BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **E. A.** From dismissal from the position of Correctional Sergeant with [redacted] State Prison, Department of Corrections and Rehabilitation at [redacted]	Case No. 06-2706 **BOARD DECISION (Precedential)** **SPB Dec. No. 09-01** January 14, 2009

APPEARANCES: Michael Lackie, of Lackie & Dammeier LLP, on behalf of appellant, E. A. ; Dawn Whitney, on behalf of Department of Corrections and Rehabilitation.

BEFORE: Anne Sheehan, President; Richard Costigan, Vice-President; and Maeley Tom, Member.

DECISION

This case is before the State Personnel Board (Board) after the Board granted E. A. 's (appellant) Petition for Rehearing. The Department of Corrections and Rehabilitation (Department or CDCR) dismissed appellant from his position as a Correctional Sergeant with [redacted] State Prison based on allegations that he: (1) filed a false Crime/Incident Report regarding an attack on July 29, 2005 during which two inmates attacked inmate S[redacted] M[redacted] (S. M.) and slashed his throat; (2) witnessed Correctional Lieutenant L[redacted] M[redacted] (L. M.) advise Correctional Officer G[redacted] C[redacted] (G. C.) how to rewrite and falsify his report of the same incident so that it would not "get him [G. C.] into trouble;" (3) was complicit in the filing of the false report; (4) knowingly accepted false reports filed by Correctional Officers R[redacted] L[redacted] (R. L.) and

R[redacted] A[redacted] (R. A.); and (5) was dishonest in his January 26, 2006 investigative interview in several respects.

Appellant contested the allegations and denied that he was aware of a different version of events other than that which he reported, or that he instructed G. C. or heard L. M. advise G. C. to change his report. He also denied that he was dishonest in his investigatory interview.

At the hearing before the Administrative Law Judge (ALJ), appellant made a motion to have a representative of the Office of the Inspector General (OIG), Bureau of Independent Review (BIR), excluded from the hearing. The ALJ denied the motion. In a proposed decision adopted by the Board, the ALJ sustained the dismissal of Appellant and reaffirmed the denial of the motion to exclude the OIG representative. Subsequently, the Board granted appellant's petition for rehearing and determined to hear the case itself.

In this Decision, the Board agrees with the ALJ that the OIG has a right to attend disciplinary hearings of peace officers employed by CDCR. The Board also agrees that the Appellant's dismissal is warranted, based upon a preponderance of evidence in the record that supports a finding that appellant was dishonest in his actions, his reports, and his investigatory interviews regarding the assault on S. M.

BACKGROUND

Employment History

Appellant began state employment as a Correctional Officer in August 1995. In March 2002, he was promoted to the position of Correctional Sergeant. He has no history of disciplinary action.

FINDINGS OF FACT

Incident with Inmate S. M.

On July 29, 2005, G. C. and R. A. were working in the dayroom identified as the H-3 unit. One of the inmates present in the dayroom was S. M., who was housed in the C/H facility. At some time between 2:30 and 3:00 p.m., as S. M. sat in the dayroom watching television next to some other inmates, he felt a tap on the left side of his head. He looked to the left but did not see anyone. When he looked to the right he saw two inmates walking hurriedly away. One inmate went to a bunk area and then turned and looked at him. The other inmate turned to the bathroom area but also turned around to look at him. S. M. looked at the other inmates briefly and then saw some stains on his clothing. S. M. asked the inmate next to him if the others had dropped coffee on him. The inmate replied, “No, that’s blood.” S. M. asked, “From where?” The inmate replied, “From you, you’re bleeding from your neck. You have a bad cut on your neck.” When S. M. placed his hand on his neck and then removed it, it was covered in blood.

S. M. approached G. C., who was at the podium in the day room. When S. M. approached with his hand on his neck, G. C. noticed S. M. was bleeding. G. C. asked S. M., “What happened?” S. M. said, "I don't know, someone cut me." G. C. responded, “You need to go to the MTA.” G. C. did not activate his alarm, as was required under CDCR policy, but radioed the Medical Technical Assistant (MTA) clinic that he had an inmate who needed medical attention. G. C. gave S. M. some paper towels to cover the wound, and walked him to the door of the building. He had not received a response to his radio transmission, so he told S. M. to go to the MTA clinic where medical staff was dispensing medication to other inmates. Neither G. C. nor

anyone else present at the time ordered that S. M. be escorted to the MTA clinic, as required by CDCR policy.

