BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case Nos. 27375
	)	and 27967
	)	
FRANCES P. GONZALES	)	**BOARD DECISION**
	)	(Precedential)
From 1 step reduction in salary	)	
for 6 months and from 5 days'	)	
suspension from the position of	)	**NO. 93-13**
Accountant I (Specialist) with the	)	
Employment Development Department	)	
at Sacramento	)	June 1, 1993

Appearances: Richard A. Stevens, Senior Counsel, representing Employment Development Department; Mark DeBoer, Attorney, California State Employees Association representing appellant.

Before Carpenter, President; Stoner, Vice President and Ward, Member.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the attached Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Frances Gonzales (appellant or Gonzales) from a one step reduction in salary for 6 months and 5 days' suspension from the position of Accountant I (Specialist) with the Employment Development Department (EDD). The sole basis for both adverse actions was appellant's excessive tardiness.

The ALJ found that while appellant's tardiness did adversely affect the operation of the unit to the detriment of the civil service, the fact that appellant's back pain impaired her efforts to arrive at work in a timely manner, the fact that she was an otherwise good employee, the fact of appellant's lengthy tenure

with the state and improvement over time in her attendance warranted modification of each of the adverse actions to an official reprimand.

After review of the entire record, including the transcripts and briefs submitted by the parties, the Board finds that the ALJ's findings are free from prejudicial error and adopts them as our own. We disagree, however, with the ALJ's conclusion that the penalties imposed by EDD in this matter were unwarranted, for the reasons set forth below.

ISSUE

This case raises the following issues for our determination:

1. Did the Department adhere to the principles of progressive discipline in this case?

2. What is the appropriate penalty in this case?

DISCUSSION

When performing its constitutional responsibility to "review" disciplinary action" [Cal. Const. Art. 7, 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; it is not obligated to follow the recommendation of the employing power. (See Wylie v. State Personnel Board (1949) 93

Cal.App.2d 838,843, 109 p.2d 974.) 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.)

Harm to the Public Service

The parties to an employment relationship rely upon the precept that the employer is obligated to pay agreed upon wages and benefits and the employee is obligated to perform his or her work in a satisfactory manner. Dependable attendance is one element of satisfactory work. The employee who does not report to work in a timely manner is not performing satisfactory work in that he or she

is failing to meet one of the primary responsibilities as an employee. Employers have the right to expect their employees to report for work on the day and at the time agreed, and may discipline employees for their failure to meet that expectation. (See Abrams & Nolan, Toward a Theory of "Just Cause" in Employee Discipline Cases, 1985 Duke L.J. 594, 611-14.)

An employee's failure to meet the employer's legitimate expectation regarding attendance results in an inherent harm to the public service. The tardiness of one employee, if tolerated, adversely affects the morale of those who meet their obligations. The nature and extent of the particular harm in the instant case was established through the testimony of appellant's supervisor, Douglas Hoffman (Hoffman):

> The impact of tardiness and high absenteeism affects the overall efficiency of our unit and the other units which we work with. Usually when an employee is absent, work such as incoming employer phone calls, work distribution, attendance keeping, etc. are assigned to other employees in the unit. This places an additional burden on them and hinders their efficiency. Lastly, but most important, excessive absenteeism and tardiness delays and diminishes the level of service rendered to the employer community which we serve.[1]

Thus, the harm to the public service resulting from appellant's excessive tardiness is clear.

Circumstances Surrounding the Misconduct

The fact that an employer has a right to expect satisfactory

[1]The quoted language appears in Respondent's Exhibit 1 which was admitted into evidence as part of the direct testimony of Mr. Hoffman.

attendance from its employees does not, however, relieve the employer from considering the circumstances surrounding the misconduct in assessing discipline nor does it relieve the employer from its duty to adhere to the principles of progressive discipline.

In the instant case, EDD did give due consideration to appellant's contention that the back pain she suffered combined with the long drive she made each day from Stockton to Sacramento, was the primary reason for her tardiness. Appellant contended that she was tardy because each morning she had to work through the back pain she suffered upon awakening until she was able to move around comfortably enough to drive to work.

