BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **J[redacted] H[redacted]** From ten percent reduction in salary for 12 months from the position of Correctional Sergeant with California Correctional Institution, Department of Corrections at Tehachapi	SPB Case No. 01-4078 **BOARD DECISION** [Precedential] **NO. 03-05** September 23, 2003

APPEARANCES: Wendell J. Llopis, Attorney, on behalf of appellant, J[redacted] H[redacted]; James D. Madison, Senior Staff Counsel, Department of Corrections, on behalf of respondent, Department of Corrections.

BEFORE: William Elkins, President; Ron Alvarado, and Maeley Tom, Members.

DECISION

This case is before the State Personnel Board (Board) after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the matter of the salary reduction taken against J[redacted] H[redacted] (appellant) in his position as a Correctional Sergeant with the Department of Corrections (Department). The salary reduction was based on allegations that appellant engaged in a physical altercation with his wife. The Board rejected the Proposed Decision to consider whether the Department established cause for discipline and whether appellant's prior adverse actions should be allowed into evidence to support the penalty imposed by the Department.

After reviewing the record in this case, including the transcript of the hearing and the exhibits, and after considering the oral and written arguments of the parties, the Board concludes that a preponderance of evidence supports the allegations against appellant. The Board further concludes that it may properly consider both appellant's

1997 and 1999 adverse actions when determining the appropriate penalty in this case, but that notwithstanding the prior adverse actions, modification of the penalty is warranted. Accordingly, appellant's adverse action is sustained, but the penalty is modified from a ten percent reduction in salary for twelve months to a ten percent reduction in salary for six months.

BACKGROUND

Employment History

Appellant began his career with the Department on June 15, 1981. On February 1, 1988, he was promoted from the position of Correctional Officer to Correctional Sergeant. At all times, he has been employed at the California Correctional Institution (CCI) in Tehachapi.

Appellant received an adverse action of a five percent reduction in salary for twelve months effective May 31, 1996. The adverse action alleged that appellant had wrongfully ordered a fellow officer to open a cell containing two unrestrained and combative inmates and failed to retain a weapon as evidence. Appellant appealed this action to the Board, but the parties later resolved the matter by way of a stipulated settlement agreement, which was approved by this Board pursuant to Government Code section 18681 on or about January 7, 1997. The settlement agreement provided, among other things, that the adverse action would be modified from a reduction in salary for twelve months to a reduction in salary for six months and would be removed from the appellant's official personnel file (OPF) on May 30, 1997.

In February 1999, appellant received another notice of adverse action from the Department alleging that appellant yelled profane statements at a coworker.[1] Appellant invoked his right to a Skelly meeting pursuant to Title 2, California Code of Regulations section 52.3.[2] After hearing appellant's side of the story at the Skelly meeting, the Department agreed to settle the matter by amending the adverse action to a five percent reduction in salary for six months and removing the amended adverse action from appellant's OPF after two years, if no further personnel actions were taken against appellant during that time. In exchange, the appellant agreed to forego an appeal of the modified adverse action.[3] The Department thereafter issued an amended notice of adverse action pursuant to the settlement agreement and placed it in appellant's OPF.

Copies of both settlement agreements and the respective amended adverse actions were also placed in the Employee Relations Officer's (ERO's) files where they appear to have remained. The Department did not inform appellant that these actions would be placed in the ERO's file and, when appellant learned of this fact, the Department would not permit appellant to inspect these files. It appears, though it is not entirely clear from the record, that the amended actions were eventually removed from appellant's OPF.

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[1] The record does not reveal which causes for discipline were charged or what penalty was imposed in the 1999 Notice of Adverse Action.

[2] Title 2, California Code of Regulations section 52.3 provides that at least five working days before the effective date of a proposed adverse action, the appointing power shall provide written notice of the proposed action, including notifying the employee of his or her right to respond to the notice. See, Skelly v. SPB (1975) 15 Cal.3d 194.

