BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeals By	)	SPB Case Nos. 29926 and 31201
MARC SHELTON	)	**BOARD DECISION** (Precedential)
From 2 working days' suspension and dismissal from the position of Fish and Game Warden at the Department of Fish and Game at Dos Palos	)	**NO. 94-19**
	)	June 7, 1994

Appearances: William H. Poe, Attorney, for appellant Marc Shelton; Daniel E. Lungren, Attorney General, by Marybelle D. Archibald, Deputy Attorney General for respondent, Department of Fish and Game.

Before Carpenter, President; Ward, Vice President; Bos and Villalobos, 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 Marc Shelton (Appellant or Shelton). Shelton was initially suspended for two working days and then, in a separate adverse action, dismissed from his position as Fish and Game Warden, Department of Fish and Game at Dos Palos.

The ALJ who heard the appeal sustained both the suspension and the dismissal. The Board rejected the Proposed Decision, deciding to hear the case itself. After a review of the entire record, including the transcript, the exhibits and the written and oral arguments presented by the parties, the Board sustains the penalty

of two working days suspension in case number 29926, but reduces appellant's dismissal in case number 31201 to an eleven (11) month suspension.

FACTUAL SUMMARY[1]

Employment History

Appellant was employed as a Student Assistant (Intermittent) in July of 1981 by the Water Resources Control Board. In September 1981 he was appointed an Intermittent Agricultural Inspector by the Department of Food and Agriculture. In September of 1984, appellant was appointed to a position as an Intermittent State Park Technician. In April of 1986 he was appointed to the class of State Park Ranger I. In August of 1986 appellant was appointed to a Fish and Game Warden position and held that position until his dismissal.

The appellant has not received any prior adverse actions.

Appellant's Duties

Appellant held the position of Fish and Game Warden in the Dos Palos/ Los Banos area. He was stationed at his residence which was located in Dos Palos. He was supervised by Lieutenant Donald Wilkins (Wilkins) whose post of duty was in Merced, California.

Appellant's duties required him to patrol the Dos Palos area enforcing Fish and Game regulations. Appellant was required to

[1]This factual summary is, for the most part, adapted from the factual findings in the ALJ's Proposed Decision.

issue citations to suspects. The citations were to be filed with the appropriate court and Lieutenant Wilkins. Appellant was required to maintain a Daily Activity Report (DAR) of his activities while on patrol. The DAR is a single page patrol log in which an officer logs in the time of day and the various activities that occur during that period of time. Christopher Patin, the Deputy Chief in charge of appellant's region, Region 4, was asked at the hearing: "Are the officers expected to log in every hour or every half hour, does that vary?". He responded: "It varies. It varies. Depending on what the supervisor requires. . .it is up to the supervisor to determine how they want their squad members to record the times on the daily activity log."[2]

Wilkins testified that an officer should put down the time that he starts patrol, takes breaks and ends patrol. He testified that the Department asked that at least one entry per hour be made unless the officer was at a particular location for more than an hour. The DARs were to be filed with Wilkins on a weekly basis.

Appellant drove a State vehicle on patrol. The vehicle had a log in which appellant was required note the mileage driven, the destination, and times of travel.

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[2]A training manual which sets out some instruction for completing the DAR was identified in the record but never moved into evidence. In any event it is unclear from the record whether appellant was trained using this document.

Appellant's residence also served as his headquarters. Appellant lived alone. Appellant maintained a telephone at his residence which was used for personal calls as well as official business. Appellant would, periodically, submit his telephone bill to Wilkins noting which calls were business related and which were personal. The telephone bill was paid by the Department. Appellant would reimburse the Department for his personal calls.

THE SUSPENSION

At the hearing before the ALJ, the parties stipulated to conflicts between the DAR forms, telephone billings and citations for the dates September 7, 1990, September 9, 1990, September 17, 1990, as well as November 16, 1990, November 17, 1990, November 18, 1990, November 19, 1990 and November 24, 1990. The parties stipulated that the DARs for the dates listed were inaccurate.

The parties also stipulated that, instead of preparing his DARs on a daily basis, appellant prepared these forms in batches from 3 to 10 days after the day in question.

