BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 31559
	)	
LESBHIA F. MORONES	)	**BOARD DECISION**
	)	(Precedential)
From a 10% reduction in salary for	)	
6 months from the position of Motor	)	
Vehicle Field Representative with	)	**NO. 93-23**
the Department of Motor Vehicles in	)	
Oakland	)	August 3, 1993

Appearances: Robert L. Mueller, Attorney, California State Employees' Association, representing Lesbhia F. Morones, appellant; Kaye Krumenacker, Staff Counsel, Department of Motor Vehicles, representing Department of Motor Vehicles, respondent.

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

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 Lesbhia F. Morones (appellant) from a 10% reduction in salary for six months from the position of Motor Vehicle Field Representative with the Department of Motor Vehicles (DMV or respondent).

The ALJ found that while appellant was tardy for relatively short time periods on approximately 54 occasions between December 1991 and May 1992, discipline was not appropriate. In her Proposed Decision, the ALJ attributed appellant's tardiness to general societal problems beyond the appellant's control such as child care, heavy traffic, and unreliable transportation. The ALJ concluded that, rather than punishing appellant, the DMV should attempt to accommodate her in some way.

The Board rejected the Proposed Decision, determining to hear the case itself based upon the record of the hearing, the written arguments submitted by the parties and the oral arguments presented to the Board. Based upon this review, the Board sustains the salary reduction, but modifies the amount of the reduction from 10% for six months to 5% for six months.

FACTUAL BACKGROUND

Appellant began work for the State in 1977 as a Clerk Typist for the Department of Transportation. She was promoted by the Department of Transportation first to an Office Assistant II, and then to a Junior Engineering Technician. In March of 1989, appellant transferred to the DMV as a Motor Vehicle Field Representative. As a Motor Vehicle Field Representative, Ms. Morones' duties included interpreting, applying and explaining DMV laws and policies to the general public, by phone and in person, and conducting various procedures for the public including registration of automobiles, and licensing of drivers and dealers.

Originally, appellant began working for the DMV on the regular shift, which began at 8 a.m.. At some point, however, the DMV attempted to accommodate the appellant by allowing her to work the late shift, which required her to begin work at either 8:15 or 8:30 a.m. (depending upon whether she was on the phones that day or behind the counter) and 10:00 a.m. on Thursdays.

Appellant received an adverse action of a 5% salary reduction for 3 months effective December 10, 1991, based upon 45 allegedly unexcused tardies which had occurred between March and October of 1991. Appellant and the DMV subsequently entered into a stipulated settlement of this adverse action, which was approved by the Board on August 18, 1992. The settlement provided that the DMV would withdraw its adverse action against appellant if appellant had no more than two unexcused tardies within six months of April 15, 1992, the date upon which the settlement was signed by the appellant. In the meantime, appellant was placed on an "attendance memo" whereby her attendance was strictly monitored by her DMV supervisors.

Appellant received the instant adverse action in May 1992. The adverse action charged appellant with violations of Government Code section 19572, subdivisions (d) inexcusable neglect of duty, (j) inexcusable absence without leave, (o) willful disobedience, and (q) violation of this part or board rule, specifically violation of Board rule 172.[1] The charges were based upon appellant's continued unexcused tardies which occurred during the period of December 1991 through May 1992. The DMV alleged that during this period, appellant was inexcusably tardy on approximately 54 occasions for a total of approximately 9 1/2

[1] The charge of violation of Board Rule 172 is dismissed pursuant to Board precedent. D[redacted]. M[redacted] (1993) SPB Dec. No. 93-06.

hours. For these absences, appellant was charged with 8.7 hours of absence without leave ("AWOL") and her pay was docked accordingly.[2]

Appellant testified at the hearing and admitted to the following instances of tardiness. She was late reporting to work on December 12, 19, and 24, 1991 for a total of 6 minutes. She was late in January 1992 on 7 different days for a total of 1 hour and 58 minutes. In February of 1992, she admits to being late to work on ten separate occasions for a total of 36 minutes. For March 1992, appellant admits she was tardy six times for a total of 31 minutes. For the month of April, appellant admits she was late reporting to work on 8 occasions for a total of 52 minutes. Finally, in May, appellant concedes she was late on five occasions for a total of 72 minutes. As to the remaining alleged tardies, appellant either denied she was tardy or could not recall the occasions cited.