[3] It does not appear that this settlement agreement was submitted to the Board for its approval pursuant to Government Code section 18681.

Factual Summary

At the beginning of the 2001, appellant and his spouse, Debra, a fellow CCI employee, were in the process of divorcing. As of February 27, 2001, Debra had moved out of the family home and had gone to live with Cindy Minghelli, a female friend and fellow co-worker. On that same date, while off-duty, appellant met Debra at their family home, where Debra was busy retrieving her personal effects. After she finished retrieving them, she spoke with appellant outside the home, as the two of them stood by her car.

At that moment, appellant spied men's shirts in the back of Debra's car.[4] According to appellant, Debra told him that the shirts belonged to a particular male coworker, and that she was "sleeping with him."[5] Appellant was upset by his wife's pronouncement and the two had a heated verbal exchange. Debra then entered the car, leaving the car door open. Appellant sat down next to the car door on the sidewalk and tried to talk with her about their marriage. Appellant claims that he was simply tugging on Debra's jacket while he was speaking with her, but Debra contends that appellant actually grabbed her arm and slapped her with an open hand on the right side of the face, stinging her.[6] At the hearing, appellant denied hitting or slapping Debra, although he admits he was angry and "felt" like hitting her. Shortly thereafter, Debra closed the door of the car and drove away.

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[4] Debra admitted at the hearing that there were men's shirts in the car.

[5] Debra denied making this statement and denied having a romantic relationship with the co-worker she named.

[6] The notice of adverse action does not allege that appellant slapped Debra; only that he grabbed her arm with the "intent" of hitting her, which appellant admitted in his investigative interview.

Debra's friend and coworker, Minghelli, testified at the hearing as to what Debra told her about the incident shortly after it happened. The majority of Minghelli's testimony corroborated Debra's testimony at the hearing. Minghelli further testified, however, that she had seen Debra and the male co-worker in question hugging and kissing prior to the incident on February 27 and that both of them had revealed to her in or about January that they were in love and having an affair. This contradicted Debra's testimony that she and the co-worker were not romantically involved during or prior to the incident.

Debra contacted the Kern County Sheriff's Department that same day and reported that appellant had grabbed and struck her. Appellant was subsequently arrested and booked by local authorities. On March 16, 2001, appellant was arraigned on a misdemeanor charge of violating Penal Code section 243(a), battery. The charge was later dismissed, however, when appellant agreed to plead "nolo contendere" to a lesser charge of "disturbing the peace" under Penal Code section 415.

Procedural Summary

Appellant was served with a Notice of Adverse Action of a ten percent reduction in salary for twelve months effective December 3, 2001, based upon the incident of February 27, 2001. The legal causes for discipline alleged in the adverse action were Government Code section 19572, subdivisions (m) discourteous treatment of the public or other employees; 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. The adverse action also contained a section entitled

"Other Matters", which cited appellant's 1999 amended adverse action as prior disciplinary action, but did not list the 1997 amended adverse action.

Appellant appealed the instant adverse action to the Board. After a hearing, the ALJ issued a Proposed Decision finding that appellant had grabbed Debra's arm during a heated argument and did so with the intent of hitting her. The ALJ recommended modification of the penalty, however, from a ten percent reduction in salary for twelve months, to a ten percent reduction in salary for six months, given the circumstances under which the misconduct had occurred. Before determining the appropriate penalty, the ALJ considered appellant's motion to exclude the introduction of the two prior amended adverse actions that had been settled and removed from appellant's OPF. The ALJ denied appellant's motion with respect to the 1999 amended adverse action, but granted it with respect to the 1997 action on the grounds that it had not been mentioned in the current notice of adverse action.

ISSUES

1. Is there a preponderance of evidence to support the allegations?
2. May the Board consider the 1997 and 1999 amended adverse actions in determining the proper penalty to assess in this case?
3. What is the appropriate penalty under the circumstances?

