BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 31600
	)	
JEROME G. WENDT,	)	**BOARD DECISION**
	)	(Precedential)
	)	
From demotion from the position of Senior Air Resources Engineer to Associate Air Resources Engineer with the Air Resources Board at El Monte	)	**NO. 95-16**
	)	
	)	November 1-2, 1995

Appearances: Stephen D. Beck, Staff Consultant, Professional Engineers in California Government on behalf of appellant, Jerome G. Wendt; James R. Ryden, Staff Counsel, Air Resources Board on behalf of respondent, Air Resources Board at El Monte.

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) after the Board granted the Petition For Rehearing filed by Jerome Wendt (appellant). The Board had adopted the Administrative Law Judge's (ALJ's) Proposed Decision to sustain appellant's demotion from the position of Senior Air Resources Engineer to Associate Air Resources Engineer at the Air Resources Board (Department) based upon numerous instances of drunken behavior on duty, as well as several unapproved absences.[1] In granting appellant's Petition

[1] The ALJ originally filed with the Board a Proposed Decision which the Board rejected and remanded to the ALJ at its meeting of August 9, 1994. The Board remanded the case to the ALJ to address whether one of the allegations made against appellant (drunkenness on duty on February 7, 1991) was precluded as the basis for adverse action since it was the subject of a corrective interview memorandum issued to appellant. The ALJ reviewed this issue and henceforth filed a new Proposed Decision with the Board. This decision held that the allegation was precluded as the basis for adverse action as it was the subject of informal discipline. The Board subsequently adopted this Proposed Decision on December 20, 1994. It was from this decision that appellant filed the Petition For Rehearing.

For

Rehearing, the Board asked the parties to brief the issue of whether the factual discrepancies asserted in the appellant's petition should affect the Board's conclusion to sustain the demotion; whether the appellant was rightfully demoted considering the Board's prior decision in William Aceves Jr. (1992) SPB Dec. No. 92-04; and, whether there was post-dismissal evidence of appellant's rehabilitation sufficient to warrant mitigation of the penalty.[2]

After a review of the entire record, including the transcripts, exhibits, and the written and oral arguments of the parties, the Board finds that appellant was inefficient, drunk on duty, and inexcusably absent without leave in violation of Government Code section 19572, subdivisions (c), (g) and (j). We further find that, even assuming appellant's misconduct were attributable to appellant's alleged alcoholism, federal and state anti-discrimination laws would not shield appellant from discipline for his alcohol-related misconduct. Finally, we conclude that

[2] Appellant alleged that the ALJ made several erroneous findings of fact, particularly in paragraphs 20, 21 and 22 of the Proposed Decision concerning what transpired between Cross, Drachand, and appellant at various meetings. In reviewing the record of the hearing, we found a few minor errors in the Proposed Decision, which have been corrected in this decision.

neither the reasoning set forth in the Board's William Aceves Jr. decision, nor principles of post-discipline rehabilitation, warrant mitigation of appellant's penalty.

FACTUAL SUMMARY

Appellant began his career with the State of California in 1971 as an Associate Air Resources Engineer with the Department. In 1975, he was promoted to the position of Senior Air Resources Engineer, where he remained until the time of his demotion.

As Senior Air Resources Engineer in the Mobile Sources Division, appellant was part of the management team responsible for a broad range of engineering, technical and administrative projects relating to the control of emissions from mobile sources. His activities included technical and regulatory assessments, emission inventory, activities to develop motor vehicle emission test plans and the evaluation of engineering test data. He was responsible for conducting public workshops, interacting with public agencies, reviewing and drafting various documents, and testifying at Air Resource Board hearings. Appellant was also responsible for hiring and supervising the work of five engineers who worked under him, and with whom he interacted on a daily basis.