Discrepancies Between DARs and Telephone Bills

Appellant submitted Daily Activity Reports (DAR) to Lieutenant Wilkins relative to his patrol activities for the following dates:

August 20, 1990
August 21, 1990
August 26, 1990
August 27, 1990
August 31, 1990
September 4, 1990

September 7, 1990
September 9, 1990
September 17, 1990

August 20, 1990

The telephone bill for August 20, 1990, notes that among the telephone calls that were placed from appellant's headquarters on August 20 were calls placed at 1459 hours, 1500 hours, at 1553 hours, at 1640, 1647, and 1652 hours. Appellant's DAR for this same date indicates that he claimed to be out on patrol from 1100 hours until 1700 hours when he noted he returned to headquarters.

August 21, 1990

Appellant's August 21, 1990 DAR indicates that at 1500 hours he was on patrol to Mendota to pick up an injured hawk, at 1700 he was in the Firebaugh area, and at 1800 hours he was out of service. The telephone bill for August 21, 1990, indicates that between 1700 and 1752 hours, appellant made eight telephone calls from his residence.

August 26, 1990

The appellant's DAR for August 26, 1990 notes he was out on patrol commencing at 1130 hours. He notes a break at 1400 hours in Los Banos. At 1630 he returned to headquarters and went out of service at 1700 hours. The telephone bill indicates that appellant made two calls from his residence at 1311 and 1331 hours on August 26, 1990.

August 27, 1990

Appellant's August 27, 1990 DAR indicates that at 1230 hours he patrolled to Firebaugh and did not return to headquarters until 1530. The telephone bill for August 26, 1990, notes appellant made three calls from his residence at 1349, 1351, and 1531 hours.

August 31, 1990

Appellant submitted a DAR for August 31, 1990. The DAR noted appellant was on patrol to Los Banos at 1000 hours and that at 1300 hours he was on patrol to Firebaugh. He patrolled to Headquarters at 1500 hours. The telephone bill for that date indicates calls made from appellant's residence at 1041 hours and 1337 hours.

September 4, 1990

Appellant submitted a DAR for September 4, 1990. The DAR noted that between 1000 and 1130 hours the appellant was on patrol to the Los Banos area.

The telephone bill for September 1, 1990, indicates appellant made calls from his residence on September 4, 1990, at 1014, 1054 and 1056 hours.

September 7, 1990

Appellant filed a DAR for September 7, 1990, in which he noted that he was on patrol from 1100 hours until 1730 hours. At 1600 hours he noted he was on patrol in the Firebaugh area. He returned to headquarters at 1700 hours.

The telephone bill for September 7, 1990, notes appellant made a call from his residence in Dos Palos at 1625 hours.

September 9, 1990

The DAR submitted by appellant for September 9, 1990, notes that appellant patrolled the south grasslands and Britto Road area from 1200 hours to 1600 hours when he returned to headquarters. The telephone bill for September 9, 1990, notes appellant made four telephone calls from his residence in Dos Palos at 1425, 1452, 1551 and 1553 hours.

September 17, 1990

Appellant submitted a DAR noting his activities for September 17, 1990. Appellant noted that he patrolled to Los Banos area commencing 1200 hours. He patrolled to headquarters at 1300 hours and was out of service at 1400 hours.

The telephone bill for September 17, 1990, indicates appellant made telephone calls from his residence at 1233 and 1322 hours.

Discrepancies Between DARs and Citations

Appellant submitted DAR forms to his supervisor for the following dates:

November 16, 1990
November 17, 1990
November 18, 1990
November 19, 1990
November 21, 1990
November 24, 1990

A comparison of the DARs and citations submitted for the same days indicates numerous discrepancies. On the DAR for

November 16, 1990, appellant noted he issued no citations but the Department presented evidence that appellant issued three citations. On November 17, 1990, appellant's DAR notes he issued five citations but the respondent presented evidence of six citations.

On November 18, 1990, appellant's DAR noted he issued three citations. These citations were not filed by appellant with the Department. On November 19, 1990, appellant noted in his DAR for that date that he issued six citations and that he returned to his headquarters at 1800 hours. However, appellant's citations for the same day indicate that appellant issued nine citations, the last of which was issued at 2100 hours.

The appellant's DAR for November 21, 1990, notes he stopped patrolling at 1530 hours, but a citation for the same day was issued at 1730 hours. This citation is not noted in his DAR. On November 24, 1990, appellant's DAR noted he issued three citations. Appellant issued five citations on November 24, 1990.