DISCUSSION

Findings on the Merits

The ALJ credited Minghelli's testimony concerning Debra's affair with her male coworker over Debra's denial of the affair. He further found that Debra's testimony regarding appellant "grabbing" her arm with the apparent intent of slapping her was

consistent with the statements she made to Minghelli and the police, as well as consistent with the statements appellant made in his investigatory interview.

Pursuant to California Youth Authority v. State Personnel Board[7], 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. 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 do not need to accord "great weight" to the ALJ's credibility findings, we nevertheless find substantial evidence in the record to support them. We conclude that appellant grabbed appellant's arm out of anger with the intent of hitting her as charged. We further conclude that this misconduct constitutes cause for discipline for discourtesy and failure of good behavior, under Government Code section 19572, subdivisions (m) and (t) respectively.

While appellant committed the act while he was off-duty from his position as a Correctional Sergeant, cause for discipline is nonetheless established. Public employees may be disciplined for their off-duty misconduct if there is a "nexus" existing between the employee's position and the nature of their misconduct.[8] The courts have further determined that such a nexus is easily established when a peace officer, while off-duty, violates the law he or she has sworn to uphold, thereby holding peace officers

[7] (2002) 104 Cal.App.4th 575.

[8] Ramirez v. State Personnel Board (1988) 204 Cal.App.3d 288.

to a "higher standard of conduct" than other employees.[9] Indeed, the Board has previously held that peace officers may be disciplined for physical abuse they inflicted on others while off-duty.[10] In this case, appellant has a duty as a Correctional Sergeant, not only to uphold the law, but to control his temper in volatile situations and prevent and report physical altercations that may occur between inmates. We have no trouble finding that a nexus exists between appellant's official duties as a Correctional Sergeant and his behavior in this case.

Prior Adverse Actions

The appellant presents a number of arguments as to why the Board should not consider either the 1997 or 1999 amended adverse action in determining the appropriate penalty in this case. We reject these arguments for the reasons set forth below and will consider the prior adverse actions in determining the appropriate penalty.

(Removal of Prior Adverse Actions From OPF)

First, appellant argues that the prior adverse actions, as amended, should not have been admitted into evidence because the settlement agreements between the parties specifically provided that the amended adverse actions were to be *removed* from appellant's OPF by a certain time.[11] Removal of an employee's adverse action from his or her OPF does not mean that the action may not later be referred to for purposes of establishing that an employee has received prior warning, for purposes of establishing

[9] See, Ackerman v. SPB (1983) 145 Cal.App.3d 395; Warren v. SPB (1979) 94 Cal. App.3d 95.

[10] Randolph Luna (1998) SPB Dec. No. 98-08 at p. 23.

[11] The stipulation settling the 1997 adverse action provided for removal of the amended adverse action from the OPF on May 30, 1997. The stipulation settling the 1999 adverse action provided for removal of the amended action from the OPF in two years *if no further adverse action was taken.* (Emphasis added.) The two-year period expired on March 1, 2001, prior to the effective date of the current adverse action.

progressive discipline or for proving the presence of aggravating circumstances in a later disciplinary action. If a department promises to remove a certain document from an employee's OPF as part of a settlement agreement, then it is legally obligated to do so.[12] The Department's removal of the action from the OPF does *not*, however, prevent the department from securing the same document from another source and introducing that document into evidence at a Board hearing.[13]

The appellant argues that it is unfair for departments to agree to remove disciplinary actions from an employee's OPF, only to use the actions in a subsequent proceeding against him or her. Removal of a disciplinary action from an employee's OPF provides a distinct benefit to the employee in the event he or she should transfer to another state agency, as it is the OPF that is provided to the future state employer upon an employee's transfer. Removal of the action from the OPF does not mean, however, that the action never existed or cannot be referred to at a later time.

In this case, the Department's promise to remove the action from appellant's OPF, and the subsequent removal of the action, has no bearing on whether the Department could introduce the action into evidence at a later disciplinary hearing for

[12] Failure to abide by such a promise and remove the document may subject the department to issuance of an order to show cause by the State Personnel Board pursuant to Government Code section 18710.

