

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	SPB Case No. 04-0330A
HAJI JAMEEL)	BOARD DECISION
)	(Precedential)
from dismissal from the position of)	
Supervising Transportation Engineer with)	NO. 05-02
the California Public Utilities Commission)	
at San Francisco)	April 5-6, 2005
)	

APPEARANCES: Steven B. Bassoff, Attorney, on behalf of appellant, Haji Jameel; Fiel D. Tigno,¹ Deputy Attorney General, on behalf of respondent, California Public Utilities Commission.

BEFORE: William Elkins, President; Maeley Tom, Vice President; Ron Alvarado, Sean Harrigan, and Anne Sheehan, Members.

DECISION

This case is before the State Personnel Board (Board) after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ). Haji Jameel (appellant) was dismissed from his position as a Supervising Transportation Engineer with Respondent California Public Utilities Commission at San Francisco (CPUC), based on allegations that he failed to meet with a CPUC investigator and provide documents on January 9, 14, 26, and 28, 2004, to assist in the CPUC's investigation of the State Auditor's allegations that appellant had misappropriated funds from CPUC.

¹ Miguel A. Neri, Supervising Deputy Attorney General, represented the California Public Utilities Commission during the hearing before the Administrative Law Judge.

In this decision, the Board finds that the Department established that appellant impermissibly failed to provide documents to investigators as part of an official CPUC investigation. The Board finds, however, that dismissal is too severe a penalty under all the circumstances. Notably, appellant was not charged with misappropriating CPUC funds. In addition, appellant based his decision not to provide the requested documents on legal advice from his attorney. The Board also recognizes that appellant has been employed by CPUC for 26 years with no history of discipline. Given all the circumstances presented here, the Board finds that a just and proper penalty is a suspension for three-months.

BACKGROUND

Employment History

Appellant's entire service of 26 years has been with CPUC, starting November 22, 1977, when he was hired as an Assistant Utilities Engineer. He was promoted to his final position of Supervising Transportation Engineer on December 1, 1991. Appellant has no history of prior disciplinary action.

Factual Summary²

(June 30, 2003: State Auditor General's Report)

On June 30, 2003, the California State Auditor sent a letter to Michael Peevey (Peevey), President of the Board of Commissioners of the CPUC, notifying him that the Bureau of State Audits (BSA) had completed its investigation into alleged financial

² The Factual Summary is taken substantially from the ALJ's Findings of Fact.

improprieties by appellant in connection with railroad conferences conducted in 1999, 2000, and 2001. BSA did not share its evidence with the CPUC, but was specific about the amounts that it claimed appellant had misappropriated from his oversight of the three conferences.

According to appellant, BSA investigators interviewed him on two occasions, with the last interview occurring during May 2002.

On October 10, 2003, appellant was placed on paid ATO while the CPUC investigated BSA's allegations. Appellant was instructed to remain available during regular business hours.

On October 20, 2003, CPUC Labor Relations Officer Patrick McDermott (McDermott), asked appellant to gather information relevant to CPUC's investigation concerning the railroad conferences. Appellant confirmed that discussion in the following electronic mail (e-mail) message to McDermott on October 21, 2003: "Per your suggestion, I am gathering all information and hopefully able [sic] to put together a package for your review." No deadline was given to appellant to produce the documents, nor was specific direction provided regarding what "relevant information" was to be produced.

On November 17, 2003, McDermott sent an e-mail message to appellant with specific instructions as to what documents appellant was to produce to CPUC investigators:

- The fronts and backs of 69 checks totaling \$30,056.00 for a 1999 railroad conference;
- 87 checks totaling \$8,835.00 for a 2000 railroad conference;

- 134 checks totaling \$41,867.77 for a 2001 railroad conference;
- A list of the individuals and vendors that attended the 2001 railroad conference;
and
- Any additional expenses paid by appellant, with proof of payment.

McDermott did not specify a time frame for producing the above-listed documents.

