BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal By	)	SPB Case No. 29887
	)	
KAREN NADINE SAULS	)	**BOARD DECISION**
	)	(Precedential)
From dismissal from the position	)	
of Office Assistant, Department	)	**NO. 92-13**
of Transportation at	)	
San Francisco	)	July 13, 1992

Appearances: Robert Mueller, Attorney, California State Employees' Association, representing appellant, Karen Nadine Sauls; Maxine Ferguson, Attorney, representing respondent, Department of Transportation.

Before Carpenter, President; Stoner, Vice-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 an appeal by Karen Nadine Sauls (appellant or Sauls) who was dismissed from her position as an Office Assistant with the Department of Transportation (Department). Appellant was charged with inexcusable neglect of duty, inexcusable absence without leave, and willful disobedience, under Government Code section 19572, subdivisions (d), (j) and (o) respectively, based upon excessive absenteeism.

Relying upon appellant's otherwise satisfactory work record, her admission that her attendance problems were caused solely by her dependance on methamphetamines, and her sincere assertion that she was no longer using drugs and was regularly attending

Alcoholic's Anonymous meetings, the ALJ modified the penalty imposed as follows:

> The dismissal should be modified to a suspension for 4 months, provided that at the time appellant is entitled to reinstatement, she is able to certify through her own word and that of at least one lay or professional counselor, that she has not taken drugs or alcohol from July 4, 1991, until the date she returns to work. If she cannot produce the certification that she has been drug- free, the dismissal is sustained.

The Board determined to decide the case itself, based upon the record and further argument by the parties. After review of the entire record, including the transcript and briefs submitted by the parties, and having heard oral arguments, we find that the penalty of dismissal should be modified and that appellant should be conditionally reinstated, for the reasons that follow.

FACTUAL SUMMARY

The facts leading up to the dismissal are undisputed. Appellant first came to work with the Department on October 17, 1988. On August 31, 1990, she received a 3 month reduction in salary for being inexcusably absent without leave.

Between September 1, 1990 and May 31, 1991, appellant was absent without leave on 70 different days. Her pay was docked over 450 hours. When she did make it to work, her performance was satisfactory.

Appellant attributed her absenteeism to the fact that she was taking methamphetamines. Appellant first began taking

methamphetamines to lose weight and then developed a dependence. Her drug dependence caused her to miss work because she was tired or "burned out", paranoid about her appearance, nervous, and physically sick more often with sore throats and flus. She had particular difficulty getting to work on Mondays, after partying during the weekend.

Appellant attended counseling sessions through the Employee Assistance Program (EAP) to help her with some personal problems.[1] Although she told her counselor about her substance abuse problem, the counselor did not recommend immediate treatment for that problem. By the time the appellant specifically sought to deal with her substance abuse problem, by seeking a referral from her supervisor to EAP, EAP was no longer available to her because she had already used her allotment of counselling for the fiscal year. Appellant's supervisor was not aware that appellant's poor attendance was attributable to a drug problem. Appellant attempted to get help through Narcotics Anonymous about 10 months before her dismissal, and attended some meetings, but was not comfortable with that program at that time.

Appellant was dismissed effective June 7, 1991. She testified at her August 27, 1991 hearing that she stopped using drugs on

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[1]The record does not reflect the dates of appellant's EAP counselling.

July 4, 1991. At the time of the hearing, she had been attending Alcoholics Anonymous meetings for approximately two weeks. On November 21, 1991, appellant submitted, in support of a Motion to Take Further Evidence Now or At Formal Evidentiary Hearing[2], signed declarations under penalty of perjury that she was still clean and sober, had secured a sponsor, and was continuing participation in a 12-step program. Appellant also submitted a written commitment to undergo voluntarily random drug testing for a period of one year from her reinstatement. At the time of the oral argument, on February 4, 1992, appellant represented that she was still in the program.

ISSUE

This case presents two primary issues for our determination:

(1) Whether the Board can consider post-dismissal evidence of ongoing rehabilitation in evaluating the appropriate level of penalty; and

(2) What is the appropriate level of penalty under all the circumstances.