G. C. watched as S. M. walked towards the MTA office, which was about 20-30 yards away. S. M., having been on the yard only once before, was unsure of where the office was located, and testified it took him a minute to get there. When S. M. arrived at the MTA office, MTA Small greeted him at the door, asked what had happened, asked why an alarm had not sounded concerning the incident, and briefly examined S. M. and determined he needed to see a doctor because the wound was deep and bleeding profusely. Small took S. M. in a wheelchair to the emergency room.

In the meantime, G. C. went back inside the building and told his partner, R. A., what had happened. Within a minute or so, Correctional Officer M[redacted] B[redacted] (B[redacted]), who had been dispensing pills as S. M. approached the MTA clinic, ran into the housing unit and yelled for all the inmates to "get down." G. C. and R. A. assisted B[redacted] in "putting the unit down." One of the Search and Escort officers, who had also been dispensing pills when S. M. arrived at the MTA office, was R. L.. After the inmates were down, L. M. and appellant arrived on the scene. At appellant's instruction, G. C. activated his alarm. G. C. and R. A. searched the inmates for weapons and then the building was searched as well.

G. C. violated a number of procedures in his handling of the S. M. incident. He failed to follow procedure by not activating his alarm immediately upon discovering that S. M. had been cut, by failing to have S. M. escorted to the MTA clinic, and by failing to have the inmates put down.

After the incident, the officers, supervisors and other involved employees wrote their reports. R. L. and G. C., along with appellant and L. M., were in the program office while drafting their reports. R. L. testified that, before writing his report, he read the reports written by G. C. and appellant. Appellant told R. L. that, in his report, he (appellant) was going to designate R. L. "as the escorting officer." Because R. L. was "trying to be a team player and go along with what everyone else was doing" by covering up for G. C.'s errors, R. L. falsified his report to state that he was told to escort S. M. to the MTA clinic. R. L. continued to make that assertion during an investigative interview concerning the incident. After he had been dismissed from state service for falsification of his report, however, R. L. recanted his statements during his *Skelly* hearing,[1] at which time he admitted that: he had not escorted S. M. from the dayroom to the MTA clinic; appellant had not asked him to escort S. M. to the clinic; and no alarm was activated until after S. M. was in the clinic. During the SPB hearing, R. L. again reiterated that he had filed a false report in an effort to "match the story" of the other reporting staff members.

According to G. C., he first submitted his incident report to L. M. in the program office, in the presence of appellant. L. M. said to G. C.: "…you'll probably get in trouble for this report, you know. And you know, we could probably write it up another way, so that way you won't get in trouble…" L. M. explained that
G. C. had not followed procedures in not activating his alarm when S. M. first approached him and he saw that S. M. was bleeding, and in not having someone escort S. M. to the MTA clinic. While in the program office, L. M. went over G. C.'s report line

[1] In *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 218, the California Supreme Court held that state employees have a property interest in their jobs and are entitled to a pre-deprivation hearing *(Skelly*

by line and assisted G. C. in drafting a report that indicated G. C. had complied with all applicable procedures when responding to the assault on S. M.. Appellant was sitting right next to G. C., one or two feet away, and close enough to overhear the conversation between L. M. and G. C..

Appellant told investigators that his report was accurate, that he arrived in the H-3 unit after G. C. had activated his alarm, and that he ordered R. L. to escort S. M. to the MTA clinic. Appellant denied that he ever heard L. M. tell anyone to change their report or suggest that there was a better way to write the report. He reviewed the reports and did not detect any inconsistencies. Appellant testified that the first time he learned that the account set forth in the reports was not an accurate reflection of what actually happened was when he was served with the Notice of Adverse Action dismissing him.