Hoffman, appellant's supervisor, responded to appellant's tardiness and excessive absenteeism by counselling her on numerous occasions and by documenting the fact of her excessive tardiness in a memorandum dated September 25, 1989. When her tardiness did not improve, her supervisor issued an informal letter of reprimand, dated December 1, 1989, in which he noted that he had moved appellant's starting time up fifteen (15) minutes (from 7:45 a.m. to 8:00 a.m.) to assist appellant in arriving at work on time. In the same letter, her supervisor informed appellant that continued tardiness would result in adverse action.

On March 1, 1990, EDD issued its first formal adverse action, the one-step reduction in salary, setting forth tardies through January 11, 1990.

On March 27, 1990, Hoffman issued appellant another informal letter of reprimand for chronic tardiness, covering tardies from January 22, 1990 through March 26, 1990. In that letter, Hoffman documented his conversation with appellant in which he advised her that she must adjust her morning routine to arrive at work by 8:00 a.m.. The letter warned that: "Failure to correct this problem of tardiness will result in adverse action up to and including dismissal."

Despite the fact that appellant's starting time was moved up numerous times by her supervisor to allow her additional time to get to work, appellant continued to be tardy on a regular basis. The second formal adverse action, effective May 14, 1990, covered an additional six instances of tardiness occurring after the March 27, 1990 informal letter of reprimand.

EDD adhered to the principles of progressive discipline by providing appellant with a series of documented warnings that continued tardiness would result in formal adverse action. The doctrine of progressive discipline does not require that the employer utilize every step in a series of possible formal disciplinary measures to address successive instances of misconduct. The memoranda and informal letters of reprimand utilized by EDD in this case gave fair and adequate warning to appellant that her tardiness was being taken seriously by her employer and that further instances of tardiness would result formal discipline. Appellant received ample warning that her

tardiness would not be tolerated by her supervisor. Given the numerous warnings she received, we see no reason why appellant could not have adjusted her morning schedule to arise one half hour earlier to allow for additional time to either loosen up more before her drive to Sacramento, or to take additional time once she arrived in Sacramento to walk from her car to work.

Likelihood of Recurrence

The fact that appellant's attendance record improved after service of the two adverse actions at issue here would certainly mitigate against the imposition of dismissal as a penalty, had dismissal been the penalty meted out by EDD. The fact of appellant's improvement, however, does not militate against our upholding the original penalties of a pay reduction and a suspension as imposed by EDD. It is unclear as to whether the Department's eventual concession in granting appellant flextime or whether the adverse actions themselves precipitated the improvement.[2]

CONCLUSION

For all of the reasons set forth above, the original penalties imposed by EDD of a one-step pay reduction for 6 months and 5 days'

[2]While we uphold EDD's discretion in choosing to pursue adverse action, and do not pass judgment on the Department's denial of the flex time schedule to appellant when she first requested it in January 1990, we note that the need for successive adverse actions to cure appellant's chronic tardiness, and associated time and cost expended in pursuing them, may have been obviated had the Department not delayed the granting of the flex time schedule until June of 1990.

suspension are sustained.

ORDER[3]

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 actions of the Employment Development Department in imposing a one-step pay reduction for 6 months and 5 days' suspension are sustained;

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

THE STATE PERSONNEL BOARD*

Richard Carpenter, President
Alice Stoner, Vice-President
Lorrie Ward, Member

*Members Floss Bos and Alfred R. Villalobos were not on the State Personnel Board at the time this case was argued before the Board and have therefore not participated in this Decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on April 20, 1993.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board

[3]We do not adopt the WHEREFORE IT IS DETERMINED paragraph set forth on p. 9 of the Proposed Decision.

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeals by FRANCES P. GONZALES From 1 step reduction in salary for 6 months and from 5 days' suspension from the position of Accountant I (Specialist) with the Employment Development Department at Sacramento	Case Nos. 27375 and 27967

PROPOSED DECISION

APPEARANCES

This matter came on regularly for hearing before Jose M. Alvarez, Administrative Law Judge, State Personnel Board, on April 5, 1991, at Sacramento, California.

Written argument was submitted by the parties to this proceeding by April 22, 1991.

The appellant, Frances P. Gonzales, was present and was represented by Cindy Parker, Attorney, California State Employee's Association.

The respondent was represented by Richard A. Stevens, Attorney, Employment Development Department.