DISCUSSION

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[2]Appellant's Motion to Take Further Evidence Now or at Formal Evidentiary Hearing is denied, except to the extent that the drug-testing agreement is admitted as evidence of appellant's willingness to undergo drug-testing as a condition of her reinstatement. The declarations are not admitted or relied upon in reaching our decision in this case, nor are the representations made at the oral argument as to appellant's current condition or rehabilitative efforts.

(Sauls **continued - Page 5)**

In Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194, the California Supreme Court set forth the factors to be considered in determining penalty:

> ...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repealed 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.) (15 Cal.3d. at 218)

In assessing the propriety of dismissal in the instant case, we note that the evidence established that since appellant's duties entailed the payment of bills, the Department was inconvenienced and financially impacted by having to get someone to fill in behind appellant when she was absent or suffer penalties for late payment. Although appellant's poor attendance certainly resulted in a cognizable harm to the Department, the harm is not of such a nature that would counsel against our consideration of mitigating circumstances and the likelihood of recurrence in assessing whether the ultimate penalty of dismissal is appropriate.

As a mitigating factor, we note that appellant's work has been satisfactory and that she has had no disciplinary problems other than those relating to her attendance. In fact, the Department was unaware that appellant's absenteeism stemmed from substance abuse until appellant admitted her problem. There were no complaints about the quality of appellant's work as opposed to the quantity.

Whether or not appellant's misconduct in this case is likely to recur appears to depend on whether or not appellant still has the substance abuse problem that she alleges was the cause of her excessive absenteeism. The issue of whether the Board can consider post-dismissal evidence of rehabilitation in its assessment of the appropriate penalty to be imposed for proven misconduct was addressed in the case of Department of Parks and Recreation v. State Personnel Board (Duarte) (1991) 233 Cal.App.3d 813. In that case, a Department of Parks and Recreation employee was dismissed based on his admission that he sexually molested his stepdaughter. The Board, on the basis of post-dismissal evidence of rehabilitation, reduced the discipline from dismissal to suspension. The Department of Parks and Recreation appealed.

The Third District Court of Appeal upheld the Board's decision, concluding that the Board did not act in excess of its jurisdiction in considering post-dismissal evidence submitted at the hearing held two years after the dismissal. The court held that such evidence may be considered for the purpose of determining whether the penalty assessed was appropriate under all the circumstances.

The court noted that there are three situations in which the Board may modify or revoke the adverse action: (1) the evidence does not establish the alleged cause for the adverse action; (2) the actions of the employee were justified; and (3) the cause

for the action is proven but is insufficient to support the punitive action taken. (Id. at 827). Since the sole issue in the case before it was the propriety of the penalty imposed, the court looked to the Skelly factors to assess the propriety of relying on post-dismissal evidence to assess penalty. The Duarte court concluded that evidence of post-dismissal rehabilitation was relevant to the assessment of the Skelly factor of likelihood of recurrence. Thus, under the rationale set forth in Duarte, supra, we can consider evidence of appellant's post-dismissal rehabilitation efforts in our assessment of the likelihood of recurrence.

The Department argues that the Duarte rationale is inapplicable to the instant case because in Duarte, the employee's rehabilitation was complete at the time of the disciplinary hearing whereas in the instant case, at the time of the hearing, Saul's rehabilitation efforts were recent, incomplete and ongoing.

The Department's argument has some appeal. Our own concern with the limited time between appellant's beginning of her rehabilitation efforts and the date of the hearing precipitated, in part, our rejection of the ALJ's Proposed Decision. Reinstatement, even conditionally, based on only two weeks attendance at Alcoholics Anonymous meetings did not seem appropriate as likelihood of recurrence was difficult to assess after such a short time. Yet, we recognize that in the case of alcohol and drug addiction,

rehabilitation efforts are often ongoing for a long period of time or even for life. Thus, the fact that Saul might not be considered to have completed her rehabilitation is not determinative of our assessment of likelihood of recurrence. We are also persuaded by the fact that the ALJ found Saul's testimony at the hearing, that she had begun rehabilitation and intended to overcome her addiction, credible and sincere.