The record further reflects that a majority of the tardies were for periods of five minutes or less, and that the appellant generally admitted to not having "a reason" for being tardy in those instances. In most of the instances where appellant admitted to being tardy for any greater length of time, the appellant cited

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[2] The record reveals that it was DMV's policy not to charge employees as "AWOL" until at least a total of six minutes had been accumulated in any one month. Employees could still be disciplined, however, for being less than six minutes late.

reasons which generally fell into three categories -- car trouble, heavy traffic, and child care problems.

Appellant testified that her spouse works evenings and is not home in the morning to assist with getting the children off to school. If on a particular morning there is a problem with one of the children, appellant will run late that day. In addition, the automobile which appellant drives to work is over ten years old and is often unreliable. Appellant can not afford to buy a new car so she is often late as a result of scrambling for alternative transportation.

The DMV, on the other hand, provided evidence in the record that it is in a consumer-service business with numerous employees. The fact that one employee is even a few minutes late impacts not only customers who must wait to be served, but fellow workers whose own schedules are then disrupted.

ISSUE

Applying the concept of progressive discipline, what is the appropriate penalty, if any, to be imposed under all of the circumstances in this case?

DISCUSSION

Appellant admits to being tardy to work on numerous occasions, despite a prior adverse action and numerous counseling sessions warning against such behavior. We begin our review of this case with the assumption that employers have the right to discipline

employees for repeated instances of tardiness.

In a recent precedential decision, Frances P. Gonzales (1993) SPB Dec. No. 93-13, the Board stated at pp. 3 and 4:

> "The parties to an employment relationship rely upon the precept that the employer is obligated to pay agreed upon wages and benefits and the employee is obligated to perform his or her work in a satisfactory manner. Dependable attendance is one element of satisfactory work. The employee who does not report to work in a timely manner is not performing satisfactory work in that he or she is failing to meet one of the primary responsibilities as an employee. Employers have the right to expect their employees to report for work on the day and at the time agreed, and may discipline employees for their failure to meet that expectation." Citing Abrams & Nolan, Toward A Theory Of "Just Cause" in Employee Discipline Cases, 1985 Duke L.J. 594, pp. 611-614.

While the appellant does not deny her tardiness, she presented the Board with numerous arguments as to why discipline is improper in this case. These arguments are discussed below.

Appellant's Request For Reasonable Accommodation

Appellant contends that the discipline imposed in this instance is unjustified because the DMV has a legal obligation to reasonably accommodate her particular family-care needs. Specifically, appellant argues that statutory directives and established public policy mandate that appellant's tardies be tolerated because they are attributable to the general "societal" problems that come with being a working mother of five children.

Appellant cites Education Code section 8850 and Government Code section 19827.2 as statutes which provide authority for the Board to require the DMV to reasonably accommodate appellant by allowing her to be tardy when she needs to fulfill child-care responsibilities. Education Code section 8850 declares, in part:

> ...[t]he family is our most fundamental social institution, and the institution which plays the most influential role in the growth of each individual human being.

Government Code section 19827.2 declares legislative findings with respect to the salaries of working women. These code sections, however, express only prefatory findings by the legislature, codified in legislation mandating state-sponsored parent/child education programs and Department of Labor comparative salary studies. They are not statutory directives which require that the DMV make reasonable accommodation for child-care needs by allowing appellant to incur excessive tardies over a prolonged period of time without disciplinary consequences. Appellant's argument that the SPB must require DMV to reasonably accommodate her child-care needs is simply not supported by current law.

Not only is appellant's request for reasonable accommodation unsupported by existing law, but it is also unsupported by the record in this case. In the instant case, appellant admitted that only a fraction of appellant's tardies were attributable to child-care problems. Nevertheless, the DMV did attempt to accommodate appellant when it permitted her to work the late shift.

Apparently, the later schedule did not solve appellant's tardiness problem.

Furthermore, as noted more particularly below, DMV's insistence that appellant adhere to her assigned schedule was not arbitrary or unreasonable. Appellant's job duties involved front-line contact assisting the public, both on the phone and in person. Clearly the public can not be served if appellant is not present to perform her work.