Credibility Determinations

The ALJ made certain credibility determinations essential for the resolution of this case.[2] More specifically, the ALJ did not credit appellant's version of events but instead believed the officers who testified that B[redacted] was the first to call for the inmates to "get down," and that it was not until after appellant arrived with L. M. that G. C. activated his alarm. The ALJ believed G. C.'s testimony that appellant told him he had not followed the correct procedures with respect to the assault on S. M. and that G. C. should have activated his alarm when S. M. first approached him at the podium. Appellant, in conjunction with L. M., tried to "remedy" the problem and cover for G. C. by writing a report that made it seem as though the proper protocol had been followed.

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hearing) before the discipline takes effect.
[2] Evidence Code § 780.

Appellant encouraged R. L. to write a report that falsely stated he had escorted S. M. to the MTA clinic by advising R. L. that appellant would be reporting that he ordered R. L. to escort S. M. to the clinic, and that R. L. did so.

Appellant provided no plausible explanation as to why G. C. and R. L. would now state that they had each filed a false report when each was fully aware that such action would subject them to discipline. The suggestion that they falsified the reports and then "came clean" only to "save their jobs" was not accepted by the ALJ as a credible explanation. In fact, R. L. was still dismissed as of the time he testified at appellant's hearing and had not been promised any leniency for changing his story.

Pursuant to *California Youth Authority v. State Personnel Board*,[3] courts must give "great weight" to the credibility determinations of a Board ALJ to the extent the determinations derive from the presiding officer's observations of the demeanor, manner or attitude of the witness whose credibility is being judged.[4] In this case, however, the ALJ did not make any credibility determinations based upon the demeanor, manner or attitude of the witnesses, but upon the plausibility and consistency of the witnesses' testimony. While we therefore are not required to accord great weight to the ALJ's credibility findings in this case, we do find that the record evidence supports them. We therefore accept the testimony of G. C. and R. L. as credible.

[3] (2002) 104 Cal.App.4th 575.
[4] *John Hughes* (2003) SPB Dec. No. 03-05, p. 7.

LEGAL ANALYSIS

Motion to Exclude

At the commencement of the hearing, appellant moved to exclude Michael Allford (Allford), a representative of the OIG-BIR,[5] from the hearing on the grounds that peace officer personnel files, including records of administrative disciplinary proceedings conducted by entities other than the peace officer's employer, are confidential under Penal Code § 832.7. Appellant argued that because the administrative disciplinary files of peace officers are confidential, pursuant to the rationale set forth in *Copley Press, Inc.* v. *Superior Court*,[6] appellant's hearing before the Board must be closed to the public, including representatives of the OIG.[7] We disagree.

In *Copley Press*, the court found that peace officer personnel files retain their confidentiality even when those files are maintained by independent administrative tribunals that hear and decide peace officer disciplinary appeals. The court also held that the identities of peace officers who have their cases pending before an

[5] Pursuant to Penal Code § 6126(a)(1), the Inspector General is charged with the following:

> The Inspector General shall review departmental policy and procedures, conduct audits of investigatory practices and other audits, and conduct investigations of the Department of Corrections and Rehabilitation, as requested by either the Secretary of the Department of Corrections and Rehabilitation or a Member of the Legislature, pursuant to the approval of the Inspector General under policies to be developed by the Inspector General. The Inspector General may, under policies developed by the Inspector General, initiate an investigation or an audit on his or her own accord.

The BIR is part of OIG and is subject to the direction of the Inspector General. The BIR's statutory responsibility is contemporaneous public oversight of CDCR's internal investigations. BIR is also responsible "for advising the public regarding the adequacy of each investigation, and whether discipline of the subject of the investigation is warranted." (Penal Code § 6133, subdivisions (a) and (b).)

[6] (2006) 39 Cal.4th 1272, 1297-1299.

[7] The OIG submitted a brief to the ALJ on the issue of the motion to exclude the OIG representative. Attached to the brief as exhibits are the applicable portions of the DOM and the Court Order adopting the DOM provisions, discussed *infra*.

administrative tribunal are to be kept confidential.[8] While the Court explicitly declined to rule on whether a representative of the newspaper had a constitutional right to attend the disciplinary appeal hearings of peace officers,[9] this Board has interpreted *Copley Press* as requiring the closure of previously public disciplinary hearings in which the appellant is a peace officer.[10] Thus, following the issuance of the *Copley Press* decision, Board ALJs began to deny public access to disciplinary hearings of peace officers in order to ensure the confidentiality of disciplinary records and the identity of peace officers charged with discipline. Likewise, hearings before the five-member Board concerning peace officer disciplinary appeals have been closed to the public.

