BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal By	)	SPB Case No. 34199
	)	
ANTHONY M. BEATRICI	)	**BOARD DECISION**
	)	(Precedential)
From one working day suspension in	)	
the position of Senior Special	)	**NO. 95-11**
Investigator, Department of Motor	)	
Vehicles at El Monte	)	July 11, 1995

Appearances: Neil Robertson, Legal Counsel, California Union of Safety Employees representing appellant, Anthony M. Beatrici; Roger J. Sato, Staff Counsel, representing respondent, Department of Motor Vehicles.

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

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Anthony M. Beatrici (appellant) from a one working day suspension in the position of Senior Special Investigator, Department of Motor Vehicles (DMV) at El Monte. As cause for the one day suspension, appellant was charged with misuse of state property, inexcusable neglect of duty, willful disobedience and other failure of good behavior for accessing the DMV's computer data base without authorization and for a purpose unrelated to his assigned duties.

The ALJ found that although appellant did violate the DMV's policy when he accessed the computer data base, mitigating factors warranted revocation of the one day suspension. The SPB rejected the ALJ's Proposed Decision and asked the parties to brief the

issue of whether the adverse action was appropriate under the circumstances. After a review of the entire record, including the transcript, exhibits and the written and oral arguments of the parties, the SPB finds that appellant did wrongfully access the DMV's computer data base and that a one day suspension is an appropriate penalty under the circumstances.

FACTUAL SUMMARY

Appellant was appointed a Special Investigator with the Employment Development Department beginning on or about August 28, 1982. He then transferred to the Alcohol Beverage Control Board later that same year. On October 1, 1984, he became a Special Investigator for the DMV. He was promoted by the DMV to Senior Special Investigator on March 2, 1992.

On or about December 7, 1992, appellant and his wife were out driving when appellant saw a particularly reckless driver swerve in front of another car, hitting that vehicle. Appellant turned his car around, proceeding to the scene of the accident, to see if he could render assistance. Just then, appellant saw the reckless driver exit his vehicle, ranting and raving at the driver of the vehicle he had just hit. Afraid that the confrontation might get out of hand, appellant exited his vehicle and approached the driver that had just been hit. Appellant told the driver that he would be happy to help in any way he could, such as by remaining at the accident scene or testifying later in court on his behalf. The

driver who had been hit told him that he was okay and appellant departed the scene.

Sometime later, appellant received a subpoena to testify about the accident in small claims court on January 19, 1993. Before he went to court that day, however, appellant stopped in at the DMV office in Compton to run a background computer print-out of the two drivers who were involved in the accident. According to the appellant, he checked the drivers' DMV backgrounds because he wanted to see if either person had a history of violence towards others and also to see if either person had outstanding warrants for arrest. Appellant claims he ran these background checks as he was concerned for his safety and the safety of others at court, and because he felt that, as a peace officer, he had a duty to ensure that neither party was wanted by law enforcement. Appellant did not share the information he discovered with other persons or otherwise obtain any personal gain or advantage as a result of accessing this information.

In response to a general departmental investigation into unauthorized accessing of information, appellant admitted to DMV investigators on March 24, 1993, and again on June 15, 1993, that he accessed DMV's computer data base on this one occasion and that he did so without prior authorization from a DMV supervisor. Appellant forthrightly explained to DMV investigators what he had done and why he had done it.

On or about October 25, 1993, the DMV issued a Notice of Adverse Action of a one working day suspension to appellant, alleging that appellant violated Government Code section 19572 subdivisions (d) inexcusable neglect of duty, (o) willful disobedience, (p) misuse of state property, and (t) other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment.[1]

ISSUES

1. Did the ALJ err in allowing the DMV to reopen its case-in-chief after it had rested its case and the appellant made a motion to dismiss?

2. Did the appellant violate Department policy?

3. What is an appropriate penalty under the circumstances?

DISCUSSION

Motion To Dismiss

The DMV began its case-in-chief by presenting the testimony of a Senior Investigator who testified only that appellant admitted accessing the DMV's data base on the one occasion. Thereafter, the DMV rested its case. The appellant brought a motion to dismiss the

[1] In addition, the DMV originally charged subdivision (f) dishonesty, but agreed to dismiss the allegation of dishonesty at the appeal hearing.

DMV's adverse action, relying upon Government Code section 19582(a) which states, in pertinent part:

> During a hearing, after the appointing authority has completed the opening statement or the presentation of evidence, the employee, without waiving his or her right to offer evidence in the event the motion is not granted, may move for a dismissal of the charges.

After this motion was made, the DMV requested permission to reopen its case to present further evidence to show that dismissal of the charge was not warranted. The ALJ opined that the DMV had not presented evidence sufficient to withstand the motion to dismiss, but allowed the DMV the opportunity to reopen its case and introduce further evidence. Thereafter, the DMV presented further evidence as to the DMV's policy against accessing confidential information and the ALJ subsequently denied appellant's motion to dismiss the adverse action. Appellant now contends that the ALJ erred in allowing the DMV to reopen its case and that the motion to dismiss should have been granted.

As both parties acknowledge in their written arguments presented to the Board, a motion to dismiss under section 19582(a) is analogous to a motion to dismiss brought pursuant to Code of Civil Procedure section 581(c). Code of Civil Procedure section 581(c) provides:

> After the plaintiff has completed his opening statement, or the presentation of evidence in a trial by jury, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a judgment of nonsuit.

