

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 33116
)
 W███████ █. M███████, █.) **BOARD DECISION**
) (Precedential)
 From 3 working days suspension)
 from the position of State) **NO. 94-26**
 Traffic Officer with the)
 Department of California Highway)
 Patrol at Redding) August 9, 1994

Appearances: John Markey, Labor Representative/Legal on behalf of appellant, W███████ █. M███████, █.; Steven Simas, Deputy Attorney General on behalf of respondent, California Highway Patrol

Before Carpenter, President; Ward, Vice President; Stoner and Bos Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Chief Administrative Law Judge (CALJ) in the appeal of W███████ █. M███████ (appellant or M███████). Appellant was suspended for three working days from his position as State Traffic Officer with the Department of California Highway Patrol (Department or CHP) for violating the Department's policy against discharging a firearm except as allowed by CHP policy.

The CALJ who heard the appeal reduced the penalty to an official reprimand. The Board rejected the CALJ's Proposed Decision, deciding to hear the case itself because of an apparent misinterpretation of the Board's precedential decisions concerning Government Code § 19572 subdivision (d) inexcusable neglect of

(M [REDACTED] continued - Page 2)

duty, (p) misuse of state property and (t) other failure of good behavior.

After a review of the entire record, including the transcript and the written and oral arguments presented to the Board, the Board finds cause to discipline appellant, but agrees with the CALJ that the penalty should be reduced from three working days' suspension to an official reprimand for the reasons that follow.

FACTUAL SUMMARY¹

Employment History

Appellant was first appointed as a State Traffic Officer on December 5, 1966. He has worked in Sacramento County, Los Angeles County and Ventura County, and was reinstated from a two year disability retirement in September 1980. Appellant thus has 25 years of state service as a peace officer with no prior discipline. All his merit salary adjustments have been granted.

Respondent's sole witness, Sergeant H [REDACTED] S [REDACTED], volunteered that appellant is known as "Mr. Highway Patrol" in the area. In April 1991, appellant received an award from the Redding Exchange Club as officer of the year.

¹ The facts are taken almost verbatim from the Proposed Decision of the CALJ.

CHP Shooting Policy

The Department of California Highway Patrol shooting policy is set forth in Highway Patrol Manual (HPM), section 70.6, chapter 5, paragraph 3. It states, in pertinent part:

(1) It is the policy of the Department to resort to the discharge of firearms against a human being or a vehicle only under legal authority and then only under the following conditions:

(a) When the officer has a reasonable belief that the use of deadly force is necessary for self-defense or to defend any other person from immediate serious bodily harm.

1. This would include the use of deadly force during the actual commission of an assault with a deadly weapon with a vehicle.

2. The foregoing does not authorize the discharge of firearms at wrong-way, high-speed, or reckless drivers of vehicles, etc., solely on the assumption that other persons may be injured or killed unless the driving act is terminated.

(b) When necessary to apprehend a person who the officer reasonably believes has committed a felony involving the use or the threatened use of deadly force except for A.D.W. with a vehicle which is covered in (c) below.

(c) When necessary to apprehend a person who has committed an A.D.W. with a vehicle which the officer reasonably believes has resulted in serious injury or death.

NOTE: The use of deadly force under (b) and (c) above shall be used only when all other reasonable means of apprehension have been exhausted, and if, under the circumstances then apparent to the officer, the use of a firearm is not likely to endanger innocent persons (emphasis in original).

The Pursuit

On July 1, 1992 at 1300 hours, appellant observed a white Chevrolet van drive into a restaurant parking lot in Lakemead.

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Appellant saw that the driver, who slouched in his seat upon making eye contact, had many "jailhouse" tattoos on his arms. The van immediately left and parked in the next lot. Appellant noticed that the van did not have a front license plate and checked its registration; it was expired.

Appellant next saw the van a few minutes later, when it failed to stop at a stop sign, sliding through the intersection at about 50 miles per hour (mph) and continuing at high speed. Appellant pursued the van, turning on the red "wig-wag" lights and siren of his patrol vehicle. The driver accelerated to over 65 mph, did not stop and "zigzagged" on both sides of the road.

The van continued onto a steep rocky dirt road which leads down to the Sacramento River, a remote wooded area frequented by derelicts, drifters and individuals with criminal backgrounds. Appellant called his pursuit in to the dispatcher and requested air assistance. He turned off the siren because the area was fairly open and uninhabited. The van continued to strike many rocks and boulders, and appellant was required to drop back. During this time, appellant observed at least seven misdemeanor violations of the California Vehicle Code.²

² These were sections 22450 - failure to stop for a stop sign; 22350 - exceeding safe speed limits; 21650 - failure to drive on the right half of the roadway; 21460(a) - driving to the left of double yellow lines; 22349 - exceeding the maximum speed limit; 23103 - driving a vehicle in willful or wanton disregard for the safety of persons or property; and 2800.2 evading a peace officer with reckless driving.