Miscellaneous charges

Appellant was scheduled for a required Physical Agility Test on June 17, 1989. He missed the test due to illness and was properly excused. The test was rescheduled for July 5, 1989. Appellant got busy on a detail, however, and forgot to attend the rescheduled physical.

On February 23, 1990, appellant failed to attend a scheduled squad meeting in Turlock.

THE DISMISSAL

The appellant submitted DAR forms to his supervisor noting his activities for the following dates[3]:

June 25, 1991
July 8, 1991
July 9, 1991
July 13, 1991
August 2, 1991
August 10, 1991
August 11, 1991
August 13, 1991
August 23, 1991

June, 1991

Appellant filed a DAR noting his activities on June 25, 1991. He logged himself out on patrol to Los Banos area at 1030 hours. He noted he returned to headquarters at 1100 and at 1130 he went to Los Banos where he took a break. He then noted he was on patrol from 1200 hours until 1700 hours when he noted he was back at headquarters.

The telephone bill notes calls made by appellant from his residence at 1047 and 1059 hours and 1657 hours.

[3]The ALJ refused to take evidence and dismissed various charges based on incidents alleged in the second adverse action which occurred on dates prior to the first adverse action.

July, 1991

The mileage log for July 5, 1991, and the DAR for that date were different in that appellant noted in the DAR that he commenced patrolling to Los Banos at 1330 hours and the vehicle log notes the time of departure at 1400 hours.

The DAR for July 6, 1991 notes that at 1200 hours appellant was at the Arroyo Canal. Yet on this same day, appellant issued a citation for fishing with more than one rod and reel at 1200 hours at Helm Canal. The appellant's DAR for July 6, 1991, notes that he did not travel to "Helm Canal" until later that day.

The appellant's DAR for July 8, 1991, notes that he issued no citations on that date. However, appellant issued a citation on July 8, 1991, at 1530 hours at Panoche Creek.

Appellant filed a DAR for July 8, 1991. He noted he went on patrol at 1100 hours. At 1700 hours he noted he was on "patrol to H.Q." However, on July 8, 1991, appellant made various calls from his residence. One of the calls was made at 1105 hours and four others were made at 1656, 1701, 1703 and 1710 hours.

On July 9, 1991, appellant filled out a DAR which he subsequently filed with respondent. He noted on the DAR that at 1300 hours he was patrolling to Los Banos and that at 1500 hours he was at the Los Banos Court. At 1600 hours he notes he took a

break. At 1700 hours he notes he was patrolling to headquarters and at 1730 hours he noted he was 10-7 (out of service) at headquarters. The telephone bill for that date notes appellant made a call from his residence at 1313 hours and that at 1700 hours he made a call from his residence to Los Banos.

Appellant filled out and filed a DAR for July 13, 1991. At 1700 hours he noted he was at the Delta Mendota Canal and returned to headquarters at 1800 hours. The telephone bill for July 13, 1993 indicates that at 1732 hours appellant called Lieutenant Wilkins at his home. The call was made from appellant's residence.

August, 1991

Appellant filed a DAR for August 2, 1991, noting his activities. Appellant noted that from 0800 hours to 1430 hours when he took a break, he was in training at Turlock, California. At 1500 hours he notes he is "enroute LBWA" the Los Banos Wildlife Area. At 1600 hours he notes he is in the "LBWA." At 1630 hours he notes he is "enroute HQ." At 1700 hours he notes "10-7 HQ."

The telephone bill for August 2, 1991, notes appellant made calls from his residence in Dos Palos at 1556, 1559, 1601, 1626, 1627 and 1640 hours.

On August 10, 1991, appellant filed a DAR with respondent. It noted he was on patrol commencing at 1100 hours. At 1300

hours he noted he was patrolling the Los Banos Wildlife Area. The telephone bill for that date notes he made a call from his residence at 1314 hours.

On August 11, 1991, appellant filled out a DAR which indicated that appellant was on patrol to Red Hills commencing at 0930 hours. At 1230 hours appellant noted he was at Red Hills. The telephone bill for August 11, 1991, indicates appellant made a call from his residence at Dos Palos at 1023 hours.

Appellant's DAR for August 13, 1991, indicates that appellant was on patrol at L.B.W. A. At 1300, appellant took a break and thereafter notes "Patrol Westside Canals." At 1600 hours appellant wrote that he was on "Patrol to HQ" and at 1630 hours he took himself out of service.