The Board is aware of the difficulties facing all working parents of young children. The Board fully encourages state employers to make use of alternative work schedules and to devise other creative solutions which will allow working parents to meet both their familial obligations and the needs and expectations of their employers. The Board's role is not, however, to mandate that in every case a state employer must provide reasonable accommodation, notwithstanding the impact upon the public service. If the difficult issue of balancing family and the work place needs to be addressed in law, it must be addressed by the legislature.[3]

Harm To The Public Service

Citing Skelly v. State Personnel Board (1975) 15 Cal.3d 194,

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[3] Since the adverse action was served, a bill has been introduced into the legislature (A.B. 1293) which would require reasonable accommodation be given for family care needs, absent undue hardship. At the time this decision was written, the bill is in the Senate Finance Committee.

appellant contends that discipline is inappropriate in her case as

the DMV did not prove that appellant's tardiness caused any harm to the public service. We disagree.

As we stated in Frances P. Gonzalez (1993) SPB Dec. No. 93-13 at p. 4:

> An employee's failure to meet the employer's legitimate expectation regarding attendance results in inherent harm to the public service. The tardiness of one employee, if tolerated, adversely affects the morale of those who meet their obligations.

In Bettie Davis v. Department of Veterans Affairs (Fed. Cir. 1986) 792 F.2d 1111, a nurse was dismissed by the Department of Veterans Affairs ("DVA") for being absent without leave for over a week. She argued that dismissal was inappropriate as the DVA failed to prove that her unexcused absence from her job had an adverse impact upon her job performance, her reliability or that of any other employees. The federal court dismissed Ms. Davis' arguments and upheld the dismissal, finding that:

> ...an unauthorized absence by its very nature disrupts the efficiency of the service... an essential element of employment is to be on the job when one is expected to be there. To permit employees to remain away from work without leave would seriously impede the function of an agency. Id. at p. 1113. (Emphasis added.)

Similarly, we find that the very nature of an unexcused absence or tardy by one whose position it is to serve the public creates an inherent harm to the public service.

Appellant, cites to Skelly v. State Personnel Board, supra, for the proposition that the DMV must provide specific evidence of the harm to the public service, and that DMV did not meet their

burden in this case. On the contrary, we find that the Skelly court recognized that failure to adhere to a work schedule in and of itself can, and will, justify discipline.

In Skelly, the Supreme Court revoked the dismissal of a physician at the Department of Health Services. Dr. Skelly had been dismissed for being tardy from lunch on numerous occasions and for being absent without leave for a few hours on a couple of days. The Court found Dr. Skelly's dismissal to constitute excessive punishment under the circumstances, and set forth several factors to consider in determining the appropriate penalty.

> ...we 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, harm to the public service. [citations] Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. Skelly v. State Personnel Board, 15 Cal.3d at 218.

Appellant cites to Skelly in her written argument as supporting her position because the Court stated:

> ...the record is devoid of evidence directly showing how petitioner's minor deviations from the prescribed time schedule adversely affected the public service.

What appellant overlooks, however, is the fact that in Skelly the record contained evidence that the Department of Health Services allowed latitude in its hours with respect to professional people in the office and that, as a professional, appellant was allowed to make up time by skipping coffee breaks and working evenings and holidays. The record in Skelly further revealed that Dr. Skelly

(Morones continued)

worked alone, did not assist members of the public as they walked in, and was more or less free to schedule his breaks and lunches to suit his convenience.

Even under those very generous circumstances, however, the Supreme Court noted:

> An administrator may properly insist upon adherence to a prescribed time schedule, as this may well be essential to the maintenance of an efficient and productive office. Nor do we imply that an employee's failure to comply with the rules regulating office hours may not warrant punitive action, possibly in the form of dismissal, under the appropriate circumstances. Indeed, in the instant case, a less severe discipline is clearly justified; and we do not rule out the possibility of future dismissal if petitioner's transgressions persist. Skelly at 219. (Emphasis added.)

Thus, Skelly stands for the principal that inherent harm is created when an employee is consistently tardy to work and that a simple failure to follow one's assigned hours may warrant discipline. Contrary to appellant's arguments, the Court found only that the penalty of Dr. Skelly's dismissal was too harsh under the circumstances, not that Dr. Skelly should not be punished at all.