Although a further hearing to adjudicate the issue of appellant's sustained rehabilitative efforts might be appropriate, the Board is reluctant in its current backlog situation to set a precedent of granting multiple hearings in cases where post-disciplinary rehabilitation is an issue. We note that had appellant delayed the hearing on her disciplinary appeal, as did Duarte, she may have had stronger evidence of sustained rehabilitative efforts and unconditional reinstatement might have been warranted. We are convinced, in this case, however, that the evidence we have is minimally sufficient to establish appellant's initiation of the rehabilitative process and her intent to pursue a course of ongoing rehabilitation.

Whether appellant has continued her rehabilitative efforts to date and whether she has been successful in her quest to remain drug-free is not fully apparent from the evidence before us. We therefore order that the Department reinstate appellant conditioned upon her providing to the Department: (1) Documentation of her

ongoing participation in a rehabilitation program from the date of her August 1991 hearing through the date of her reinstatement; (2) certification from a licensed physician that she has been examined, drug tested, and has been determined to be drug-free; and (3) documentation of her commitment to adhere to her written agreement, previously filed with the Board, to undergo voluntarily random drug-testing for a period of one year from the date of her reinstatement. In the event there is a legitimate dispute over the validity of the documentation provided, the Department may request a hearing before the ALJ who will determine whether the documentation is adequate to comply with the conditions set forth herein.

Once appellant is reinstated, appellant's success at rehabilitation should become readily apparent to the Department. If appellant is not rehabilitated, her attendance problems will no doubt resurface. Should such problems recur, further disciplinary action, up to and including dismissal, would undoubtedly be warranted.As further assurance of her good faith and willingness to be monitored on an ongoing basis, appellant has agreed in writing to undergo random, voluntary drug testing for a period of a year. We believe that under all the circumstances, the likelihood of recurrence of an attendance problem caused by substance abuse is significantly diminished. We therefore reduce the dismissal to a suspension for 14 months from the effective date

of the dismissal and order her reinstatement, based upon appellant's written agreement, previously submitted to the Board, to undergo random voluntary drug testing, at reasonable intervals, for a period of one year and conditioned upon appellant's providing the documentation described above.

CONCLUSION

In most circumstances, a department would be justified in dismissing an employee for excessive, unexcused absenteeism provided that department has followed progressive discipline. In this case, the Department did follow progressive discipline. The evidence established, however, that the appellant's attendance problem was attributable to an addiction problem and post-dismissal evidence suggests that she is engaged in ongoing rehabilitative efforts. In this case, assuming appellant can provide the documentation noted above to evidence her ongoing rehabilitative efforts, we are moved to give appellant another chance, based on the fairly minimal risk of harm to the public service, her satisfactory work record, the nature of her position, her sincerity as recognized by the ALJ, and her willingness to undergo voluntary random drug-testing as a means of assuring the Department of the unlikelihood of recurrence.[3] A 14-month suspension and

[3]In reaching the result we reach today, we emphasize, as did the court in Duarte, that post-disciplinary rehabilitation is not enough, in and of itself, to justify overturning a dismissal. (233 Cal.App.3d at 829) The harm to the public service remains, as mandated by Skelly, the overriding concern in assessing the propriety of the discipline imposed. Other circumstances including, but not limited to, the employee's work record and the nature of the duties performed, weigh strongly in the equation of what emphasis is to be given to evidence of post-dismissal rehabilitation.

reinstatement conditioned upon voluntary drug-testing should serve as a punishment for past misconduct and a strong message that future misconduct will not be tolerated.