Appellant was transferred to the Planning Section of the Mobile Sources Division in July of 1989, where he was placed under the immediate supervision of Robert Cross (Cross). His second line supervisor was K. Don Drachand (Drachand). At the time appellant

was transferred into this unit, Cross was told by various sources that appellant was a problem drinker and that he often appeared to be inebriated at work. Upon appellant's transfer, Cross discussed with appellant the information he had received about appellant's drinking, told him that such behavior was unacceptable, and suggested that he take advantage of the Employee Assistance Program offered through work in order to solve the problem. Appellant denied having any alcohol problem, stating instead that his only problem was a medical problem related to his diabetes, which caused the appearance of intoxication. Cross suggested that if appellant had such an ongoing medical problem, he should obtain medical substantiation. Appellant refused to do so. On and off throughout the remainder of 1989 and into 1990, Cross received several complaints from engineers on appellant's staff that appellant appeared to be drunk at work.

In 1991, appellant's episodes of intoxication escalated. On February 6, 1991, appellant came in late to a meeting involving representatives of the locomotive industry. When he arrived at the meeting, he spoke boisterously as he entered the room, emitting the smell of alcohol and appearing to several persons present at the meeting, including Cross, to be highly intoxicated. When industry representatives asked appellant simple questions which he should have been able to answer, appellant had trouble formulating his thoughts, much less talking at all. When confronted by Cross after

the meeting in a corrective interview, appellant denied that he was drunk at the meeting, explaining that his diabetes was acting up and he was simply having a bad day that day. When asked again by Cross to provide medical evidence to substantiate his claim, appellant refused. Cross counselled appellant in a memorandum dated February 7, 1991 that behavior such as that exhibited at the meeting could not continue and he again urged appellant to solve his problem, either by seeking assistance from the Employee Assistance Program or medical help.[3]

Several months later, on July 30, 1991, appellant attended an Alternative Fuel Retrofit Workshop. Several employees testified that appellant appeared to be very drunk at this workshop, that he was slurring his words, emitting the smell of alcohol and speaking incoherently.

On August 9, 1991, at a meeting with the railroad industry, appellant again appeared to several persons in attendance at the meeting to be drunk.

Just two weeks later, on August 28, 1991, appellant was again witnessed by his staff to be drunk, slurring his words, drooling, walking unsteadily, and ranting and raving in a loud voice about

[3] We do not find that this memorandum constituted informal discipline under Steven P. Richins (1994) SPB Dec. No. 94-10. The memorandum merely summarized the counselling session which occurred the previous day. The memorandum specifically stated that it was not intended to be punitive and, moreover, the memorandum did not indicate that further action would not be taken.

having his salary cut by 5 percent.[4] One employee later witnessed appellant going out to his car, reaching behind his driver's seat and finding a bottle, but did not see him take a drink. Later that morning, appellant left work early without seeking permission or informing Cross, his supervisor.

When confronted by Cross the next day about the previous days' incidents, appellant denied having been drunk and again pointed out that he had a medical condition. In response, Cross sent appellant an electronic mail message, reiterating his request that appellant provide medical evidence of any condition he might have. He also informed appellant that he was considering initiating adverse action against him based upon these continuing incidents. In response to this note, appellant reiterated to Cross that his problem was purely medical, stated that he felt he was the subject of discrimination, and that he (appellant) should be the one seeking adverse action against Cross.

After receiving more complaints in September from appellant's staff concerning appellant's drunken behavior, Cross formally asked appellant to seek medical substantiation of any medical condition he might have by referring him to a medical examination pursuant to Government Code section 19253.5. Appellant refused to comply with this request, stating he would appeal such

[4] This salary reduction was not part of any adverse action, but was an across-the-board reduction imposed on managers and supervisors by the State.

a decision and further threatened Cross with a lawsuit. Cross decided to hold back on the referral to double-check that he had the authority to order appellant to take a medical examination.

In the meantime, on October 9, 1991, appellant was interviewing candidates for Air Resource Engineering positions with a fellow employee. During the interview, appellant demonstrated drunken behavior, slurring his words, speaking incoherently, and emitting the odor of alcohol. Several times during the interview, appellant interrupted the interviewee and spoke abruptly and loudly. The fellow interviewer sought out Cross after the interview and insisted that appellant be replaced as one of the interviewers. Cross obliged and immediately gave appellant's interviewing duties to another employee.

Two weeks later, on October 23, 1991, appellant failed to show up for work and did not bother to call.[5] Cross verbally counselled him about this unexcused absence, but indicated that, this time, he would overlook it.