The facts in the instant case are much more compelling than

those in Skelly. In the instant case, the record reveals that appellant and all other DMV workers in the office were required to be present during working hours to assist members of the public in a timely manner. Moreover, since appellant worked in a large public-service office with a number of employees who were all

entitled by union contract to certain time-allotted breaks, lunches, etc., her tardiness, even if minimal, adversely impacted fellow employees in a domino-effect. We find harm to the public service from appellant's tardiness is not only inherent, but is also apparent from the particular record in appellant's case.

Appropriateness of Penalty

Having dismissed appellant's arguments, the Board finds that the DMV has the right to impose discipline against the appellant for her repeated tardiness. The Board further finds, however, that the penalty imposed upon the appellant, a 10% reduction in salary for six months, is too severe under the circumstances.

As noted in the case of Skelly v. State Personnel Board, supra:

> While the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, it does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion. (Citations.) 15 Cal.3d at 217-218.

In exercising its judicial discretion, the Board is charged with rendering a decision, which, in its judgment, is "just and proper." Government Code, section 19582. One aspect of rendering a "just and proper" decision is assuring that the penalty is "just and proper." In determining what is a "just and proper" penalty for a particular offense, under a given set of circumstances, the Board

has broad discretion; it is not obligated to follow the recommendation of the employing power. (See Wylie v. State Personnel Board (1949) 93 Cal.App.2d 838, 843.)

As noted above, the Supreme Court in Skelly v. State Personnel Board set forth several factors for the Board to consider in assessing the propriety of the imposed discipline. Among the factors to be considered is the extent to which the employee's conduct resulted in, or if repeated is likely to result in harm to the public service, the circumstances surrounding the misconduct and the likelihood of its recurrence.

In this case, appellant's conduct, if repeated, is likely to result in further harm to the public service. Continued tardiness by the appellant may negatively impact the morale of fellow employees who must rearrange their own schedules in order to "cover" for the appellant. Moreover, appellant's tardiness could ultimately impact the reputation of the DMV office in the eyes of the public who may suffer delays in service because of appellant's absence.

Respondent has imposed progressive discipline in appellant's case. Certainly discipline greater than that imposed on appellant in the first adverse action, a 5% salary reduction for three months, is warranted.

While stronger adverse action may be justified to prevent further harm, we hesitate to uphold a penalty as severe as a 10% salary reduction for six months under all the circumstances.

The majority of appellant's tardies were for very short periods of time, generally under five minutes. Of those tardies that were longer, some were attributable to highly unusual circumstances, such as appellant's car being vandalized. The record indicates that appellant is otherwise a conscientious employee. She may not have exerted the effort put forth by other working parents in state service, however, to find a means to deal with her personal concerns and still ensure that she can get to work on a timely basis. While appellant's excuses for her tardiness and the de minimis nature of many of the tardies do not preclude the DMV from imposing discipline for appellant's conduct, these factors may be considered in assessing the proper level of penalty.

In addition, the Board finds evidence in the record that appellant's attendance improved after the issuance of the second adverse action. The Board would like to give appellant the benefit of the doubt that she has taken steps towards resolving the personal issues that contributed to her tardiness problem and towards avoiding further adverse action.

CONCLUSION

Appellant's repeated tardiness violated Government Code section 19572, subdivisions (d) inexcusable neglect of duty, (j) inexcusable absence without leave and (o) willful disobedience. Having considered all of the circumstances, we conclude that an appropriate penalty is a 5% reduction in salary for a period of six months.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Government Code sections 19582 and 19584, it is hereby ORDERED that:

1. The adverse action of a 10% reduction in salary for six months is modified to a 5% reduction in salary for six months.

2. Respondent shall pay the appellant all back pay and benefits that would have accrued to her had she received a 5% salary reduction for six months instead of a 10% salary reduction for six months.

3. This matter is hereby referred to an 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.

STATE PERSONNEL BOARD*

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

*Member Floss Bos was not present and therefore did not participate in this decision. Member Alfred R. Villalobos was not a member of this Board when this case was originally heard and did not participate in this decision.

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at it meeting on August 3, 1993.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board