[13] See Marie Rose Johnson (2002) SPB Dec. No. 02-08 where the Board held that the department's promise to remove an adverse action from an appellant's OPF did not prohibit that department from considering the adverse action when taking future employment action against appellant in the absence of specific language in the stipulation to that effect.

purposes of establishing progressive discipline, prior notice or for consideration in the assessment of penalty.

(Authority To Consider Prior Adverse Actions)

Appellant next argues that neither amended action can be considered by this Board because the prior actions fall outside of the purview of Government Code section 19582(d). Section 19582(d) provides:

> In arriving at a decision or a proposed decision, the board or its authorized representative may consider any prior suspension or suspension of the appellant by authority of any appointing power, or any prior proceedings under this article. (Emphasis added.)

Appellant strictly construes this statute and argues that the Board may only consider prior adverse actions in arriving at a decision if the prior actions either: 1) consisted of a penalty of a suspension; or, 2) were the subject of a "prior proceeding under this article", meaning that the action was the subject of an administrative appeal hearing before the Board. Appellant argues that since neither of the amended adverse actions was a suspension and neither was the subject of a hearing held before the Board, the Board does not have the legal authority to consider these prior amended actions in arriving at a decision in this case.

The Board has never read Government Code section 19582(d) so restrictively.[14] The "article" referred to in subdivision (d) is Article I, which begins with Government Code section 19570, and includes laws governing disciplinary actions taken against state employees. The term "prior proceeding" contemplated by section 19582(d)

[14] See Jack Tolchin (1996) SPB Dec. No. 96-04 at p. 14.

encompasses the entire disciplinary process, beginning with the adverse action taken by the appointing power pursuant to Government Code section 19570, whether or not the action is appealed to the Board. The appellant's contention, that section 19582(d) allows the Board to consider prior adverse actions, other than suspensions, only where the adverse actions were the subject of a hearing before the Board, would frustrate the purpose of the Civil Service Act, which requires the Board to make a decision that is "just and proper" under all of the circumstances.[15] Such an interpretation would prohibit the Board from considering prior adverse actions when an employee admits to the wrongdoing, chooses not to appeal the adverse action or appeals the action but decides not to go forward with a hearing and settles the matter by agreeing to some lesser form of disciplinary action. It defies common sense to believe that the Legislature intended the Board to be able to consider prior disciplinary actions only when the penalty was a suspension or only in those instances where the prior actions were the subject of a formal hearing, as opposed to instances where the prior adverse actions were uncontested by the employee or agreed to in a settlement.

Moreover, such an unduly restrictive interpretation of section 19582(d) is inconsistent with prior Board precedential decisions that dictate that the Board must follow principles of progressive discipline when determining the appropriate penalty in a particular case.[16] The Board has defined this requirement as generally mandating that an employer seeking to discipline an employee for poor work performance follow a sequence of warnings or lesser disciplinary actions before imposing a more severe

[15] Government Code section 19582(a).

[16] R[redacted] C. N[redacted] (1992) SPB Dec. No. 92-07. See, also Mercedes Manayao (1993) SPB Dec. No. 93-14.

penalty, such as dismissal.[17] If the Board were to be limited to considering only suspensions or adverse actions that have been the subject of a contested Board hearing, the Board would be hampered in its ability to apply the principles of progressive discipline in a fair manner to determine the appropriate penalty to impose in individual cases. Thus, the Board rejects appellant's interpretation of section 19582(d).