(M [REDACTED] continued - Page 5)

As the van headed toward thick terrain, the road turned sharply upward. The van stopped and backed up to complete the turn. Appellant stopped his vehicle about 50 feet to the rear. He exited his vehicle and tried to stop the pursuit by shooting out the tires of the van. When appellant stopped and got out of his vehicle, he was on a lower part of the road about three feet below the van. Appellant believed that the higher road, with its thick brush, was a safe backstop to halt the van. While concealed in the surrounding brush, appellant fired four rounds at the rear right tires of the van as it passed him. None of his shots hit the van.

The van did not stop, but continued for a few hundred feet where it struck a large boulder, resulting in a flat tire, and became stuck in soft dirt. Appellant returned to his patrol vehicle continued to pursue the van on the upper road. As he approached the rear of the van, the driver got out and locked the doors. Appellant exited his patrol vehicle, carrying a shotgun, and ordered the driver to stop. The driver ran down the embankment toward the river. Appellant checked the van. He saw the driver go into the river and try to swim across.

Appellant returned to his vehicle and drove toward the river where he last saw the driver. Another automobile drove up, carrying three occupants, one of whom was a bail bondsman looking for the driver. Air assistance was circling overhead. Appellant

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located the driver and, with backup police assistance, took him into custody without further incident.

The pursuit took place over four and one-half miles and lasted from 6 - 10 minutes. No damage to CHP equipment or injury to CHP personnel resulted from the apprehension of the driver. A pursuit investigating team concluded that the pursuit complied with the HPM and CHP policy.

At the time of the pursuit, appellant knew the identity of the driver, a Gerald Rose, because of the registration check. The van was searched the next day. Marijuana, methamphetamine and paraphernalia for transportation and sale were found, and Rose was charged. Rose had an extensive record, a six-page criminal history "rap sheet," including numerous controlled substance arrests. Appellant did not know of Rose's criminal history or that drugs were in the car when he began the pursuit.

The Investigation

As part of the investigative process, appellant was given a blood alcohol test which proved negative. He was interviewed three times. Appellant told investigators that he believed he was in fear of his life because of the remoteness of the area, thinking he would be ambushed. He never had a more severe or serious pursuit in 25 years with the Patrol. He saw the driver acting very suspiciously, and using extremely reckless tactics to evade the pursuit in total disregard for the condition of the vehicle or

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himself. Appellant did not see a weapon in the van and did not observe the commission of a felony.

The shooting investigation team concluded that appellant's discharge of his firearm was legally justified i.e., under legal authority. The investigation team found, however, that appellant's discharge of his firearm was inconsistent with CHP shooting policy because appellant did not fire his weapon with the intent to inflict deadly force but for the sole purpose of terminating the pursuit. The shooting investigation team concluded that appellant's discharge of his weapon constituted an unapproved forcible stop and an intentional discharge of a weapon at a vehicle in violation of HPM 70.6, Chapter 5, paragraph 3.c (1) (a)2.

Based on the conduct outlined above, appellant was charged with inappropriately discharging his department-issued semi-automatic pistol while pursuing a vehicle for misdemeanor traffic offenses. This conduct was alleged to violate Government Code sections 19572 subdivision (d) inexcusable neglect of duty, (p) misuse of state property and (t) other failure of good behavior, whether on or off-duty, which causes discredit to the agency.³

³ The notice of adverse action, dated April 6, 1993, also alleged a violation of State Personnel Board Rule 172. The Department withdrew this allegation at the commencement of hearing pursuant to State Personnel Board (SPB) precedential decisions, Appeal of R [REDACTED] B [REDACTED] (1993) SPB Dec. No. 93-21 and Appeal of Michael Prudell (1993) SPB Dec. No. 93-30.

DISCUSSION

CHP policy is explicit. A State Traffic Officer may discharge his weapon only under carefully specified conditions. Appellant violated this policy by discharging his weapon in an attempt to disable the van. Appellant had observed only misdemeanor reckless driving offenses, and had not seen a weapon or the commission of a violent felony. The CHP shooting policy does not allow the discharge of firearms at the vehicles of fleeing or reckless drivers.

We find that appellant's conduct in shooting at the van tires constitutes inexcusable neglect of duty in violation of Government Code § 19572, subdivision (d). This Board has previously defined an inexcusable neglect of duty to include "an intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty". [See R [REDACTED] H [REDACTED] (1994) SPB Dec. No. 94-07, p. 6 citing Gubser v. Dept. of Employment (1969) 271 Cal.App.2d 240, 242].

