanor, to be irrelevant to the question of whether appellant can be disciplined for his dishonesty. All that is required for

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the appointing power to take adverse action for dishonesty is that the dishonesty be rationally related to the appellant's employment.

Whether the appellant was charged in a separate legal proceeding for the underlying misconduct, and the severity of those charges, does not and should not automatically dictate whether adverse action can be taken for dishonesty under the Government Code.

Penalty

Finally, appellant argues that even if it is determined that the appellant was dishonest, an official reprimand is too severe a penalty given the fact that he has already paid a \$104 fine. The DMV contends, on the other hand, that formal discipline on applicant's personnel record in addition to the fine is warranted under the circumstances of this case. The DMV further contends that given appellant's background with the DMV, his conduct was particularly egregious.

The Board finds that an official reprimand in this instance is a "just and proper" penalty irrespective of the fact that appellant also received a fine for the infraction of the vehicle code. His action had the potential to harm the public service. The fact that a DMV employee is violating the very laws DMV is authorized to enforce by making fraudulent use of one of its disabled person placards may cause embarrassment to the DMV as an agency with oversight of the disabled placard program. The public may be led to believe that the DMV is offering its employees special

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privileges not available to the public at large. By taking formal disciplinary action, the DMV sends a strong message to its employees that not only are they expected to abide by the laws as citizens, but also as employees of the DMV, the agency charged with implementation of the law.⁴

The Board finds that under the circumstances of this case, the potential harm to the public service justifies an official reprimand and that an official reprimand is an appropriate penalty in addition to the fine appellant has paid.

ORDER

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

1. The above-referenced adverse action of an official reprimand is sustained.

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

THE STATE PERSONNEL BOARD*
Richard Carpenter, President
Alice Stoner, Vice President
Lorrie Ward, Member

*Members Floss Bos and Alfred R. Villalobos were not on the Board when this case was originally considered.

* * * * *

⁴ We do not intend to imply that every Vehicle Code violation by a DMV employee justifies adverse action. The fraudulent nature of appellant's infraction in this case, and the possible reflection of appellant's misconduct on the DMV as noted above is determinative of the outcome of this case.

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on July 6, 1993.

Officer

GLORIA HARMON
Gloria Harmon, Executive

State Personnel Board