(Pleading Prior Actions In The NAA)

The appellant further contends that, based on the Board's precedential decision in Leah Korman,[18] the 1997 amended adverse action may not be considered in this case because it was not mentioned in the instant notice of adverse action. We disagree. The Board stated in Korman that the *charges* upon which the adverse action is based must be set forth with specificity so that the employee may be informed of exactly what charges he or she must defend. An employee's prior adverse actions do not constitute "charges" upon which a current adverse action is based. Rather, prior adverse actions are usually cited *only* for purposes of demonstrating that the employee had prior notice that the conduct was inappropriate, for showing progressive discipline or for demonstrating the presence of aggravating circumstances - factors that the Board may only consider in the assessment of penalty once the Department has established

[17] R[redacted] C. N[redacted] at p. 6.

[18] (1991) SPB Dec. No. 91-04. In Korman, the Board stated that if an employee is not told what acts are being charged, he or she is hampered in his or her ability to prepare a defense and the ALJ is unable to determine what evidence is relevant.

cause for discipline.[19] Certainly, the appellant in this case cannot argue that he was "blindsided" by reference to these prior amended actions to which he stipulated in the past. We conclude that the Board may consider prior adverse actions in determining the appropriate penalty, even if they have not been cited in the notice of adverse action.

(Prior Actions Held in a "Hidden" Personnel File)

Appellant next contends that the 1997 and 1999 amended actions should not have been considered by the Board in determining the appropriate penalty because both documents were taken without appellant's permission or knowledge from "hidden files" contained in the Department's ERO files. While appellant does not dispute the veracity of the documents presented at the hearing, he contends that they are rendered inadmissible by the Department's failure to comply with the Public Safety Officers' Bill of Rights Act (POBR), specifically Government Code sections 3305 and 3306.5.

Government Code section 3305 of the POBR provides:

> No public safety officer shall have any comment adverse to his interest entered in his personnel file, or any other file used for any personnel purposes by his employer, without the public safety officer having first read and signed the instrument containing the adverse comment indicating he is aware of such comment, except that such entry may be made if after reading such instrument, the public safety officer refuses to sign it. Should a public safety officer refuse to sign, that fact shall be noted on that document, and signed or initialed by such officer. (emphasis added)

Government Code section 3306.5 provides, in pertinent part:

> (a) Every employer shall, at reasonable times and at reasonable intervals, upon the request of a public safety officer, during usual business hours, with no loss of compensation to the officer, permit that officer to inspect personnel files that are used or have been used to determine that officer's

[19] See Skelly v. State Personnel Board (1975) 15 Cal.3d 174.

qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.

(b) Each employer shall keep each public safety officer's personnel file or a true and correct copy thereof, and shall make the file or copy thereof available within a reasonable period of time after a request therefore by the officer.

Appellant argues he was not given the opportunity to sign the prior adverse actions in violation of section 3305. The protections granted by POBR, however, do not apply when an employer affords the peace officer the same or greater protections than those set forth in POBR.[20] The court in Crupi found that since an administrative appeal hearing was available to a peace officer, allowing the officer the opportunity to respond to the "adverse comment", as is otherwise required by section 3305, was not necessary.[21] Likewise, appellant's right to file an appeal of the adverse action to this Board granted him far greater protection that that afforded to him by section 3305. We conclude that the failure of the Department to give appellant an opportunity to sign the prior adverse action did not violate his rights under POBR and does not prevent the Board from considering the prior action.

Appellant also argues that the Department denied him the right to inspect his ERO file, thereby violating section 3306.5 and rendering the documents in that file inadmissible in this proceeding. We disagree. The Department's alleged refusal to allow appellant to inspect this file in this case does not require that the Board exclude these prior actions from consideration in the present appeal.

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[20] Crupi v City of Los Angeles (1990) 219 Cal.App.3d 1111, 1121.

[21] The court specifically distinguished the case from Aguilar v. Johnson (1988) 202 Cal.App.3d 241, cited by appellant, where the officer was not given a notice of, or an opportunity to respond to, the citizen complaint.