In *Berkeley Police Association v. City of Berkeley*,[11] the First District Court of Appeal answered the question left open in *Copley Press* and held that, given its legal obligation to maintain the confidentiality of its investigatory records and findings pertaining to citizen complaints against peace officers, the City of Berkeley Police Review Commission (PRC) had a duty to close its evidentiary hearings to the public. Appellant now argues that *Berkeley Police Association* supports his argument that the OIG representative should have been excluded from his disciplinary hearing. We disagree.

The *Berkeley Police Association* case does not address the issue of whether a representative of OIG, as opposed to a member of the general public, should be allowed access to a peace officer disciplinary hearing. By statute, OIG has been vested

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[8] *Copley Press, Inc.*, 39 Cal. 4th at 1297-1299.
[9] *Id.* at 1304, fn. 27.
[10] In its original adoption of the proposed decision in this case, the Board issued a resolution stating that the logical result of the *Copley Press* decision necessarily requires that members of the public be excluded from peace officer disciplinary hearings; however, the Board also set forth its rationale as to why OIG representatives were not to be excluded from such hearings.
[11] (2008) 167 Cal.App.4th 385.

with unfettered access to any and all CDCR files, including peace officer personnel files.[12] In fact, an employee who denies such access may be guilty of a misdemeanor.[13] One could argue that the mere fact of such access implies access to the disciplinary hearings of peace officers. Such access need not be implied, however, because the law, as explained more fully below, provides explicit authorization for such access.

The OIG has been charged by statute, federal court orders, and policies adopted pursuant to and incorporated within those orders, with oversight of the Department's disciplinary process. The Department's Operations Manual (DOM)[14] and BIR protocols, incorporated into federal court orders,[15] contemplate attendance of OIG representatives at SPB disciplinary hearings on appeals by peace officers. Chapter 3, Article 22 of the DOM provides for the BIR to have access to all stages of the disciplinary process. Section 33030.28, number 20, requires the Department's attorney to consult with the assigned Special Assistant Inspector General (SAIG) in cases the BIR is monitoring, on issues that include hearing strategy and specifically whether the SAIG will attend the SPB hearing. The BIR is also charged with reviewing the SPB's decision in the disciplinary case.

Clearly, the legislature has provided OIG with full and unfettered access to the disciplinary process utilized by the Department to discipline its peace officers. The OIG could not fulfill its statutory mandates and those mandates imposed by the federal courts if it were to be barred from attending SPB disciplinary hearings in peace officer

[12] Penal Code § 6126.3.
[13] Penal Code § 6126.4.
[14] The DOM contains the operational policies of CDCR. *See* fnte. 6, *supra.*

[15] *Madrid v. Woodford, et al.,(United States District Court, Case No. C90-3094)* Class Action Order dated 12/22/05. *See* fnte. 8, *supra.*

cases. We conclude that OIG was properly allowed to attend the hearing in this case.

Handling of Assault of Inmate S. M.

A preponderance of the evidence establishes that appellant submitted a false report in connection with the assault on inmate S. M. and its aftermath. He falsely wrote that he responded to G. C.'s personal alarm, that he ordered R. L. to escort inmate S. M. to the MTA Clinic, and that he was unaware that L. M. had instructed G. C. in how to falsify his report. In addition, appellant affirmatively instructed R. L. to write his report to be consistent with appellant's report that he (appellant) had ordered R. L. to escort inmate S. M. to the MTA Clinic and that R. L. had done so. R. L. felt pressured to make his report consistent with appellant's report.