Exasperated with the complaints concerning appellant's behavior and the repeated incidents concerning appellant, and having assured himself of his legal authority, Cross issued a formal request to appellant pursuant to Government Code section 19253.5 ordering that he be medically examined by a physician to

[5] The record reflects that a coworker phoned appellant's home around noon and at that time, appellant claimed a close friend had died and that he was not coming in to work.

determine whether he was fit for duty as a Senior Air Resources Engineer. The letter to appellant, dated October 24, 1991, indicated that the medical examination was scheduled for November 6, 1991 and that the Department would pay for the examination. One week later, on October 31, 1991, appellant wrote back to Cross, questioning his authority to order a medical examination for him and indicating that he had no intention of appearing at the examination. In the meantime, on October 25, appellant was again observed by Department staff to be intoxicated at work; slurring his words, emitting the odor of alcohol and walking so unsteadily that he could barely stand up.

Cross responded to appellant's October 31 message, stating that he did have the authority to order a medical examination and that he expected appellant to attend it. Appellant did not, however, attend either the examination or work on November 6, informing Cross only later that his son was in an accident that day. Soon after, appellant, Cross and Cross' supervisor Drachand met to discuss appellant's refusal to attend the medical examination and Drachand reiterated Cross' order to attend a medical examination. Appellant agreed to attend a medical examination, and did so on November 8, 1991.

The results of the medical examination were ultimately forwarded to the State's Medical Officer, Dr. Stephen Weyers, who reviewed the content of the medical report. Upon review of the

report, Dr. Weyers concluded in a letter dated December 6, 1991, that appellant's diabetic condition would not cause him to smell of alcohol, stumble, slur his words, or appear incoherent, and that appellant appeared to be medically fit to report for duty.[6] Dr. Weyers also noted that the medical report showed that Wendt denied ever being drunk at work.

Throughout several occasions in November, appellant was still observed by his employees to be in a state of intoxication at work. Many of these employees complained in confidence to Cross on November 14, 1991 about appellant's behavior and shared with Cross their concern about appellant's retaliating against them, possibly physically, for their complaints. Cross became extremely concerned about the situation.

On or about the morning of December 11, 1991, Cross went to appellant's office to inform him about the results of Dr. Weyers' report, and found appellant asleep on his desk. After waking appellant, Cross informed him of the results of the medical examination and reiterated that he expected appellant to get help for any problems he might have. Appellant became hostile, told Cross that he did not have any problem, and refused to seek help of any kind.

[6] Dr. Weyers' letter did not conclude whether or not appellant was an alcoholic, but noted that alcohol use or abuse was not ruled out by the information provided to him.

The next day, December 12, Cross scheduled a meeting outside of the Department's offices at a local restaurant. In attendance at the meeting were appellant, Cross, and three of appellant's employees. These three employees, among others, had shared with Cross their concerns about appellant's behavior and wanted to get appellant help for what they perceived as his problem with alcohol. At this meeting, appellant's employees confronted him in a constructive manner about the drunken behavior they had observed and about what they perceived as problems in their division attributable to appellant's behavior. Appellant was hostile and defensive during this meeting. Although he told the gathering that he had been getting treatment for months, he refused to expound more on the subject and furthermore refused to agree to any specific course of action to get help.[7]

Because many of appellant's employees were leaving appellant's section, making it clear to management that they did not wish to work with appellant in his present state, the Department decided on December 12 to remove appellant's employees from under him by

[7] This was not the first time appellant had mentioned he was "getting help." For example, he stated the same thing in an electronic mail message in early October. Appellant's claims, however, were difficult for Cross and Drachand to take seriously, as at the same time appellant mentioned he was getting help, he also said it was only to get "them" off his back, he refused to give any specifics as to the treatment he claimed he was receiving, he was hostile to those with whom he spoke, and, most importantly, was still observed thereafter in various states of intoxication.

reassigning them to other projects.[8] The following day, December 13, Cross and Drachand met with appellant to discuss their decision with him. They explained that they were removing his employees from under him and that they would be forced to proceed with an adverse action based upon the numerous complaints they had received regarding his drunken behavior at work unless he proposed a concrete, permanent solution to the continuing problem. Appellant refused to propose any solution, but rather, countered by stating that he was being harassed, that he had been getting his problem solved all along, and that all they (Cross and Drachand) were doing was harassing him. Appellant threatened Cross and Drachand with lawsuits for their harassment and told them to leave him alone. Cross and Drachand left the meeting with appellant, telling him that he had until after the holidays, specifically up until January 6, 1995, to come up with a permanent solution to this problem (i.e. commitment to a specific alcohol rehabilitation program) or else an adverse action would be issued.