On November 17, 2003, appellant sent an e-mail message to McDermott, requesting that CPUC contact his attorney, Douglas Rappaport (Rappaport), regarding the requested documents.

On November 24, 2003, Rappaport sent a letter to McDermott, advising that he had been retained to represent appellant in the investigation, and that appellant disputed the BSA's report.

Sometime thereafter, CPUC retained the Office of the Attorney General to represent its interests in obtaining the requested information from appellant.

On December 3, 2003, Rappaport advised McDermott that he had subpoenaed the requested checks from appellant's bank.

On December 18, 2003, Rappaport advised McDermott that he had received the documents from appellant's bank, and that he would produce the requested documents to CPUC by the first of the year. McDermott then informed Rappaport that the CPUC wanted appellant to meet with CPUC's auditor in Sacramento to discuss the records, and that appellant should report to work in Sacramento on December 29, 2003, with the documents in question. In response, Rappaport advised McDermott to e-mail appellant directly regarding meeting with the auditor in Sacramento.

(Instruction to Attend a December 29, 2003 Meeting)

On December 23, 2003, CPUC Deputy Director David Trojacek (Trojacek) left a voice mail message for appellant on appellant's home answering machine,³ instructing appellant to report to Sacramento on December 29, 2003, to meet with CPUC investigators. Appellant was also directed to bring the documents in question to that meeting. On that same date, Rappaport returned Trojacek's telephone call, advising Trojacek that appellant would be happy to return to work, but that he would not produce the requested documents because they were "attorney work product."

Appellant did not report to Sacramento on December 29, 2003, to meet with CPUC investigators.

(Instruction to Attend a January 9, 2004 Meeting)

On January 7, 2004, Supervising Deputy Attorney General Fiel Tigno (Tigno) sent a letter to Rappaport via facsimile transmission, advising that she represented CPUC in its attempt to obtain the requested documents from appellant. That correspondence recounted CPUC's recollection of various conversations:

- (a) "that on December 3, 2003, McDermott and Rappaport had a telephone conversation wherein Rappaport stated that he had subpoenaed appellant's bank for the requested checks and deposits."
- (b) "that on December 18, 2003, Rappaport advised McDermott that he had received the documents from appellant's bank, and that he would produce the requested documents to CPUC by the first of the year; that McDermott informed Rappaport that the CPUC wanted appellant to meet with its auditor in Sacramento to discuss the records

³ Trojacek was unable to leave an e-mail message for appellant, as the e-mail address for appellant's home that CPUC had on file for appellant was no longer valid.

and to report back to work on December 29, 2003; that Rappaport advised McDermott to e-mail appellant directly regarding meeting with the auditor in Sacramento.”

(c) “that on December 23, 2003, Rappaport called appellant’s supervisor, David Tojacek, and informed him that appellant would not produce the documents, as they were attorney work product and Rappaport had not completed his investigation.”

Tigno informed Rappaport that appellant was to meet with CPUC auditor Michael Kohaya (Kohaya) in Sacramento on January 9, 2004, and that appellant was to provide the documents previously requested by McDermott.

Appellant did not receive a direct instruction from anyone at CPUC to attend the January 9, 2004, morning meeting with Kohaya. According to appellant, Rappaport did not notify him of the January 9 morning meeting until the afternoon of January 9. Rappaport reportedly told appellant that he was working with CPUC’s attorney concerning whether appellant could be required to produce the requested documents at the meeting. As a result, appellant did not attend the meeting.

On January 9, 2004, Rappaport sent Tigno a facsimile transmission, requesting that Tigno indicate what legal authority existed that required appellant to produce the requested documents.

(Instruction to Attend a January 14, 2004 Meeting)

On January 12, 2004, Tigno sent Rappaport a facsimile transmission responding to Rappaport’s January 9, 2004 correspondence. In that document, Tigno asserted that appellant was required to produce the documents pursuant to the provisions of Government Code section 19572, subdivisions (e) and (o), and also pursuant to the

provisions of Lybarger v. City of Los Angeles.⁴ Tigno further warned that appellant's continued failure to cooperate in CPUC's investigation of appellant's alleged misconduct could be cause for administrative discipline, up to and including dismissal, and further requested that appellant meet with Kohaya in Sacramento on January 14, 2004, with the requested documents.