Appellant had a known duty to follow CHP policy. Appellant has received repeated training on CHP shooting policy and knew that the policy prohibited him from discharging his weapon except under certain narrow circumstances. Appellant purposely assessed the situation and evaluated the terrain before making the decision to shoot at the van tires. We find that the deliberateness of appellant's conduct demonstrates that appellant acted

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intentionally, and not merely in the heat of the moment.

The CALJ found misuse of state property in violation of Government Code § 19572, subdivision (p) based on a finding that appellant violated CHP policy on the discharge of a firearm. We disagree. The Board defined misuse of state property in R [REDACTED] B [REDACTED] (1993) SPB Dec. No. 93-21 at p. 11 as:

generally imply[ing] either the theft of state property or the intentional use of state property or state time for an improper or non-state purpose often, but not always, involving personal gain.

We also noted that misuse of state property "may also connote improper or incorrect use, or mistreatment or abuse of state property." Id. at p. 12.

Generally speaking, misuse of state property does not occur when an employee uses state property for the purpose for which it was intended even if there is some other element of error attached to the use. For example, if a state worker used the state telephone to conduct personal business during state time, a department might file charges under the Government Code § 19572, subdivision (p) misuse of state property because the worker was not using the telephone for the purpose it was intended -- state business. If, however, the same state worker, used the telephone to communicate with another employee about a work assignment but, in the course of the conversation, made abusive comments, the worker might be found to have been discourteous, but he would not have misused the telephone.

Here, appellant used his revolver for the purpose it was intended -- the control and/or arrest of an individual suspected to be a law breaker. Thus, appellant's conduct does not constitute a cause for discipline under Government Code § 19572, subdivision (p) even though appellant's use of his weapon was later found to violate CHP policy.

We agree with the CALJ that appellant's conduct did not constitute other failure of good behavior in violation of section 19572 (t). No discredit reflected to the agency. The pursuit was lawful, as was the shooting. Appellant violated only an internal policy. Although violation of an internal policy can, in turn, bring harm to the public service, we do not believe, under the circumstances, that appellant's actions, if known, would likely bring discredit to CHP.⁴

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, in its judgment is "just and proper". [Government Code § 19582.] In determining what is a "just and proper" penalty for a particular offense, the

⁴ In Nightingale v. State Personnel Board (1972) 7 Cal.3d 507, the Supreme Court held that an employer need not prove that an employee's misconduct was known to the public in order to cause discredit to his agency or his employment within the meaning of subdivision (t). Id. at 513. It is enough that, should the misconduct become known, it would discredit his agency or his employment.

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Board has broad discretion. [See Wylie v. State Personnel Board (1949) 93 Cal.App.2d 838.] The Board's discretion, however, is not unlimited. While the Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline, among the factors the Board must consider are those specifically identified by the Court in Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194 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. at 218].

When an employee takes it upon himself to ignore or disobey clear department policy, the harm to the public service is evident. If officers may ignore department policy with impunity, the adoption of policy will quickly become meaningless.

The circumstances surrounding this misconduct do, however, require mitigation of the penalty. Appellant is a long-term employee with a heretofore unblemished record. He suffered one lapse of judgment during a high speed chase. An official reprimand should suffice to remind appellant of the importance of following policy in the future.⁵

⁵ In reducing the penalty against appellant, the CALJ mentioned that appellant had suffered enough in that he had been blood alcohol tested and investigated three times. The Board disagrees with the CALJ's use of necessary investigation as a mitigating factor in assessing penalty.

CONCLUSION

For all of the reasons set forth above, the Board finds cause for disciplining appellant for inexcusable neglect of duty under Government Code section 19572, subdivision (d). We do not find evidence that appellant misused state property or suffered other failure of good behavior of such nature to cause discredit to the appointing authority or his employment pursuant to subdivision (p) or (t). We further believe that an official reprimand is the proper penalty.

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 three working days' suspension of W [REDACTED] I. M [REDACTED], [REDACTED]. from his position as State Traffic Officer with the Department of California Highway Patrol is hereby reduced to an official reprimand.

2. The Department of California Highway Patrol shall pay to appellant all back pay and benefits that would have accrued to him had he not been suspended for three working days.

3. This matter is hereby referred to the 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.

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4. This opinion is certified for publication as a Precedential Decision (Government Code § 19582.5).

THE STATE PERSONNEL BOARD*

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

* Member Alfred R. Villalobos did not participate in this decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on August 9, 1994.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board