Admittedly, in some cases where evidence has been found to have been gathered as a result of a violation of a public employee's constitutional rights, the courts have prohibited the governmental employer from using the evidence against the employee, even when introducing it only as a part of an administrative disciplinary proceeding.[22] The purpose of the use of the "exclusionary rule" in such instances is said to be two-fold: The first, is to deter governmental officials from lawless conduct by denying them a reward for such conduct. The second purpose is to preserve the integrity of the judicial process by keeping it free of the taint of the use therein of improperly obtained evidence.[23] The purpose behind the administrative exclusionary rule would not be served in the case before us. The prior adverse actions were not "improperly obtained" by the Department in violation of the appellant's constitutional rights, but were prepared by the Department and lawfully maintained in the Department's files.

In the absence of evidence that the information in the ERO's files was improperly obtained, the Department's refusal to allow the appellant to inspect that file, without more, does not require exclusion of evidence from that file in this proceeding. While appellant may have been able to invoke the grievance provisions of his collective bargaining agreement or initiated a complaint for injunctive relief in the superior court pursuant to Government Code section 3309.5, there is no authority for the proposition

[22] Dyson v. State Personnel Board (1989) 213 Cal.App.3d 711.

[23] See Dyson at p. 718, citing Government Board of Metcalf (1974) 36 Cal.App.3d 546, 549.

that the Department's alleged failure to comply with section 3306.5 mandates that we exclude from our consideration any adverse actions contained in those files.

(Confidentiality Provisions of Penal Code Section 832.7)

Lastly, the appellant argues that the Department should not be allowed to consider either of the prior amended adverse actions because Penal Code section 832.7 expressly provides that peace officer personnel records maintained by a state agency are "confidential" and cannot be disclosed in any criminal or civil proceeding. Appellant contends that section 832.7 applies in this case to bar the introduction of prior disciplinary actions of peace officers in administrative hearings held by the Board. In support of his position, appellant cites to San Diego Police Officers Association v. City of San Diego Civil Service Commission ("San Diego").[24] In San Diego, local peace officers brought a lawsuit for declaratory relief against the civil service commission, seeking a declaration that the "routine disclosure" of personnel records at public administrative disciplinary hearings involving peace officers violated Penal Code section 832.7. The Court of Appeal found that the routine disclosure of peace officer personnel records stated a valid cause of action and that the lawsuit could proceed. Appellant points to this case as support for finding that the Board should not be permitted to consider prior disciplinary actions where peace officers are concerned, because those actions would be subject to public disclosure during an administrative hearing before the Board.

[24] (2003) 104 Cal.App.4th 275.

The Board disagrees. The court in San Diego did not declare that prior disciplinary actions imposed upon peace officers could never be introduced as evidence of progressive discipline at a hearing before the Commission. Rather, it specifically limited its holding to finding *only* that the peace officers stated a valid cause of action for violation of section 832.7 by alleging that the County "routinely disclosed" confidential personnel records at public disciplinary hearings. As the court said:

> Given the powerful position of law enforcement officers in our society, there are many valid reasons for requiring that the public be kept fully informed about the police discipline system. (citations omitted.) However, our decision on the merits of the Associations' claims cannot be based on such generalized public policy notions. As a judicial body, it is our role to interpret the laws as they are written. Because Associations have alleged that Public Entities "routinely" disclose personnel records and the Legislature has designated these personnel records as "confidential," the complaint states a valid cause of action.[25]

The law provides that *all* disciplinary actions of state employees, including those involving peace officers, are to be filed with the Board.[26] Appeals of those disciplinary actions are to be investigated and/or heard by the Board.[27] Administrative appeal hearings of disciplinary actions before the Board are required to be open to the public, and the decisions that are ultimately issued by the Board are public records.[28] Given that administrative hearings before the Board are open to the public, and decisions of the Board in those cases are public, it would be inconsistent to construe section 832.7

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[25] Id. at p. 287. See contra, Bradshaw v. County of Los Angeles (1990) 221 Cal.App. 3d 908, where the Second District Court of Appeal found that Penal Code section 832.7 did not apply to administrative hearings, but only to civil or criminal proceedings.