No one from CPUC directly instructed appellant to attend the January 14, 2004, meeting. According to appellant, during a telephone conversation with Rappaport on the evening of January 13, 2004, Rappaport told him that CPUC wanted appellant to attend a meeting in Sacramento the following morning. Rappaport also told appellant that appellant did not have to attend the meeting, because he was still discussing the matter with CPUC's attorney. As a result, appellant did not attend the meeting.

On January 15, 2004, Rappaport sent Tigno a facsimile transmission, asserting that he had been out of the office and had just received Tigno's January 12, 2004, correspondence. Rappaport requested a continuance of several days so that he could research the issue of whether appellant could be compelled to produce the requested documents, and asked that the Attorney General's Office confirm or deny that appellant was the subject of a criminal investigation. Rappaport also requested that his letter not be construed as non-cooperation by appellant, in light of the short meeting deadline that had been imposed by CPUC.

⁴ (1985) 40 Cal.3d 822.

(Instruction to Attend a January 26, 2004 Meeting)

Tigno sent Rappaport a facsimile transmission on January 20, 2004, which requested that appellant meet with Kohaya on January 26, 2004, and produce the requested documents. Tigno warned that appellant's failure to cooperate with the investigation would subject him to discipline, up to and including dismissal.

No one from CPUC directly instructed appellant to attend the January 26, 2004 meeting. Appellant had no specific recollection of when Rappaport informed him about the meeting, but believed he did so after the meeting was scheduled to have taken place. As a result, appellant did not attend the meeting.

(Instruction to Attend a January 28, 2004 Meeting)

Sometime during the afternoon of January 27, 2004, CPUC Director Richard Clark (Clark) sent a facsimile transmission to appellant, in care of Rappaport, that directed appellant to meet with Kohaya on January 28, 2004, at 8:00 a.m., in Sacramento, and to produce the requested documents.

During that same afternoon, Rappaport sent a response to Tigno, via facsimile transmission, requesting that Tigno provide appellant with an immunity agreement in order to ensure that appellant's statements, documents, and any evidence derived therefrom, would not be used against appellant in any subsequent criminal proceedings, and would not be disclosed by the Department of Justice to any law enforcement agency.

No one from CPUC directly instructed appellant to attend the January 28, 2004 meeting. According to appellant, Rappaport informed him about the meeting at the time it was scheduled to commence. Rappaport told appellant that he was attempting to

clarify the question of appellant's immunity from prosecution with CPUC's attorney. As a result, appellant did not attend the meeting.

On January 28, 2004, Tigno sent another facsimile transmission to Rappaport indicating that appellant's testimony during CPUC's investigation could not be used against appellant in subsequent criminal proceedings, and also asserting that Tigno represented CPUC only in the civil employment matter, not in any criminal proceedings.

Procedural Summary

The Department served appellant with a Notice of Adverse Action dismissing him from state service, effective February 13, 2004. As legal cause for discipline, CPUC alleged that appellant's failure to cooperate with the CPUC investigation and produce the requested documents constituted cause for discipline under Government Code section 19572, subdivisions (d) inexcusable neglect of duty, (e) insubordination, (f) dishonesty, (j) inexcusable absence without leave, (o) willful disobedience, 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.

Appellant filed an appeal of the disciplinary action with the Board, and a hearing on the matter was subsequently conducted before an SPB ALJ, who issued a Proposed Decision. The Board rejected the Proposed Decision in order to consider the issues set forth below.

ISSUES

- (1) Whether the protections afforded under Lybarger v. City of Los Angeles extend to the production of documents at an investigatory hearing?

(2) If the Lybarger protection does not extend to the production of documents, did the Department prove cause for discipline by a preponderance of the evidence?