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 dismissal taken against KAREN NADINE SAULS is modified to a suspension for 14 months;

2. The Department of Transportation and its representatives shall reinstate appellant Karen Nadine Sauls to her position of Office Assistant effective August 7, 1992, conditioned upon her providing, on or before that date:

(a) Documentation of her ongoing participation in a rehabilitation program from the date of her August 1991 hearing through the date of her reinstatement;

(b) Certification from a licensed physician that appellant has been recently examined and drug-tested and has been determined to be drug-free;

(c) Documentation of her commitment to adhere to her written agreement to undergo voluntarily random drug testing for a period of one year from the date of her reinstatement;

3. We further order that the drug testing occur at the Department's expense, at reasonable intervals to be determined by the Department, and in accordance with the procedures set forth in 2 California Code of Regulations, section 599.960 et seq., except that the Department need not establish reasonable suspicion to test;

4. 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 whether the conditions for reinstatement, as set forth in paragraphs 2 and 3 above, have been satisfied;

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

STATE PERSONNEL BOARD*

Richard Carpenter, President

Alice Stoner, Vice-President

Clair Burgener, Member

*Member Richard Chavez did not participate in this decision.

Member Lorrie Ward's dissent begins on page 13.

Member Ward, dissenting: Although I recognize that under the rationale in Department of Parks and Recreation (Duarte) v. State Personnel Board the Board has discretion to consider post-dismissal evidence of rehabilitation, neither the facts nor the evidence in this case warrant the use of that discretion to conditionally reinstate the appellant and to modify the dismissal to a suspension.

The facts establishing appellant's misconduct in this case are undisputed. She was employed for less than two years when she received a 3-month reduction in salary for being inexcusably absent without leave. In the 9 months following service of the first adverse action, appellant was inexcusably absent without leave on 70 different occasions. Thus, appellant's misconduct was persistent, even after she received a warning that her misconduct would not be tolerated without consequence. Although the Department of Transportation (Department) was greatly inconvenienced by appellant's absences and even suffered some monetary loss in the form of penalties for late payment of bills, the Department exercised good management practices by using progressive discipline as a means of noticing appellant of the seriousness with which it viewed her attendance problem before resorting to dismissal.

After appellant received the initial adverse action, she did not take sufficient steps to cure her misconduct. Although she was

in counselling, appellant apparently did not focus on her substance abuse problem as a main issue to be resolved. When her initial stint with Narcotics Anonymous was unsuccessful because she did not feel comfortable with the group, rather than seek another rehabilitation program appellant dropped the ball and continued to be absent without leave from work until her dismissal. In short, the fact that appellant was not a long term employee at the time of her dismissal, the fact that she was involved in illegal drug use which impacted her attendance, and the fact that she did not clean up her act after receiving the first adverse action are all circumstances that lead me to conclude that this Board should not go out on a limb to provide this appellant with special consideration by conditionally reinstating her.

Even assuming I were to conclude that this particular employee's background warranted special consideration, I do not agree with the majority that the evidence of rehabilitation produced in this case is sufficient to establish an unlikelihood of recurrence. The only evidence of rehabilitation properly before us is the testimony of the appellant at the time of the hearing that she stopped using drugs approximately one month after her dismissal, that she began participating in Alcoholic's Anonymous only two weeks prior to the hearing before the administrative law judge, and that she intended to continue in her rehabilitation. In my mind, that testimony is insufficient to establish an

unlikelihood of recurrence. Appellant tried rehabilitation through Narcotics Anonymous once and failed; the evidence in the record that she attended Alcoholics Anonymous for two short weeks before her hearing does not convince me that she has been or will be successful in her more recent rehabilitation efforts. Furthermore, I do not believe that we can make up for the paucity of evidence of rehabilitation in the record by making appellant's reinstatement conditional upon her demonstrating her rehabilitation to the Department.

I am convinced that the harm to the public interest arising out of appellant's habit of being absent without leave numerous times over the course of a year was sufficiently great to warrant dismissal. I do not find the circumstances of the misconduct compelling enough to mitigate the harm: appellant is not a long term employee and she was already given a chance to improve her work habits in the form of a prior adverse action short of dismissal. Neither is the evidence sufficient to establish unlikelihood of recurrence. For these reasons, I would sustain the dismissal.

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(Sauls continued - Page 16)

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on July 13, 1992.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board