The telephone bill for August 13, 1991, indicates appellant made three telephone calls from his residence at 1608 and 1613.

Appellant's DAR for August 23, 1991 indicates that at 1330 hours appellant wrote "patrol to L.B.W.A. (Break) Los Banos." At 1500 hours he wrote "patrol DMC" (Delta Mendota Canal). The telephone bill for August 23, 1991, notes appellant made two calls from his residence at 1350 and 1357 hours.

Inaccurate Reporting of Overtime

In order to conform to the standards of the Fair Labor and Standards Act (FLSA), appellant was required to track the hours worked, breaks taken, and any overtime accrued. On July 5,

1991, July 6, 1991, July 8, 1991, July 12, 1991 and August 9, 1991, August 10, 1991, August 13, 1991, August 23, 1991 and August 31, 1991, the appellant filled out and submitted DARs to the respondent which did not accurately report the time worked by appellant on those dates. Appellant did not note overtime work or the length of breaks. Appellant did not accurately indicate when he was on patrol so as to avoid having to report time worked as overtime.

Pertinent Evaluations/Counseling

Appellant's performance evaluation for the period ending December 31, 1990 noted "[c]onsistently your paperwork fails to arrive by the given deadline. It is often incomplete and/or lacking the professional quality expected." This performance evaluation was received by appellant on April 16, 1991. In this same evaluation, Lieutenant Wilkins noted that since February 1, 1991, when Wilkins and appellant last discussed appellant's performance, appellant had improved. Appellant's paperwork was now "arriving in time, complete, and on the correct forms.

Lieutenant Wilkins indicated he would conduct another performance evaluation relative to appellant's work in July 1991.

On June 5, 1991, appellant was served with the first adverse action based on events which occurred in August, September and November of 1990. The Department originally assessed a 5 working days' suspension. At a Skelly hearing held August 1, 1991,

however, the 5 working days' suspension was reduced to a two working days' suspension. Appellant served this suspension on June 17 and 18, 1991.

On June 11, 1991, the Lieutenant Wilkins provided appellant with a memorandum memorializing a discussion between appellant, Wilkins and Captain Sanford held the previous day. The discussion concerned appellant's performance from January through May of 1991.

Relative to two DAR reports, the June 11 memorandum noted that appellant's performance was "near acceptable." The report indicated:

> Additional effort is necessary to achieve the level of accuracy expected. This form is the basis of all activities reported. Information from this form is used throughout the Department and accuracy is mandatory. The amount of information reported is good. Improved levels of accuracy are needed in time entry, work locations, and neatness.

The same report indicated appellant's use of the vehicle mileage log was "near acceptable. Appellant was informed that "Accuracy is the main concern on this form." This assessment also noted that appellant's attendance reports were "near acceptable" but pointed out problems with appellant's accuracy in reporting time worked. He was informed that "Inaccuracy in this area can be viewed as deliberate misrepresentation for compensation." The report indicated overall that appellant had definitely improved in both performance and attitude.

In a memorandum dated September 26, 1991, Captain Sanford

denied appellant's request for a merit increase which had been previously denied. Sanford informed appellant that the reason he was recommending that the merit increase be denied was that appellant's performance was still below Department standards.

Sanford did, however, acknowledge an improvement in appellant's performance and agreed to request that two letters of warning issued in January of 1990 be removed from appellant's file. Captain Sanford's memorandum does not specifically mention either continuing problem areas or areas of improvement. The memorandum does not indicate the basis or time frame upon which Sanford based his assessment. Sanford did not testify at the hearing before the ALJ.

Appellant testified that in January of 1992, Wilkins congratulated him, telling him that he was now meeting the standard of the other wardens. Lieutenant Wilkins was not asked about this meeting during his testimony.

On March 4, 1992, appellant was served with an adverse action for dismissal effective March 16, 1992. The dismissal was based on appellant's reports for the months of July, August and September, 1991.

ISSUES

1. Whether a preponderance of evidence supports a finding of dishonesty;

2. Assuming there was not a preponderance of evidence to support the dishonesty charge,

a) did the Department properly apply progressive discipline; and

b) were statements made that could have misled appellant into believing his performance had improved and was satisfactory? If so, do those statements create an estoppel as to disciplining appellant for alleged paperwork problems during that time period?