(3) If so, what is the just and proper penalty for the proven misconduct?

DISCUSSION

Applicability of Lybarger

In Lybarger, the California Supreme Court addressed the issue of whether *testimony* that has been compelled from a public employee under threat of disciplinary action, could thereafter be used against that same employee in subsequent criminal proceedings. The Court concluded that, although the testimony could be used against the employee in a disciplinary hearing, it could not be used against the employee during any subsequent criminal proceeding. In so deciding, the Court specifically noted that:

As a matter of constitutional law, it is well established that a public employee has no absolute right to refuse to answer potentially incriminating questions posed by his employer. Instead, his self-incrimination rights are deemed adequately protected by precluding any use of his statements at a subsequent criminal proceeding.⁵

Neither Lybarger, nor Lefkowitz or Garrity, upon which the Lybarger court relied, addresses the issue of whether the *documents* produced by a public employee during the course of an administrative investigation are also exempt from use in a subsequent criminal proceeding. The issue of whether the compelled production of documents must be afforded the same Fifth Amendment protections against self-incrimination as is

⁵ Lybarger, 40 Cal.3d at 827 *citing* Lefkowitz v. Turley (1973) 414 U.S. 70, 77-79, 38 L.Ed.2d 274, 94 S.Ct. 316; Garrity v. New Jersey (1967) 385 U.S. 493, 500, 17 L.Ed.2d 562, 87 S.Ct. 616..

afforded compelled testimony has, however, been addressed by the United States Supreme Court, as well as by the California Supreme Court.

In United States v. Hubbell,⁶ the United States Supreme Court declared that:

The word 'witness' in the constitutional text limits the relevant category of compelled incriminating communications to those that are 'testimonial' in character. [Citation omitted.] As Justice Holmes observed, there is a significant difference between the use of compulsion to extort communications from a defendant and compelling a person to engage in conduct that may be incriminating. [Citation omitted.]⁷

The Court further noted that it is a

...settled proposition that a person may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not 'compelled' within the meaning of the privilege.⁸

The above notwithstanding, the Court also observed that there are certain circumstances under which the compelled production of documents may have a compelled testimonial aspect to it. In so concluding, the Court stated:

By 'producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic.' [Citation omitted.] Moreover ... when the custodian of documents responds to a subpoena, he may be compelled to take the witness stand and answer questions designed to determine whether he produced everything demanded by the subpoena. [Citation omitted.] The answers to those questions, as well as the act of production itself, may certainly communicate information about the existence, custody, and authenticity of the documents. Whether the

⁶ (2000) 530 U.S. 27, 147 L.Ed.2d 24, 120 S.Ct. 2037.

⁷ Hubbell, 530 U.S. at 34-35, 147 L.Ed. 2d at 35.

⁸ Id. 530 U.S. at 35-36, 147 L.Ed.2d at 35-36.

constitutional privilege protects the answers to such questions, or protects the act of production itself, is a question that is distinct from the question whether the unprotected contents of the documents are themselves incriminating.⁹

When considering the issue of compelled production of documents, the California Supreme Court reached a similar conclusion as that reached by the United States Supreme Court. In Craib v. Bulmash,¹⁰ the California Supreme Court concluded that:

It is well settled that a person can assert the [Fifth Amendment] privilege only to prevent ‘being incriminated by his own compelled testimonial communications.’ (Fisher v. United States (1976) 425 U.S. 391, 409, 48 L.Ed.2d 39, 55, 96 S.Ct. 1569.) The contents of subpoenaed business records which have been *voluntarily* prepared are not privileged, because they were not made under compulsion. (United States v. Doe (1984) 465 U.S. 610-611, 79 L.Ed.2d 552, 558-559, 104 S.Ct. 1237.) (Emphasis in original.)