[26] Government Code section 19574.

[27] Government Code sections 19576 and 19578.

[28] Government Code section 19582(b);Title 2, California Code of Regulations section 51.4.

as requiring the employer to apply to the courts for permission to introduce prior adverse actions taken against the appellant and appeal outcomes prior to the introduction of that evidence at their appeal hearing. We do not believe that Penal Code section 832.7 was intended to prevent the Board from considering prior disciplinary actions of peace officers in resolving appeals of subsequent adverse actions.

Moreover, the rationale applied by the court in San Diego has no applicability to this case. In San Diego, the court was attempting to prevent the public from circumventing the "Pitchess" process by allowing a party to a lawsuit to easily obtain information contained in administrative files through a public records act request or similar tool without having to proceed through the formal Pitchess process.[29] The court said:

> If a law enforcement agency could - without the consent of the affected officer - present evidence at a public hearing, evidence regarding all past complaints and investigations of the complaints to assist in proving a particular personnel action, even if those complaints were later determined to be unfounded, criminal and civil litigants would then have full access to later wade through those records in an attempt to prove their current allegations against the officer. This is precisely what the Legislature sought to avoid by codifying the *Pitchess* procedures...[30]

The instant situation is entirely distinguishable. For one, the Board is not the appellant's employer with access to all of the peace officer's personnel records. Two,

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[29] In Pitchess v. Superior Court (1974) 11 Cal.3d 531, the Supreme Court of California established a motion procedure requiring a "good cause" finding and an in camera examination before personnel information of a peace officer could be disclosed to civil or criminal litigants, attempting to balance the litigant's need for the disclosure of relevant information with the peace officer's right to the legitimate expectation of privacy in his or her personnel records. The Pitchess procedures have since been codified at Evidence Code sections 1043 and 1046.

[30] San Diego at p. 284.

the adverse actions the appellant seeks to exclude in this case were taken by the Department itself against him, were required to be filed with the Board, and were subject to possible appeal through a public evidentiary hearing at appellant's option. The Board's consideration of these prior disciplinary actions in this case does not open the door to circumvention of the Pitchess process, by allowing the public access to confidential information from the appellant's personnel records that the public would not otherwise have been entitled to see. The San Diego case does not preclude the Board from considering an employee's prior adverse actions for purposes of demonstrating prior notice, progressive discipline, or appropriateness of penalty.

Penalty

Given that the Board finds the Department has established cause for discipline against appellant, and that evidence of appellant's prior adverse actions may be considered in determining an appropriate penalty, we must consider what penalty is appropriate under all of the circumstances.

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.[31]

[31] Skelly v. State Personnel Board at pp. 217-218.

In this case, appellant is a peace officer and has demonstrated a willingness to cause some physical harm through grabbing his wife's jacket with the intent to hit her. As previously noted, he has at least two prior disciplinary actions, although neither action involved use of physical force. On the other hand, the incident involving appellant and his wife was of a highly personal and emotionally-charged nature and is unlikely to recur. Moreover, the record reveals that appellant did not cause any actual harm to his wife and that he was cooperative with officials during the arrest. Under all of these circumstances, we find that a ten percent reduction in salary for six months is an appropriate penalty. Should the appellant have any recurrences of inappropriate conduct in the future, however, particularly involving physical violence or outbursts of anger, a more severe penalty, up to and including dismissal, may be appropriate.

ORDER

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

1. The ten percent reduction in salary for twelve months against appellant from the position of Correctional Sergeant is modified to a ten percent reduction in salary for six months;
2. The Department shall pay to appellant all back pay and benefits, if any, that would have accrued to him had his salary been reduced for twelve months instead of six.
3. This matter is hereby referred to the Chief 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[32]
William Elkins, President
Ron Alvarado, Vice President
Maeley Tom, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on September 23, 2003.

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Walter Vaughn
Executive Officer
State Personnel Board

[32] Member Sean Harrigan did not participate in this decision.