Subsequently, appellant did not appear for work on December 17, 18, 19 or 20, 1991; instead, he went to Kaiser-Permanente Hospital. Appellant claimed at the hearing that he went to Kaiser for the purpose of beginning Kaiser's Alcohol Treatment Program. He did not, however, tell anyone at the Department where he was

[8] Neither appellant's position nor salary was changed at this point.

going prior to his first day of absence on the 17th, nor that he would not be coming in for work.[9] It was only on December 18th that appellant notified Cross that he was at Kaiser because of problems with his blood pressure and that he would be out until December 20.[10] Appellant did not bring a physician's note to work to cover the four day absence until January 9, 1992. Despite the fact that Cross found the note to be incomplete (it did not reveal the nature of appellant's condition or any prognosis for appellant), appellant's absences were apparently recorded as sick leave.

On January 6, 1992, Cross and Drachand again met with appellant to find out if appellant had agreed to propose a solution to his recurring problem. Specifically, at this meeting, Drachand told appellant that he wanted a written statement reflecting a solution to the problem of his continuing state of intoxication or an adverse action would be processed. According to Drachand, appellant was still guarded and hostile at the meeting, again claiming that he was being harassed and threatening legal action against both Drachand and Cross. While appellant vehemently denied having any problem, he later asked that Cross leave the meeting,

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[9] Appellant claimed at the hearing that he called in prior to 7:00 a.m. but no one answered the telephone.

[10] The record reveals that appellant did have blood pressure problems and was being examined at Kaiser, at least in part, for those problems.

and proceeded to tell Drachand "off the record" that he was seeing some type of counselor or psychologist. He also showed Drachand a blank Kaiser alcohol treatment contract, but did not discuss the alcohol treatment program he was supposedly undergoing. While appellant refused to divulge any further information to Drachand, he did agree that he would allow Phyllis Carey, a personnel administrator with the Administrative Services Division at the Department, to verify his claim that he was taking care of the problem. Drachand agreed to delay any adverse action until the appellant had a chance to talk to Carey and provide her with pertinent information as to his specific solution to the problem.

Phyllis Carey's supervisor, Sandy Oglesby, contacted appellant by telephone approximately two weeks later. Oglesby told appellant that she was calling on Phyllis Carey's behalf, as there was a vacancy in her section at the moment and Carey was too busy doing two jobs to take the information. Oglesby explained to appellant that she would be happy to convey any medical information he would have given Carey to management in a confidential manner. Appellant refused to give Oglesby any information, telling her that any information that the Department needed had already been provided to Cross on the Return To Work form provided by Kaiser after his absences in December.[11] Appellant further told Oglesby that his

[11] The Return To Work Form did not state any information other than appellant was out from December 17 until December 20, 1991 and could thereafter return to work.

absences in December were due to elevated blood pressure and that the Department had no right to further information beyond that. Appellant never mentioned any alcohol treatment programs to Oglesby and again stated that he was being harassed and threatened legal action against the Department.

In the interim, since appellant was no longer supervising any staff, complaints about appellant's behavior diminished. Management at the Department, however, still perceived the problem to be unresolved as appellant was still hostile and denying that he had any problem with alcohol or his behavior.

Finally, on March 24, 1992, Drachand met with appellant to discuss the situation. Drachand told appellant the Department was offering two final options. The first option was that appellant would agree in writing to undergo a six month alcohol treatment program during which time he would be placed in a non-supervisory position (in essence a temporary demotion) and at the end of the six months, he would receive his former management position back, subject to periodic alcohol blood testing. The second option was that the Department would initiate adverse action against appellant. Appellant agreed to the first option, to enter into an agreement that he would enter into an alcohol treatment program.