In the instant case, CPUC repeatedly demanded that appellant produce the following documents: (1) the fronts and backs of 69 checks totaling \$30,056.00 for a 1999 railroad conference; (2) 87 checks totaling \$8,835.00 for a 2000 railroad conference; (3) 134 checks totaling \$41,867.77 for a 2001 railroad conference; (4) a list of the individuals and vendors that attended the 2001 railroad conference; and (5) any additional expenses paid by appellant, with proof of payment.

In response, appellant refused to produce the requested documents unless CPUC provided him with an immunity agreement in order to ensure that appellant’s statements, documents, and any evidence derived therefrom would not be used against

⁹ Id., 530 U.S. at 36-37, 147 L.Ed. 2d at 36-37.

¹⁰ (1989) 49 Cal.3d 475.

him in any subsequent criminal proceedings, and would not be disclosed by the Department of Justice to any law enforcement agency.

As an initial matter, the Board finds that the documents in question constitute voluntarily prepared business records that were not created under compulsion. Consequently, compelled production of the documents would not constitute a *per se* violation of appellant's Fifth Amendment protections. The remaining question to be addressed, therefore, is whether there would be a compelled testimonial component to appellant's production of the documents.

After reviewing the matter, the Board concludes that requiring appellant to produce the requested documents would not violate appellant's rights against self-incrimination. First, CPUC identified with reasonable particularity the documents it was seeking, and did not merely make a general demand that appellant identify and produce any records that he might possess that might be relevant to CPUC's investigation. This case does not, therefore, involve a situation where CPUC was on a fishing expedition for possibly incriminating evidence, such that appellant's compelled production of those documents would verify their existence and would, therefore, be testimonial in nature. Instead, it appears evident that CPUC was already reasonably aware of the existence of the documents in question.

Nor was appellant compelled to create any new documents in response to CPUC's demand for production. Instead, CPUC only required appellant to produce previously and voluntarily prepared business records, which had not been created under compulsion.

Next, it is evident that the requested documents were in appellant's possession or control, as CPUC was requesting specific checks that had been deposited into appellant's bank account. As the Fisher Court noted:

Surely the Government is in no way relying on the truth-telling of the [appellant] to prove the existence of or his access to the documents The existence and location of the papers are a foregone conclusion and the [appellant] adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers.¹¹

Finally, the Board concludes that appellant's production of the requested documents would not serve to authenticate those records, particularly as cancelled checks are self-authenticating. Therefore, his act of producing the required documents would constitute nothing more than his "belief that the papers are those described in the subpoena."¹²

The Board further notes that, to the degree that the checks constitute funds that were to be paid to CPUC, appellant was merely the custodian of those business records for CPUC. "A person compelled to produce records which belong to another entity and which he holds in a 'representational capacity' may not assert the privilege for himself, even though compliance may incriminate him."¹³

Given the foregoing, the Board finds that appellant was required to produce the documents demanded by CPUC. In so finding, the Board concludes that the protections set forth in Lybarger, prohibiting the use in subsequent criminal proceedings

¹¹ Fisher, 425 U.S. at 411, 48 L.Ed.2d at 56.

¹² Fisher, 425 U.S. at 412-413, 48 L.Ed.2d at 57.

¹³ Craig, 49 Cal.3d at 486 fn. 13, *citing* Braswell v. United States (1988) 487 U.S. 99, 110, 101 L.Ed.2d 98, 109.

of *testimony* compelled from a public employee during an administrative investigation, are not applicable to the instant proceedings, as there was no compelled testimonial component to appellant's production of the documents in question.¹⁴

The Department Established Cause for Discipline

The evidence established that on November 17, 2003, McDermott requested that appellant produce the documents in question. In response, on that same date appellant sent an e-mail message to McDermott, requesting that CPUC contact his attorney, Rappaport, regarding the requested documents. On November 24, 2003, Rappaport notified McDermott that he had been retained to represent appellant.

Appellant was directed to meet with Kohaya in Sacramento on January 9, 14, 26, and 28, 2004, and to produce the documents in question.¹⁵ Appellant failed to do so.