DISCUSSION

THE SUSPENSION

The Board finds that appellant's conduct in repeatedly preparing inaccurate DARS during the months of August, September and November, 1990 constitutes inefficiency and neglect of duty pursuant to Government Code Section 19572, subdivision (c) and (d). The inaccuracies included statements by appellant on his DARs which indicated that appellant was on patrol or otherwise engaged during the same time that appellant's telephone bill indicated that he was at headquarters using the telephone. The DARs for a number of days failed to adequately report the number of citations issued that day. In addition, the DARs indicated that on a number of occasions, appellant reported that he had gone out of service by a particular time but citations issued

that same day showed appellant issuing citations after the time he reported himself as going out of service.

The parties stipulated that before appellant's suspension, appellant did not fill out his DARs on a daily basis but instead prepared his DAR forms from 3 to 10 days after the fact. Appellant's paperwork is excessively sloppy but, for the reasons discussed below, the Board does not find the charge of dishonesty to be proven by a preponderance of the evidence.

Appellant's two day suspension is sustained.

THE DISMISSAL

Appellant did not generally document his whereabouts and activities during his work day. Instead, appellant completed his DARS in batches. Originally, appellant completed batches of these reports up to 10 days after the fact, but at the time of the incidents noted in the dismissal action, he was filling them out on a weekly basis. After the suspension, appellant relied on notes he made while on patrol and his memory of events to fill out the DAR form, but he was still not preparing the reports on a daily basis.

Many of the discrepancies appear to be simply the product of sloppy record keeping. For example, a comparison of appellant's July 8, 1991 DAR with a citation issued the same day indicates that appellant was not at Arroyo Canal but instead at Helm Canal. Thus, the error here is not that appellant falsely represented

himself to be working when he was not, but that he failed to note correctly where he was working.

The Department failed to establish that there was a particular method a warden must use to complete his DAR. Chief Patin testified that the amount of detail required was up to the individual supervisor. More than half the discrepancies charged in appellant's dismissal related to a particular type of sloppy record keeping. For example, on July 9, 1991, appellant noted in his DAR that between 1100 and 1300, appellant was working at his headquarters filing and doing paperwork. He noted on his DAR that at 1300 he left to go to L.B.W.A.(Los Banos Wildlife Area). The telephone bill indicates, however, that he did not leave at 1300 but was still at headquarters making a phone call at 1313.[4]

Again, the error charged here is not that appellant was not working, but that he did not accurately report his location or activities. Appellant's practice was to note his location and activities using the nearest half hour[5]. Thus, if appellant made a phone call at 1313, and then left headquarters, he had a choice of what to write on his DAR; 1300 hours or 1330 hours. If he choose 1300 because 1313 is closer to 1300 than to 1330,

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[4]Appellant was not charged with making excessive personal phone calls on state time. Thus, for purposes of this discussion, no distinction is made between personal and business calls.

[5]Appellant testified that during the time period at issue in the first adverse action, he used hour increments. Afterwards, he used half hour increments.

the result would be discrepancy between the DAR and the phone bill.

The flaw in appellant's methodology should have been readily apparent to appellant's supervisor in June of 1991 when, just before serving his suspension for poor reporting in August, September and November of 1990, appellant's reporting was specifically reviewed. Appellant was informed that his DARs were "near acceptable." No mention was made of how appellant could prevent discrepancies of the type described above.

Appellant's reporting methodology does not, however, explain all of appellant's report writing problems. For example, on July 13, 1991, August 11, 1991, August 13, 1991 and August 23, 1991, appellant's DARs show him to be out on patrol at the same time he was making telephone calls from his residence.[6]

In addition, a number of appellant's DARs do not reflect the hours appellant worked, breaks taken or overtime accrued. Appellant was well aware of the standards of the FLSA. In some instances, appellant purposely misidentified his time so as to not require his supervisor's approval for overtime. Timekeeping errors, even those which purport to give the state more time than

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[6]Appellant was also charged with failing to file citations with the department on numerous dates in June, July and August 1991. The Board finds this charge to be substantially unproven.

the hours for which it bargained, are nonetheless timekeeping errors.

