

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)
)
 TELY M. CAYABAN) SPB Case No. 29904
)
) **BOARD DECISION**
 From reduction in salary as a) (Precedential)
 Registered Nurse, Range B, to)
 the minimum rate as a Registered) **NO. 92-16**
 Nurse, Range A, for 12 months at)
 Agnews Development Center,) October 6, 1992
 Department of Developmental)
 Services at San Jose)

Appearances: Robert Mueller, Attorney, California State Employees' Association, representing appellant, Tely M. Cayaban; Dean Stiles, Attorney, representing respondent, Department of Developmental Services.

Before Carpenter, President; Burgener and Ward, 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 Tely M. Cayaban (appellant or Cayaban) from a reduction in salary as a Registered Nurse, Range B, to the minimum rate as a Registered Nurse, Range A, for 12 months at Agnews Developmental Center, Department of Developmental Services (Department).

The adverse action was based on charges that the appellant erred in dispensing medication. The ALJ found that the penalty meted out by the Department was out of proportion to the offense, concluded that a counseling memorandum received by the appellant and her removal from the position of dispensing medications were

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sufficient punishment, and revoked the adverse action in its entirety.

After review of the entire record, including the transcripts and briefs submitted by the parties, and having listened to oral arguments, the Board rejects the Proposed Decision of the ALJ revoking the adverse action and instead, for the reasons set forth below, modifies the penalty imposed by the Department.

FACTUAL SUMMARY

Appellant first came to work with the Department as a Licensed Vocational Nurse on April 20, 1988. She became a Registered Nurse I in June 1988, a Registered Nurse II in December 1988, and a Registered Nurse, Range B, in August 1989.

Appellant had a one-step reduction in salary for three months effective October 1, 1990. In a settlement agreement, appellant agreed that the previous July, while she had been on duty administering medications, a member of the State Licensing Team came to observe her work. She told the Licensing Team member that noon medications had been dispensed at 11:15 a.m., but when the team member examined the records, she discovered that most of the medications had not been signed for. During the same visit, appellant drew attention to a metal cart with four stainless steel trays on it, each tray containing tumblers with medication. The tumblers were not marked with the medication they contained or with the name of the client who was to get it. As a result of the above

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findings, the hospital received a negative citation from the Licensing Board.

After having received the adverse action in October 1990, appellant was retrained in the procedure for dispensing medications to clients. The procedure involves taking cassettes of medication that are prepackaged by the pharmacy separately for each patient in sufficient amounts to last 48 hours, separating them into individual doses, and checking and double checking that the medication and doses are the ones prescribed by the doctors.

On February 11, 1991, the pharmacy delivered 600 milligrams (mg) of Motrin for a patient instead of the 400 mg that had been ordered by the doctor. Motrin is an anti-inflammatory and pain reducing medication and is available over-the-counter in 200 mg pills. Since the patient had been taking Motrin for a very long time, appellant neglected to check the dosage and dispensed the wrong dosage of medication to the patient. The error was noticed by the medication nurse on the next shift who also was to dispense 400 mg to the same patient. When told of her error, appellant realized her mistake immediately. She did not minimize her error or her culpability either at the time she made the error or at the hearing. She expressed remorse at having made the mistake.

The doctor who prescribed the medication for the patient testified that the patient did not suffer any harm by being given 600 mg instead of 400 mg of Motrin. The Department's witnesses

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testified that giving the wrong dosage of some medications could cause serious complications and could even be life-threatening.

Appellant was charged with inefficiency, inexcusable neglect of duty, discourteous treatment of the public or other employees and other failure of good behavior under Government Code section 19572, subdivisions (c) (d) (m) and (t), respectively.

ISSUE

There are two issues presented for review in this case. In rejecting the Proposed Decision of the administrative law judge, the Board raised the question of what penalty was appropriate for the admitted misconduct. The appellant raised an additional issue in her brief: whether the admitted misconduct constitutes inexcusable neglect of duty.

DISCUSSION

Inexcusable Neglect of Duty¹

Appellant argues that her admitted error, failure to follow established medication procedures and resultant distribution of a wrong dosage of the drug Motrin to a patient does not constitute inexcusable neglect of duty because the error was unintentional. We disagree.

Appellant was bound to follow the hospital's procedures for distribution of medications to the patients. Appellant testified

¹The facts do not support the charges that appellant violated Government Code section 19572, subdivisions (c), (m), or (t).

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that because this patient had been taking Motrin for some time, she did not bother to check the dosage as she was required to do. She offered no other excuse for failing to follow the procedure of checking and double-checking the medication she received against the list of medications prescribed. The fact that appellant did not intentionally distribute the wrong amount of medication does not change the fact that she made a conscious decision not to abide by the procedures mandated to assure that medication errors do not occur. We, therefore, find that appellant's neglect of duty was inexcusable.

The 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 section 19582). One aspect of rendering a "just and proper" decision involves assuring that the discipline imposed is "just and proper." 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, 843) 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:

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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.)