When appellant was shown a draft of the agreement on or about April 29, 1992, however, he refused to sign it and threatened a lawsuit. At that time, Drachand told appellant that the Department

would proceed with adverse action. The Department started the proceedings to initiate an adverse action, and an adverse action of demotion was served on appellant on May 29, 1992.[12] The adverse action cited causes for discipline under Government Code section 19572, subdivisions (c) inefficiency, (g) drunkenness on duty, and (j) inexcusable absence without leave.

At the hearing, appellant introduced a number of documents to demonstrate his past and continuing efforts at alcohol rehabilitation. One was a letter dated February 1, 1994 from the Chairman of Downey Beginner's Group of Alcoholics Anonymous which indicated that appellant had participated in the program for over two years. Another was a letter dated July 8, 1992 from a therapist at Kaiser confirming appellant's enrollment in a Chemical Dependency Recovery Program from December 16, 1991 through May 15, 1992. These documents were introduced to demonstrate appellant's rehabilitation efforts. Although appellant denied at the hearing that he was drunk at work as alleged, he did testify that he "identified" as an alcoholic and has since rehabilitated so that he no longer has any drinking problem.

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[12] In the meantime, on or about May 19, 1992, a letter was routed to Drachand and placed in Drachand's files concerning appellant's participation in an alcohol treatment group at Kaiser, implying that appellant was, at that time, seeking professional assistance for his alcohol problem.

ISSUES

1) Assuming appellant is an alcoholic, did the Department have the right to discipline appellant for misconduct arising out of his alcoholism given federal and state laws protecting individuals with disabilities from discrimination?

2) What is the appropriate penalty under the circumstances?

DISCUSSION

Alcoholism As A Defense To Misconduct

We find a preponderance of evidence in the record that appellant was repeatedly drunk while on duty as a supervisor on, at minimum, February 6, July 30, August 9, August 28, October 9 and October 25, 1991. Thus, we find cause for discipline established under Government Code section 19572(g), drunkenness on duty. There were a number of witnesses (whom the ALJ found to be credible) who testified as to appellant's inebriated condition, each citing the fact that appellant slurred his words, stumbled and smelled of alcohol. While appellant still claims he was never drunk at work, no evidence was introduced at the hearing to rebut the contentions by these witnesses, nor was there any medical evidence offered by appellant to support his contention that his appearance was attributable to his diabetic condition. On the contrary, Dr. Weyers' letter stated that appellant's appearance would not be attributable to a diabetic condition. Expert testimony is not required for the finder of fact to conclude that a person is under

the influence of alcohol: lay persons may testify competently as to observing a person in such a condition. People v. Ravey (1954) 122 Cal.App.2d 699. We find that appellant can be disciplined pursuant to section 19572(g).

In addition, we find that there is a preponderance of evidence to discipline appellant for inefficiency under these circumstances. The Board has defined inefficiency to include, inter alia:

> ...an employee's failure to produce an intended result with a minimum of waste, expense or unnecessary effort. R[redacted] B[redacted] (1993) SPB Dec. No. 93-21, page 10.

In this case, appellant's drunken behavior resulted in a number of situations whereby the state's time and resources were wasted. Appellant was dismissed from conducting an interview which he was supposed to be conducting, his subordinate employees were forced to transfer or quit his division, he was found sleeping on the job on at least one occasion, he failed to show up for work on several days without calling in first as required, and, finally, he spoke incoherently to his employees, interviewees and members of the public at various times. Each of these incidents, we believe, created a situation whereby appellant, and ultimately his fellow employees, were not able to do their work in the most effective and efficient manner possible. Thus, we believe that the department has proven that appellant's various acts of misconduct constitute cause for discipline under Government Code section 19572(c), inefficiency.

Finally, we find a preponderance of evidence in the record that appellant was inexcusably absent without leave on August 28 and November 6, 1991.[13] Appellant failed to call in and report for duty those days as required by Cross. Nor were his absences on those days ultimately excused. Thus, we find cause for discipline has been established under Government Code section 19572(j) inexcusable absence without leave.