Case law provides, however, that when a motion under section 581(c) is brought by a defendant, a judge is given the discretion to allow the plaintiff the opportunity to reopen his or her case to introduce further evidence which may have been omitted from the initial presentation of evidence. Greene v. Atchison (1953) 120 Cal.App.2d 135.

The court in Charles C. Chapman Building Co. v. California Mart (1969) 2 Cal.App.3d 846 made an even stronger statement, finding the court has a duty to reopen the case in such an instance:

> After a motion for nonsuit is made in a jury trial (Code Civ. Proc. section 581(c)), it is the trial court's duty, if so requested, to permit the plaintiff to reopen his case and introduce further evidence, since one of the objects served by the motion is to point out the oversights and defects in the plaintiff's proof so that he may supply, if possible, the specified deficiencies. (citations omitted.) It is error to refuse plaintiff this privilege and, after such refusal, to grant a motion for nonsuit. (Id. at 858).

In this case, the ALJ did not err in allowing the DMV to reopen its case. Moreover, as set forth herein, we find sufficient evidence in the record to support the adverse action and thus find no error in the ALJ's decision to deny appellant's motion to dismiss.

Violation of Department Policy

In her Proposed Decision, the ALJ found that appellant wrongfully accessed confidential information from DMV's data base without the necessary authority from DMV, and that this conduct

constituted willful disobedience and misuse of state property. After a review of the record, the Board agrees that there is a preponderance of evidence in the record to support a finding that appellant wrongfully accessed the DMV's computer data base on this one occasion without proper authorization. We further find that this act constituted a violation of Government Code section 19572, subdivisions (d) inexcusable neglect of duty, (m) misuse of state property, (o) willful disobedience and (t) other failure of good behavior.

The written policy of the DMV, which appellant signed in 1990, specifically states that appellant "may access information [in the DMV's data base] only when necessary to perform work assigned by a supervisor to accomplish the Department's mission and objectives." The policy further proceeds to state that appellant "may not access or use information from the Department's data bases for personal reasons." Appellant acknowledges that he was aware of this policy and further acknowledges having received, reviewed and signed this policy only two years earlier.

When appellant witnessed the car accident, he was not on state time nor pursuing state business. His appearance as a witness for one of the parties to the accident was made purely in his personal capacity. At no time during the accident or during the course of being subpoenaed to testify was appellant pursuing any work related duties or responsibilities. While appellant may not have received

any personal gain from investigating the background of the parties to the accident, it is clear that his investigation into the parties' backgrounds was neither authorized by any supervisor at the DMV nor relevant to the job duties he performs for the DMV as a Senior Special Investigator.

As appellant's supervisor testified, appellant's action in accessing confidential information in this instance was improper as a traffic accident on non-DMV property and a subsequent court hearing related to the accident are matters over which appellant has no jurisdiction or authority to investigate. If appellant was concerned with the violent propensities of the parties to the accident or the criminal histories of the parties, he could and should have taken those concerns to the proper law enforcement authorities with jurisdiction over such matters. Since the DMV's security policy provides that DMV personnel, including investigators, are not permitted to breach the confidentiality of departmental records unless necessary to perform work assigned by a supervisor to accomplish the DMV's missions and objectives, appellant was wrong in his actions. Accordingly, disciplinary action of some form was warranted.

Penalty

When performing its constitutional responsibility to review disciplinary actions [Cal. Const. Art. VII, section 3(a)], the Board is charged with rendering a decision which is "just and

proper". (Government Code section 19582.) In determining what is a "just and proper" penalty for a particular offense, under a given set of circumstances, the Board has broad discretion. (See Wylie v. State Personnel Board (1949) 93 Cal.App.2d 838.) The Board's discretion, however, is not unlimited. In the seminal case of Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194, 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) 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 factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board considers are those specifically identified by the Court in Skelly as follows:

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

In her Proposed Decision, the ALJ recognized appellant's wrongdoing but found no harm to the public or the DMV by appellant's actions. We disagree. Persons residing in California have a constitutional right to privacy. Cal. Const., art. I, section 1. While we believe that appellant's intentions were

honorable, his actions nevertheless intruded upon the constitutional right to privacy enjoyed by the persons whose records appellant examined without authority. We believe harm necessarily inures to the public service when persons are allowed to misuse their authority to glean otherwise confidential information. We also see harm caused to the DMV by the potential exposure to liability for such breaches in confidentiality.

While we consider appellant's actions to be relatively serious, we recognize the numerous mitigating factors present in this case as noted by the ALJ in her Proposed Decision. Those factors include appellant's otherwise spotless 10 year history as an investigator at the time of the incident, his lack of personal gain or benefit by his actions, his honorable intentions and his forthrightness with department investigators. While the Board concurs with the ALJ that these are important mitigating factors which serve to reassure the Board that the likelihood of recurrence is small, we feel, nevertheless, that these mitigating factors were already taken into consideration by the DMV when it chose to impose the relatively minor penalty of a one working day suspension.

Although appellant's supervisor testified that he believed an informal letter of reprimand was an appropriate penalty in this case, we believe that a one day suspension is also a penalty within the range of penalties which are "just and proper" under 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 a one working day suspension taken against Anthony M. Beatrici 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
Richard Carpenter, Member

* Member Alice Stoner concurred in the decision to discipline the appellant, but believed that the penalty should have been modified to an Official Reprimand. Member Ron Alvarado was not a member of the Board when this case was argued 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 its meeting on July 11, 1995.

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