Appellant argues that there was no evidence of "harm to the public service." Appellant relies on the testimony of the prescribing doctor that the patient who received 600 milligrams of Motrin from appellant as opposed to the prescribed 400 milligrams suffered no harm as a result of appellant's error. She makes much of the fact that the overdose involved Motrin, a drug that is also available without a prescription over-the-counter in smaller doses.

Neither the law nor the policy behind the law supports appellant's contentions. Significantly, the Skelly test inveighs us to consider not only whether any harm actually ensued from the employee's misconduct, but also whether the misconduct, if repeated

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in the future, is likely to result in harm to the public service. We are charged with generalizing to a certain extent the actual misconduct that occurred so that we can determine whether, and to what extent, formal discipline is necessary to deter the employee from engaging in the same type of misconduct in the future. Thus, in the instant case, the issue is not whether a patient was harmed or likely to be harmed by an overdose of Motrin, but whether a patient is likely to be harmed by a medication error. The misconduct sought to be deterred here is not the dispensing of an erroneous dosage of the particular drug Motrin, but the careless failure to abide by the hospital's policy that requires nurses who are dispensing medication to check and double-check the medications dispensed to assure that each patient receives the precise amount of medication prescribed. While no harm resulted from appellant's dispensing of an overdose of Motrin, harm to the public service is likely if appellant continues to make medication errors. In fact, the wrong dosage of medication could result in serious illness, or even death, to the developmentally disabled patients residing in this particular hospital.

The circumstances surrounding the misconduct also support the Department's determination that some formal discipline was mandated. Only three months prior to the misconduct at issue in this case, appellant had received a 5% pay reduction for three months based on irregularities in medication procedures that were

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observed by the State Licensing Team. She received retraining in the proper procedures for administering medications to patients after the first adverse action. The prior adverse action and retraining were apparently insufficient to impress upon appellant the importance of carrying out her medication responsibilities with the utmost care and attention. Appellant's explanation for her error, that she knew the patient had been taking Motrin for some time and was, therefore, not as careful as she should have been to check the dosage, or would have been if a different medication had been involved, does not render her misconduct excusable, but is a mitigating factor in assessing penalty.

Skelly also requires us to consider the likelihood of recurrence in assessing penalty. Appellant was negligent in carrying out her medication responsibilities in July 1990, suffered adverse action as a result in October 1990, received retraining, and then was negligent again in February 1991. Appellant was subsequently removed from her medication responsibilities. Although immediate recurrence is unlikely, given the Department's decision to remove appellant from her medication duties, we are concerned that unless appellant again receives a strong message regarding the importance of vigorously following medication procedures, once appellant is restored to the full range of duties of a Registered Nurse, Range B, medication errors might recur. Consistent with the concept of progressive discipline, the receipt

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of a second formal adverse action should serve to remind appellant of the seriousness with which the Department views medication errors and as a warning that future errors of the same nature will be addressed with even stronger discipline. Appellant's willingness to admit she should have been more careful and expressions of remorse at the hearing are considered in mitigation of the penalty.

Having decided that some formal adverse action is warranted, we now determine what level of penalty is appropriate under all the circumstances. Had this been appellant's first error, a counseling memorandum or official reprimand would have been within the range of penalties that would serve to warn appellant to be more careful in the future. As noted above, however, the Department already assessed a 5% pay reduction for three months for an earlier medication error. Under the concept of progressive discipline, successive similar failures in performance should be addressed by progressive levels of punishment. We agree with the ALJ's determination that the penalty imposed by the Department in this case was overly harsh under all the circumstances.² First, we note that appellant is being punished based on a singular error, albeit not her first error for which she was already punished. Second, having noted that appellant's mistake, if made with another

²The penalty amounted to approximately \$500.00 per month for 12 months, for a total of \$6000.00

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drug, could have serious consequences, we also recognize that had appellant been dealing with a drug other than Motrin, or with a new prescription for a patient rather than with a familiar prescription for a familiar patient, she might have been more careful to check and double-check the dosage. Thus, while we do not go so far as to find appellant's behavior excusable, we agree with the ALJ that the level of punishment was out of proportion to the offense. We also note that appellant has expressed remorse for her carelessness and believe she will be more vigilant in the future.

CONCLUSION

For all of the reasons set forth above, we modify the penalty originally imposed by the Department to a 5% pay reduction for a period of six months.

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 above-referenced adverse action of reduction in salary from a Registered Nurse, Range B, to the minimum rate for a Registered Nurse, Range A, for 12 months is MODIFIED to a 5% reduction in salary for a period of six months as a Registered Nurse, Range B;

2. The California Department of Developmental Services and its representatives shall pay to appellant all back pay and benefits that would have accrued to her had she received a 5% pay

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reduction for 6 months rather than the pay reduction actually implemented;

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 to the amount of salary and benefits due appellant.

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

STATE PERSONNEL BOARD*

Richard Carpenter, President

Clair Burgener, Member

Lorrie Ward, Member

*Vice-President Alice Stoner and Member Richard Chavez 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 October 6, 1992.

GLORIA HARMON

Gloria Harmon, Executive Officer
State Personnel Board