Appellant contends, however, that the Department cannot discipline him for his various acts of misconduct as his alcoholism entitles him, not to discipline, but to reasonable accommodation. Preliminarily, we note that the record is not altogether clear on the question of whether appellant was an alcoholic at the time of the incidents cited herein, and whether or not all of the misconduct with which appellant was charged was attributable to alcoholism. While appellant stated at the hearing that he "identifies" himself as an alcoholic and claims to have undergone an alcohol recovery program, he was at the same time evasive in his testimony about the issue of alcoholism, never testifying directly that he is an alcoholic, nor did he have any medical doctor or other professional testify to the fact that he is an alcoholic. Moreover, appellant has claimed all along, and continued to claim

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[13] We fail to find that appellant was inexcusably absent without leave on December 17 through 20 as the Department credited him with sick leave for those days, in essence, approving his absence those days.

at the hearing, that he was never drunk at work as the Department alleged. Thus, it is difficult to conclude that appellant was indeed an alcoholic during the time in question and that his various acts of misconduct were attributable to alcoholism.

Even assuming appellant was an alcoholic during the time in question and that his various acts of misconduct were attributable to the alcoholism, federal and state anti-discrimination laws would not shield him from discipline for his misconduct.

The Americans With Disabilities Act (ADA) of 1992 (42 U.S.C. 12101 et seq.) provides that employers may not discriminate against a qualified individual with a disability because of the disability of such individual in regard to the terms, conditions or privileges of employment. 42 U.S.C. section 12112(a). Alcoholism is considered to be a "disability" under the ADA and the State of California, an "employer". Thus, no state agency or department may discriminate against an employee, such as by issuing discipline, on the sole grounds that the person is an alcoholic. On the other hand, the ADA specifically provides that an employer may require that employees shall not be under the influence of alcohol at the workplace and that employers may prohibit the use of alcohol at the workplace. 42 U.S.C. sections 12114(c)(1) and (2). The ADA further provides that an employer may hold an alcoholic to the same qualification standards for job performance and behavior that it would hold other nondisabled employees, even if the unsatisfactory

performance or behavior is related to alcoholism. 42 U.S.C. section 12114(c)(4). Clearly, the Department has the ability to discipline a nondisabled employee for drunkenness on duty, inefficiency and inexcusable absence without leave under the same circumstances.

The Equal Employment Opportunity Commission, the federal agency charged with enforcement of the ADA, has stated that while alcoholism is a disability entitling one to the protection of the ADA and to reasonable accommodation, an employer may discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects their job performance or renders them not qualified for the position. A Technical Assistance Manual On The Employment Provisions (Title I) Of The Americans With Disabilities Act, Equal Employment Opportunity Commission, January 1992, section VIII-3.

Therefore, although the ADA precludes the Department from taking discipline against appellant for being an alcoholic, assuming he was an alcoholic, the ADA does not preclude the Department from taking discipline against appellant for being under the influence of alcohol while at work.

Similar to the ADA, the Federal Rehabilitation Act of 1973 (29 U.S.C. section 701 et seq.) provides that no otherwise qualified individual with a disability shall, solely by reason of his or her disability, be subjected to discrimination under any program

receiving Federal financial assistance. As the State of California, including the Department, receives financial funding from the federal government, appellant is included in the Federal Rehabilitation Act's protection. Furthermore, as is the case under the ADA, alcoholism is considered a disability under the Federal Rehabilitation Act. Little v. F.B.I. (4th Cir. 1995) 1 F.3d 255, 257. The Rehabilitation Act, however, specifically states:

> For purposes of sections 503 and 504 [29 U.S.C. sections 793 and 794] as such sections related to employment, the term "individual with a disability" does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others. 29 U.S.C. section 706(8)(D).

Several cases have held that the Federal Rehabilitation Act does not preclude discipline based, not on alcoholism, but on misconduct attributable to alcoholism. Little v. FBI, supra, 1 F.3d 255[14]; Gonzales v. State Personnel Board (1995) 33 Cal.App.4th 422. In Gonzales, the California Court of Appeal recently sustained the Board's decision to dismiss an alcoholic employee from state service based upon the employee's alcohol-related

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[14] In Little v. FBI, the United State Court of Appeals upheld the discharge of an FBI agent for being intoxicated while on duty. The court found that being intoxicated while on duty rendered this agent not otherwise qualified for the position and that the Federal Rehabilitation Act protects only action based upon an employee's disability, not misconduct attributable to that disability.

misconduct. In finding that the employee could be disciplined, despite his disability, the Gonzales court noted:

> The Rehabilitation Act is designed to put individuals with disabilities on equal footing with non-disabled people in regards to the hiring, promotion, and discharge decisions of the federal government and its grantees. It is not designed to insulate them from disciplinary actions which would be taken against any employee regardless of his status. Id. at page 433, citing Wilbur v. Brady (D.D.C 1992) 780 F.Supp. 837, 840.