Given the Board's finding that appellant was not excused from producing the requested documents, and given that CPUC was authorized to direct appellant to cooperate with its investigation, the Board finds that appellant was required to attend the January 9, 14, 26, and 28, 2004, meetings with Kahayo in Sacramento. Although CPUC did not directly notify appellant that he needed to attend those meetings, CPUC did, pursuant to appellant's request to McDermott on November 17, 2003, notify appellant's attorney about the meeting.

¹⁴ The Board is similarly unpersuaded by appellant's argument that, pursuant to the provisions of Government Code section 18676, CPUC was required to grant him immunity with regard to the production of the disputed documents prior to him being required to produce them. Instead, Section 18676 has specific application to proceedings before the Board. At the time that CPUC had requested production of the documents, no dispute was pending before the Board.

¹⁵ Because the Notice of Adverse Action did not allege that appellant failed to report to CPUC investigators on December 29, 2003, no findings are made as to whether appellant's failure to do so constitutes grounds for discipline.

It is well settled that notice to an individual's attorney constitutes notice to that individual, and that the individual is bound by the actions of his legal representative.¹⁶ Moreover, in the instant case, appellant specifically requested that CPUC direct its inquiries regarding appellant's production of the requested documents to Rappaport. The Board finds, therefore, that CPUC provided adequate notice to appellant of his need to attend the meetings with CPUC's auditor in Sacramento.

Neither was appellant permitted to condition his performance on CPUC's granting him immunity, as CPUC was under no obligation to do so.¹⁷ Instead, appellant was required to comply with CPUC's valid directive.

Appellant's failure to comply with those lawful directives and report to the meetings constitutes violations of Government Code section 19572, subdivisions (d) inexcusable neglect of duty,¹⁸ (j) inexcusable absence without leave,¹⁹ (o) willful disobedience,²⁰ 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.²¹ Appellant's failure to comply with the directive does not,

¹⁶ See Stalberg v. Western Title Ins. Co. (1994) 27 Cal.App.4th 925, 930, *citing* Civ. Code § 2332; Lazzarevich v. Lazzarevich (1952) 39 Cal.2d 48, 50 (finding that a person is generally held to know what his attorney knows and should communicate to him).

¹⁷ Richard Stanton (1995) SPB Dec. No. 95-02, p. 10.

¹⁸ See L. [REDACTED] W. [REDACTED] (1993) SPB Dec. No. 93-10, p. 6 (finding inexcusable neglect of duty where the employee willfully refused to obey an order his supervisor was entitled to give and have obeyed).

¹⁹ See Frances Gonzales (1993) SPB Dec. No. 93-13, pp. 3-4 (finding inexcusable absence without leave where the absence was not excused or otherwise authorized).

²⁰ See R. [REDACTED] H. [REDACTED] (1993) SPB Dec. No. 93-22, p. 6 (finding willful disobedience occurs where the employee knowingly and intentionally violates a direct command or prohibition).

²¹ See Yancey v. SPB (1985) 167 Cal.App.3d 478, 483, *quoting* Stanton v. SPB (1980) 105 Cal.App.3d 729, 739-740 (finding that other failure of good behavior occurs where the conduct is such that it could easily disrupt or impair the public service).

however, constitute insubordination under subdivision (e),²² or dishonesty under subdivision (f).²³

Penalty

We turn next to the issue of the appropriate penalty under all the circumstances. When performing its constitutional responsibility to review disciplinary actions,²⁴ the Board is charged with rendering a decision that is "just and proper."²⁵ The Board has broad discretion to determine a "just and proper" penalty for a particular offense, under a given set of circumstances.²⁶ The Board's discretion, however, is not unlimited. In the seminal case of Skelly v. State Personnel Board (Skelly),²⁷ 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)²⁸

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

²² See Richard Stanton (1995) SPB Dec. No. 95-02, p. 6 (finding that insubordination generally implies a general course of mutinous, disrespectful or contumacious conduct.