Evidence having been received and duly considered, the Administrative Law Judge makes the following findings of fact and Proposed Decision:

I

JURISDICTION

The above 1 step reduction in salary for 6 months effective March 1, 1990, the 5 days' suspension effective May 18, 1990, and appellant's appeals therefrom comply with

the procedural requirements of the State Civil Service Act.

The reduction in salary was first scheduled to be heard on April 27, 1990. The hearing was continued at appellant's request with the respondent concurring. On October 10, 1990 a second hearing was scheduled to hear both the reduction in salary and suspension. This hearing was continued at the respondent's request with the appellant concurring. The next hearing was scheduled for April 5, 1991. A hearing was held on that date.

II

EMPLOYMENT HISTORY

Respondent appointed the appellant to the classification of Clerk Typist II in July of 1975. On October 1, 1977 this classification was retitled as Office Assistant II (Typing). The appellant held this classification until she was appointed an Account Clerk II on September 8, 1981. On October 3, 1983 respondent appointed the appellant to the class of Accounting Technician. On June 1, 1987 the appellant was appointed an Accountant I (Specialist) by the respondent. This was the class held by the appellant at the time of the instant adverse actions. The appellant has not received any prior adverse actions.

III

ALLEGATIONS

As cause for the issuance of the two adverse actions the respondent alleges that the appellant was excessively tardy or absent from work on numerous occasions.

IV

FINDINGS OF FACT

The Reduction in Salary

In 1984 the appellant was in an auto accident which caused injuries to her back. The appellant does suffer back pain due to said accident. In the morning when she awakens it takes some time for her to be able to work through the back pain so as to move about somewhat comfortably. The appellant also lives in Stockton, California and commutes to her work in Sacramento, California. For a period of time she did live in Sacramento, California but this created problems for the schooling of her child so she returned to Stockton, California. Between 1984 and the incidents noted herein the appellant would arrive to work late on various occasions. Her supervisors would allow her to use vacation in lieu of sick leave to make up for her tardiness in arriving at work provided she had the time on the books.

V

In August of 1989 the appellant went to work for a new supervisor. This supervisor had a different attitude towards appellant's problems in arriving to work on time. On September 25, 1989 the supervisor provided the appellant with a memorandum restricting her usage of sick leave and requiring her to provide a medical excuse if she was to use said leave. The memorandum also placed the appellant on notice that her tardiness was adversely affecting the operations of the unit she was working in. She was also put

on notice that her continued tardiness caused others in the unit to have to cover for her absences. The supervisor stated that "usually when an employee is absent, work such as incoming employer phone calls, work distribution, attendance keeping etc. are assigned to other employees in the unit. This places an additional burden on them and hinders their efficiency. Lastly, but most important, excessive absenteeism and tardiness delays and diminishes the level of service rendered to the employer community which we serve."

VI

Appellant's duties in the unit were to review and analyze quarterly adjustment forms of employers.

VII

In October of 1989 the appellant was tardy to work four times. On two of those occasions the appellant was late to work some twenty minutes.

In November of 1989 the appellant was late to work on nine occasions. She was twenty minutes late for work on one occasion, fifteen minutes late for work once, ten minutes late for work twice and seven minutes late to work twice. On a single occasion she was late to work by five minutes. On two occasions in November, 1989 the appellant's pay was docked 3.5 hours and 1.5 hours respectively. The docks were due to her tardiness to work on those days without any medical substantiation and it was in lieu of sick leave. On December 1, 1989 the appellant was late for work 7 minutes.

VIII

On December 1, 1989 the appellant's supervisor provided the appellant with an informal written reprimand. In that document he noted the above-noted dates where she had been late to work. It also notes that the appellant's starting time commencing in October of 1989 had been moved from
0745 hours to 0800 hours to accommodate her schedule. The supervisor noted that this did not appear to help. The supervisor again told the appellant that her attendance affected the overall efficiency of the unit and impacted the level of service.

On December 12, 1989 the appellant was late to work
5 minutes. On December 13, 1989 the appellant was late to work 15 minutes. On December 19, 1989 the appellant was late to work 12 minutes. On December 28, 1989 the appellant was late to work 6 minutes.