California law also provides that state employers cannot discriminate in employment against persons with disabilities. Government Code section 19230 provides:

> It is the policy of this state that qualified individuals with a disability shall be employed in the state service... on the same terms and conditions as the nondisabled, unless it is shown that the particular disability is job related.

Although we are not aware of any cases addressing whether alcoholism is a disability for purposes of this section, the California Court of Appeal in the case of Gonzalez v. State Personnel Board, supra, held that section 19230 is similar in wording and purpose to the Federal Rehabilitation Act and, therefore, an employee whose misconduct is attributable to alcoholism should be treated the same as they would be treated under that Act. In Gonzalez, the employee argued that section 19230 prevented his dismissal based on conduct attributable to alcoholism because the state had the duty to reasonably accommodate his disability. The court rejected this argument, finding that the

employee could be dismissed, despite section 19230, because the misconduct rendered him "not otherwise qualified for the job."[15]

We find that appellant's continued use of alcohol rendered him unqualified for his position as a Senior Air Resource Engineer as his drunken behavior contributed to his absenteeism and inefficiency, and alienated his subordinate employees, causing them to complain and ultimately leave his supervision. Neither the ADA, the Federal Rehabilitation Act, nor the analogous provisions of California law shield appellant from discipline for what was then his current use of alcohol on the job and his misconduct related thereto. Appellant's repeated on the job intoxication rendered him unqualified for the position of Senior Air Resources Engineer.

Penalty

Pursuant to Government Code section 19582, the Board must render a decision in a disciplinary appeal which in its judgment is just and proper. In the case of Skelly v. State Personnel Board (1975) 15 Cal.3d 175, the California Supreme Court set forth several factors that the Board should consider when determining

[15] The appellant did not raise the issue of California's other anti-discrimination in employment law, Government Code section 12940 et seq., which also prohibits discrimination on the basis of physical disability or medical condition. Again, we assume that a court would follow the same reasoning applied in the Gonzalez case, and hold that discipline may be imposed for misconduct attributable to alcoholism, even if the alcoholism itself could not be cause for discipline.

what a just and proper penalty is in each case. According to the Court, those factors include:

> ...[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. Skelly at 218.

Although we conclude that neither federal nor state law prohibits the Department from disciplining appellant for the various acts of misconduct that appellant claims were attributable to alcoholism, prior Board decisions have established that the circumstances surrounding the misconduct should be considered in determining the appropriate penalty.

Appellant cites the Board's decision in William J. Aceves Jr. (1992) SPB Dec. No. 92-04 as support for the argument that demotion was unwarranted in this case. Although the Board in Aceves revoked the termination of a Senior Computer Operator at California State University (CSU) who had been terminated for alcohol-related misconduct, we find the circumstances in that case are entirely distinguishable.

In Aceves, the employee received first a written reprimand, and then a three month suspension (which was upheld by the Board) for repeated absences without leave, tardies, and one instance of sleeping on duty. From the record in the case, it appeared that CSU failed to refer Aceves to the Employee Assistance Program (EAP)

or any other treatment program, even though they seemed aware that the misconduct upon which these disciplinary actions were based was attributable to alcohol abuse. At the time Aceves received the three month suspension, he went to Kaiser to see about entering an alcohol rehabilitation program. However, because he was suspended from his job, he did not have the money to enter the treatment program during the time of the suspension. After the three month suspension ended, Aceves was absent just two more times without leave. Immediately after these absences, Aceves spoke to his supervisor, telling him he was sorry, that he had an alcohol problem, and asked to see the EAP coordinator for help. The EAP coordinator advised him to enroll in an in-house treatment program. Aceves asked his supervisor if he could work the program around his work schedule but his supervisor told him he could not. Aceves' supervisor told Aceves that he could take the time off for the program using vacation time though and that he should be prepared to bring verification of his participation in the program upon his returning to work after completing the program. Aceves thereafter enrolled in the program, but, immediately after returning from the program, he was dismissed from his position based upon the two unapproved absences he incurred prior to entering the program.