²³ See Eliette Sandoval (1995) SPB Dec. No. 95-15, pp. 4-5 (finding that dishonesty generally requires a showing of an intentional misrepresentation of known facts, or a willful omission of pertinent facts, or a disposition to lie, cheat or defraud).

²⁴ Cal. Const. Art. VII, section 3(a).

²⁵ Government Code section 19582.

²⁶ See Wylie v. State Personnel Board (1949) 93 Cal.App.2d 838.

²⁷ (1975) 15 Cal.3d 194.

²⁸ 15 Cal.3d at 217-218.

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.²⁹

The Board's statutory authority to modify or revoke an adverse action is specified in Government Code section 19583, which provides, in relevant part:

The adverse action taken by the appointing power shall stand unless modified or revoked by the board. If the board finds that the cause or causes for which the adverse action was imposed were insufficient or not sustained, or that the employee was justified in the course of conduct upon which the causes were based, it may modify or revoke the adverse action....

Appellant's actions constitute serious misconduct. CPUC was investigating the possible misappropriation of a large sum of money from the state. Appellant had possession of, or access to, a number of documents that would help establish, in large part, whether the funds had, in fact, been misappropriated. As a state employee, appellant was required to cooperate in the investigation as to whether the funds had been misappropriated, regardless of whether the documents being sought by CPUC would tend to incriminate him. Appellant's failure to comply with CPUC's repeated directives to cooperate and produce the requested documents results in significant harm to the public service.

²⁹ Id.

In mitigation, it is important to note, that CPUC did not charge appellant with misappropriation of funds, thus the issue of whether appellant actually misappropriated state funds is not before the Board. Instead, the sole issue before the Board is whether appellant improperly failed to cooperate with CPUC investigators in obtaining documents relevant to CPUC's investigation. Furthermore, the Board notes that appellant has been employed by CPUC for 26 years, and that during that time he has never been subject to disciplinary action. The Board also recognizes that, absent the present issues surrounding his employment, appellant appears to have been an exemplary employee. More importantly, the Board is cognizant of the fact that appellant's failure to cooperate with CPUC investigators appears to have resulted from appellant's reliance upon – albeit ultimately misguided – the advice of his attorney.

After reviewing the entire record, the Board is satisfied that the just and proper penalty for appellant's actions is a suspension for three months. In so finding, however, the Board is also placing appellant on notice that the instant action constitutes progressive discipline concerning the issue of his failure to cooperate with CPUC investigators by not producing those documents validly requested by CPUC. Should CPUC hereafter direct appellant to produce the documents in question, and should appellant again refuse to produce those documents for review by CPUC investigators or auditors, appellant may very well be subject to further discipline.

CONCLUSION

CPUC has proven that appellant failed, on several occasions, to comply with the valid directives of his superiors to produce a number of documents for review by CPUC investigators. As such, CPUC established grounds for imposing discipline on appellant.

In mitigation, this is appellant's first disciplinary action in 26 years, and appellant's failure to produce the requested documents resulted from appellant following the misguided advice of his attorney. Therefore, a suspension for three months is the appropriate penalty in this case, and should serve to convey to appellant the seriousness of his misconduct. Moreover, it is incumbent on appellant to recognize that his failure to comply with any future requests that CPUC may make regarding appellant's production of the documents in question may very well constitute grounds for his dismissal.

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 dismissal of Haji Jameel from the position of Supervising Transportation Engineer is modified to a suspension for three months;
- (2) Pursuant to Government Code section 19584, the California Public Utilities Commission shall pay to Haji Jameel all back pay, interest, and benefits, if any, that would have accrued to him had he been suspended from his position for three months, instead of having been dismissed from his position; and
- (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.

STATE PERSONNEL BOARD

William Elkins, President
Maeley Tom, Vice President
Ron Alvarado, Member
Sean Harrigan, Member
Anne Sheehan, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing
Decision and Order at its meeting on April 5-6, 2005.

Floyd Shimomura
Executive Officer
State Personnel Board

[Jameel-dec.]