The Board finds appellant's conduct in preparing inaccurate DARS to constitute incompetency and inefficiency pursuant to Government Code Section 19572(b) and (c). Appellant was notified of the importance of accuracy in the DARs. Yet, the June, July and August DARs contain numerous conflicts with appellant's telephone bill, his citation records, and his mileage logs.

The Board does not find, however, that the Department has proven by a preponderance of evidence that appellant was dishonest. Dishonesty entails an intentional misrepresentation of known facts. Appellant's poor record keeping is more consistent with sloppy performance than with dishonesty. Appellant was aware that the Department was comparing his DARs with his telephone bills -- he was disciplined for record keeping inaccuracies immediately prior to the incidents charged in the dismissal action. Appellant spends the bulk of his time on unsupervised patrol. With very little effort on his part, appellant, if he wished, could have evaded discovery of any discrepancy. Yet, appellant continued to present DARs which did not match other records within his control.

The Board finds appellant's conduct to be consistent with findings of incompetency and inefficiency within the meaning of

Government Code Section 19572, subdivision (b) and (e), but not with a finding of dishonesty.

PENALTY

When performing its constitutional responsibility to review disciplinary actions [Cal. Const. Art. VII, section 3(a)], the Board is charged with rendering a decision which, in its judgment is "just and proper". (Government Code §19582). In determining what is a "just and proper" penalty for a particular offense, the Board has broad discretion. [See Wylie v. State Personnel Board (1949) 93 Cal.App.2d 838.] The Board's discretion, however, is not unlimited.

In 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.]

Appellant is a Fish and Game Warden. He is required to work a 40 hour week but his job duties give him broad discretion to set his own schedule. Accordingly, appellant's DAR is one of the few means available to the Department to track appellant's whereabouts and activities.

Appellant is a peace officer. As such, appellant is often called to testify against individuals charged with fishing and hunting violations. Accurate record keeping is of paramount importance to individuals who may be called on to testify based on written records.

Discrepancies in appellant's reporting harms the public service because appellant's supervisors cannot rest assured that appellant is on the job. His supervisors cannot evaluate his activities if there is no means of determining what activities appellant performed. There can be no assurance that the state is getting a forty hour work week nor can the state be assured it is complying with the FLSA if appellant's recording of his activities is essentially meaningless.

The circumstances surrounding the discipline imposed include a number of separate factors. Appellant is a long term employee -- at the time of his dismissal he had more than ten years of

service. Before the adverse actions discussed herein, appellant suffered no previous adverse actions.

Although we attribute some of the errors charged to the methodological flaw discussed above, many errors remain. We find appellant's conduct in preparing erroneous DARs to be egregiously sloppy. We also find that he purposely disregarded FLSA standards in preparing his DARs. However, since we do not find dishonesty and find that a failure of training and supervision may have contributed to a number of the incidents alleged, we reduce the penalty imposed by the Department to an eleven months' suspension.

A stiff penalty is imposed because of the importance the Department of Fish and Game places on accurate record keeping. Fish and Game wardens are generally unsupervised: consequently, the department places a high value on accurate records as a means of evaluating an employee's performance and tracking his whereabouts.

Progressive Discipline

A circumstance which often affects the penalty assessed by the Board is whether the Department followed the principles of progressive discipline. The Board has long advocated the application of the principle of progressive discipline in state employee disciplinary actions. In Mercedes Manayao (1993) SPB Dec. No. 93-14, the Board noted:

> The purpose of progressive discipline is to provide the employee with an opportunity to learn from prior mistakes and to take steps to improve his or her performance on the job, prior to the imposition of harsh discipline.

The action taken by the Department fits this description. The first adverse action filed in June of 1991 was based on incidents which occurred August through November 1990. This adverse action resulted in a two working days' suspension. This action put appellant on notice of his need to improve his performance. Thus, the Department gave appellant the opportunity to learn from his prior mistakes and to take steps to improve his report writing prior to the imposition of harsher discipline.

About the same time that appellant was served the first Notice of Adverse Action, his supervisor reviewed his more recent performance. Based on a review of March, April and May of 1991, appellant's supervisor indicated that appellant's ability to produce accurate reports had improved but significant discrepancies continued.

The second adverse action concerned timekeeping discrepancies which occurred in July, August and September of 1991. Thus, despite the first adverse action and his supervisor's warning that discrepancies continued, appellant continued to submit inaccurate reports. Since the Department considers accurate report writing essential to the supervision of

Fish and Game Wardens, the Department dismissed appellant based upon the additional timekeeping discrepancies. The Department complied with the principle of progressive discipline.