In Aceves, the Board looked at all of the circumstances of the case and found that the dismissal was unwarranted. The Board found that while an employee's alcoholism was not a shield to discipline

for alcohol-related misconduct, it could be a mitigating factor to be considered when imposing discipline. The Board considered the facts that Aceves was an otherwise good, long-term employee, his misconduct related to excessive absenteeism, he was actively seeking rehabilitation, and that CSU never attempted to facilitate or accommodate Aceves' rehabilitation efforts. The Board concluded that while a state employer is not required to allow an employee to avail himself or herself of an alcohol treatment program prior to disciplining that employee for misconduct attributable to alcoholism, given the circumstances in Aceves' case, CSU should have given Aceves the opportunity to show improvement after he began the in-house rehabilitation program.

The instant case is entirely distinguishable from that in Aceves. In this case, the Department repeatedly offered to help appellant, giving him numerous referrals to EAP. Appellant's supervisors repeatedly asked appellant to name his preferred course of treatment for his alcohol problem, but appellant repeatedly denied having any problem. Although appellant did make a few statements that he was having his problem solved, and at one point in January showed Drachand a blank Kaiser treatment contract and in May gave Drachand a letter showing his involvement in a program at Kaiser, at the same time appellant gave management mixed signals. Specifically, appellant refused to admit that any of the instances of alleged drunkenness were actually due to alcohol, continued to

refuse to disclose the nature of his treatment to his supervisors and to the personnel department when it inquired, and acted with hostility toward those who tried to discuss it with him. These factors do not parallel the situation in Aceves where an employee who was attempting a course of rehabilitation faced an uncooperative employer. On the contrary, management at the Department made extraordinary efforts to get appellant to help himself and never received a firm commitment from him that he was actually getting help. Under these circumstances, we do not believe mitigation of appellant's penalty is warranted under the reasoning of Aceves.

Neither do the facts of this case warrant the Board's invoking its discretion to mitigate the penalty based upon the appellant's evidence concerning his rehabilitation efforts in years since the adverse action was issued. In Department of Parks and Recreation v. State Personnel Board (1991) 233 Cal.App.3d 813, the court held that the Board has discretion to modify an employee's penalty based upon evidence in the record that the employee's misconduct was attributable to a problem for which the employee has since successfully engaged in rehabilitation efforts. The Board has invoked this discretion from time to time to modify an employee's dismissal, when it believed that the evidence of the employee's ongoing rehabilitation efforts, coupled with the circumstances of

the particular case, warranted such a modification. Karen N. Sauls (1992) SPB Dec. No. 92-13.

Although appellant testified that he has participated in a rehabilitation program, appellant introduced no competent evidence by a physician or other qualified professional person from which the Board could conclude that appellant had indeed been successfully rehabilitated from any alcohol problem he might have had. Moreover, even if there had been such testimony, we do not believe that it would necessarily cause us to reduce the severity of appellant's penalty, as we believe the penalty of demotion was appropriate under all of the circumstances. Given appellant's long and successful work history with the Department prior to these incidents, and the degree of understanding demonstrated by the persons with whom appellant worked, we believe that if appellant has successfully conquered his alcohol problem, there is nothing to preclude his eventual reinstatement to a supervisory position.

CONCLUSION

In conclusion, we find that the Department has proven by a preponderance of evidence that appellant was repeatedly drunk at work, inefficient in his duties, and inexcusably absent without leave on two occasions. We further find that, even assuming that appellant was an alcoholic, neither federal or state anti-discrimination laws prohibit the Department from taking disciplinary action against him. Finally, we conclude that the

penalty of demotion is a just and proper penalty under all of the circumstances.

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, it is hereby ORDERED that:

1. The adverse action of demotion taken against Jerome Wendt is hereby sustained.

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

STATE PERSONNEL BOARD

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

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on November 1-2, 1995.

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