Government Code section 19572 sets forth the legal causes for imposing discipline on a state employee. Inexcusable neglect of duty is an "intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty."[16] Dishonesty generally requires a showing of an intentional misrepresentation of known facts, or a willful omission of pertinent facts, or a disposition to lie, cheat or defraud.[17] Other failure of good behavior requires that the misconduct must be of such a nature as to reflect negatively upon the employee's job. The "misconduct must bear some rational relationship to [the employee's] employment, and must be of such character that it can easily result in the impairment or disruption of the public service."[18]

[16] *S[redacted]. K[redacted]* (1998) SPB Dec. No. 98-05, p. 6, fn. 6.
[17] *Haji Jameel* (2005) SPB Dec. No. 05-02, p. 17, fn. 23.
[18] *D[redacted]. M[redacted]* (1995) SPB Dec. No. 95-10, p. 9.

Appellant's falsification of a criminal incident report and his affirmative participation in having officers falsify their reports is an inexcusable breach of his duty to ensure accurate reporting of incidents. Appellant's conduct in this regard also constituted dishonesty, as did his repetition of his false story at an investigatory interview. Honesty is a continuing character trait required of peace officers.[19] Appellant's conduct clearly constituted a failure of good behavior that reflected poorly on the Department. Peace officers are held to a higher standard of conduct than are non peace officer employees. Appellant fell far below that standard when he modeled for his employees how to participate in the "code of silence" that has for too long thwarted the full and fair investigation of misconduct within our state prison system.

PENALTY

We turn next to the issue of the appropriate penalty under all the circumstances. When performing its constitutional responsibility to review disciplinary actions,[20] the Board is charged with rendering a decision that is "just and proper."[21] The Board has broad discretion to determine a "just and proper" penalty for a particular offense, under a given set of circumstances.[22] The Board's discretion, however, is not unlimited. In the seminal case of *Skelly v. State Personnel Board*, the California Supreme Court noted:

> 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)[23]

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[19] *Gregory Johnson* (1992) SPB Dec. 92-01 p.9, *citing Paulino* v. *Civil Service Commission* (1985) 175 Cal.App.3d 962.
[20] Cal. Const., art. VII, § 3(a).
[21] Gov. Code § 19582.
[22] *See Wylie v. State Personnel Board* (1949) 93 Cal.App.2d 838.
[23] 15 Cal.3d at 217-218.

In exercising its judicial discretion in such a way as to render a decision that is "just and proper," the Board considers a number of relevant factors to assess the propriety of the discipline imposed by the appointing power. Among the factors the Board considers are those specifically identified by the Court in *Skelly* 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.[24]

The Board's statutory authority to modify or revoke an adverse action is specified in Government Code section 19583, which provides, in relevant part:

> The adverse action taken by the appointing power shall stand unless modified or revoked by the board. If the board finds that the cause or causes for which the adverse action was imposed were insufficient or not sustained, or that the employee was justified in the course of conduct upon which the causes were based, it may modify or revoke the adverse action....

As noted above, when a correctional peace officer engages in a “code of silence” regarding an incident of violence and the handling of the incident, the public suffers greatly. Appellant was not only dishonest, but he fostered dishonesty among the people he supervised. The likelihood of recurrence is high given appellant’s denials of any wrongdoing whatsoever. Dismissal is warranted.

CONCLUSION

Appellant engaged in serious misconduct when he conspired to hide the true facts of an incident from his superiors by submitting a false report, encouraged subordinate officers to do the same, and was dishonest at his investigatory interview.

[24] *Id.*

He modeled the very misconduct that precipitated the establishment of the OIG-BIR. Not only did he participate in a "code of silence," but he modeled that misconduct for his subordinate officers, encouraging them to do the same. He has failed to accept responsibility for his misconduct. Appellant's dismissal is entirely appropriate under all the circumstances.

We further conclude that representatives of the OIG-BIR are entitled to be present at the disciplinary hearings of CDCR peace officers.

ORDER

WHEREFORE IT IS DETERMINED that:

(1) The dismissal of E. A. , effective August 14, 2006, is sustained.

(2) This Decision be designated as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD[25]

Anne Sheehan, President
Richard Costigan, Vice President
Maeley Tom, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on January 14, 2009, as recorded in the minutes.

Suzanne M. Ambrose
Executive Officer
State Personnel Board

[25] Member Patricia Clarey did not participate in this Decision.