Progressive discipline requires not only that there be a progressive sequence to the discipline, but that the progression be timely. In Rita Nelson (1992) SPB Dec. No. 94-11 the Board noted:

> [C]orrective and/or disciplinary action should be taken by a department on a timely basis: performance problems should not be allowed to accumulate before progressive discipline is initiated.

Granted, there was a long delay between the events charged and the date the adverse action were filed.[7] Some delay is understandable. Gathering the data of the sort used to support these adverse actions is tedious and time consuming. The primary documents in this adverse action are telephone bills that were not immediately available. The record does not disclose the Department's reasons for a delay of this length.

The Board finds, however, that the delay did not affect whether the discipline was progressive. The value of timely action is to prevent the accumulation of performance problems that would then be used to justify increased punishment. In the

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[7]The last incident charged in the first adverse action occurred in November of 1990. The Department did not take adverse action on these incidents until June 11, 1991.

The last incident charged in the second adverse action occurred in August of 1991. The Department did not take action on these incidents until March of 1992.

present case, the first adverse action covered a four month period. The second adverse action covered a three month period that followed the first action. The accumulation of incidents in this case did not prejudice the appellant. Appellant was counselled regarding the continuing problem with his timekeeping between the time of the incidents underlying the suspension and the date the suspension was actually served. Despite said counselling in June 1991, appellant's timekeeping problems continued to manifest themselves that summer. The dismissal action was based on continuing problems with appellant's timekeeping. Appellant had adequate opportunity to improve his performance after the incidents of late 1990 and early 1991 were brought to his attention. Further formal discipline was warranted.

Estoppel

Finally, appellant argues that the Department should be estopped from imposing a penalty for conduct which occurred in July, August and September of 1991 because, on September 26, 1991, appellant was led to believe that his reporting was greatly improved. In Lentz v. McMahon (1989) 49 Cal.3d 393, 399, the California Supreme Court noted that:

> "[t]he modern doctrine of equitable estoppel is a descendant of the ancient doctrine that 'if a representation be made to another who deals upon the faith of it, the former must make the representation good if he knew or was bound to know it to be false.'" (citations omitted).

The Supreme Court went on to enumerate the elements of modern estoppel:

> Generally speaking, four elements must be present ...: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (citations omitted). Id.

Applying this test to the case at hand, the Department is not estopped from administering discipline. Assuming, arguendo, that appellant's supervisor did advise appellant on September 26, 1991 that he had improved sufficiently, and that appellant concluded, based on his supervisor's statements, that he was now on the right track, appellant has failed to establish detrimental reliance. Appellant was not disciplined for any of his actions (or omissions) taken after September 26, 1991. Thus, appellant cannot be said to have relied to his detriment on his supervisor's statement that he had improved.[8]

CONCLUSION

For all of the reasons set forth above, the Board finds appellant guilty of inefficiency and inexcusable neglect of duty pursuant to Government Code Section 19572, subdivisions (c) and (d) for grossly inaccurate record keeping as charged in Case

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[8]Given this finding that there was no estoppel, we need not determine whether appellant is correct when he testified that Wilkins had assured him in January of 1992 that he now was up to standard.

Number 29926. The Board also finds appellant guilty of incompetency and inefficiency in Case Number 31201 for inaccurate record keeping. The penalty of a two working days' suspension taken against appellant in June of 1991 is sustained. However, the penalty of dismissal is modified to an eleven (11) months' suspension.

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 action of the Department of Fish and Game in case number 29926 imposing a two working days' suspension on appellant, Marc Shelton, is sustained;

2. The above-referenced action of the Department of Fish and Game in case number 31201 dismissing appellant is modified to an eleven months' suspension;

3. The Department of Fish and Game at Dos Palos shall reinstate Marc Shelton to the position of Fish and Game Warden and pay to him all back pay and benefits that would have accrued to him had he been suspended for eleven months rather than dismissed.

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 the salary and benefits due appellant.

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

THE STATE PERSONNEL BOARD*

Richard Carpenter, President
Lorrie Ward, Vice President
Floss Bos, Member
Alfred R. Villalobos, Member

*Member Alice Stoner was not present and therefore did not participate in this decision.

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on June 7, 1993.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board