IX

In January 1990 the appellant was late to work five times. On the 5th she was late seven minutes. On
January 8, 1990 the appellant was late to work 21 minutes. On January 9, 1991 the appellant was late to work 1 hour and 15 minutes. On January 11, 1990 the appellant was late to work 15 minutes.

X

The Suspension

On January 22, 1990 the appellant was late to work 5 minutes. In February 1990 the appellant was tardy to work four times. On two occasions she was late to work

3 minutes, on one occasion 7 minutes and on one occasion 9 minutes.

In March of 1990 the appellant was late to work nine times. On March 8, the appellant was tardy by 1 hour and 25 minutes. On the 12th of March and 13th of March she was late to work 9 and 5 minutes respectively. On the 15th of March 1990 the appellant was late to work 2 hours and 20 minutes. On the 16th and 19th of March, 1990 the appellant was late to work 10 and 19 minutes respectively. On March 22, 1990 the appellant was 2 hours late to work and on the 23rd of March she was late to work 2 hours and 16 minutes. Finally on March 16, 1990 the appellant was late to work 16 minutes.

On March 27, 1990 the appellant received another unofficial reprimand from her supervisor. It was in writing and indicated the various dates in January, February and March of 1990 when the appellant was late to work.

XI

In January 1990 the appellant requested she be placed on flex time and that her starting time at work be moved from 0800 hours to 0900 hours. The request was denied on grounds that her attendance was unreliable.

In February of 1990 the requirement that the appellant's absences be medically verified was removed. There is no dispute between the parties that the appellant does suffer from back pain.

In June of 1990 the appellant's start time was moved back to 0900 hours. In an eight month period between

May 1, 1990 and the date of the hearing April 5, 1991, the appellant has been late to work eight times. Appellant's attendance has improved.

* * * * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT THE ADMINISTRATIVE LAW JUDGE MAKES THE FOLLOWING DETERMINATION OF ISSUES:

Appellant contends that the respondent is required to reasonably accommodate the appellant in the circumstances she finds herself in. Appellant concedes that the appellant's supervisor did engage in some accommodation by moving her start time to 0800 hours but that such proved insufficient. The appellant indicates that the supervisor did act with some compassion in that he ultimately allowed her to start work at 0900 hours. Appellant contends that this was insufficient and that it should have been done earlier. Further, appellant contends that moving the start time solved the appellant's problems.

While it may be true that the moving back of the start time assisted in dealing with the problem of appellant's tardy appearances at work it did not totally solve them. She was still late for work eight times between May of 1990 and April of 1991. No real evidence was introduced as to the magnitude of these events. It is assumed that they were minor. However, it also appears that the two adverse actions had an effect on the appellant in terms of her appearance on the job in a timely (manner. It took two actions to let the appellant know that attendance

requirements were a serious matter with the respondent.

Appellant's conduct did affect the unit. It took the supervisor's time. It affected co-workers in that they had to cover for appellant's absences. These are not minor matters in a unit where work has to be done, phones answered, and various other matters attended to. If one reads the supervisors' memorandum he perceives his mission to be service to the public. To put it mildly that is the total business of civil service employees. When that service suffers the civil service suffers inasmuch as the client community may adversely perceive what State employees do.

It is noted, however, that the appellant was truly ill. It further appears that she did make valiant effort to arrive at work but that her pain impaired that effort. It further appears from the record that the appellant in all other respects is a good employee. She appears to get along with her supervisor, and but for her attendance the supervisor appears to have a positive attitude towards the appellant.

Taking into account the appellant's length of service which is without blemish, and further noting her improvement in arriving at work commencing in May of 1991 it appears that it would be proper, as appellant requests, to modify each of the adverse actions to an official reprimand.

* * * * *

WHEREFORE IT IS DETERMINED that the 1 step reduction in salary for 6 months taken by respondent against Frances P. Gonzales effective March 30, 1990 and the 5 days' suspension taken by respondent against Frances P. Gonzales effective May 18, 1990 are both hereby modified to an official reprimand each to be effective on the same dates.

* * * * *

I hereby certify that the foregoing constitutes my Proposed Decision in the above-entitled matter and I recommend its adoption by the State Personnel Board as its decision in the cases.

DATED: November 12, 1991.

JOSE M. ALVAREZ

Jose M. Alvarez, Administrative Law Judge, State Personnel Board.