BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

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| In the Matter of the Appeal by | ) | SPB Case No. 27432 |
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| **ULYSSES WASHINGTON** | ) | **BOARD DECISION** |
| | ) | (Precedential) |
| From a one step reduction in salary | ) | |
| for one year from the position of | ) | **NO. 93-10** |
| Correctional Lieutenant at the | ) | |
| Avenal State Prison, Department | ) | March 3, 1993 |
| of Corrections | ) | |

Appearances: Shelly Lytle, Senior Hearing Representative, California Correctional Peace Officers Association, representing appellant Ulysses Washington; J.R. Guichard, Employee Relations Officer, Avenal State Prison, Department of Corrections, representing the respondent, Department of Corrections

Before Carpenter, President; Stoner, Vice President; Ward and Bos, 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 Ulysses Washington (appellant) from a one-step reduction in salary for one year from his position as a Correctional Lieutenant at the Avenal State Prison, Department of Corrections (Department).

The reduction in salary was based on charges that appellant disobeyed the order of the Administrative Officer of the Day (AOD) to search and arrest a visitor who had entered the prison grounds with a bullet concealed in his clothing. The ALJ who heard the matter found appellant to be guilty of inexcusable neglect of duty for failing to carry out his superior's order. However, the ALJ

modified the penalty to an official reprimand in light of the appellant's unblemished work record and the fact that the AOD had told appellant not to bother him on the night of the incident.

After a review of the entire record, including the transcript and briefs submitted by the parties, the Board finds appellant to be guilty of inexcusable neglect of duty, but modifies the penalty to a one-step reduction in salary for 3 months.

**FACTUAL SUMMARY**

Appellant has been employed with the Department since 1975. He has no prior adverse actions. Since 1975, appellant has held various positions within the Department, including that of Correctional Officer and Correctional Lieutenant, the latter being his position at the time of the incident.

The adverse action was based upon a single event which occurred on September 22, 1989. On that evening, the appellant was acting as Watch Commander for the prison. During appellant's watch, a visitor to the prison was found to be in possession of a bullet. The bullet was discovered in the visitor's pocket when the visitor walked through the prison's metal detector. It is a felony for a visitor to enter a prison with a bullet. The visitor admitted to the prison officials who found the bullet that he was legally entitled to carry a weapon, which he had with him in his car. When asked if prison officials could search his car, the visitor responded that they could.

Subsequently, one of the sergeants present, Sergeant Reyna, called appellant for advice on how to proceed. Appellant told Sergeant Reyna to read the visitor his "Miranda" rights while he (appellant) contacted the AOD, Mr. John Texeira, to obtain direction on how to proceed. Mr. Texeira told the appellant to confiscate the bullet and deny the visitor access to the prison. Mr. Texeira also informed the appellant to search the visitor's vehicle, confiscate any weapon found, and then arrest the visitor. Also during this conversation, Mr. Texeira informed the appellant that he was headed out to a formal dinner in honor of the Warden's departure, and that he should not be paged "unless the institution was burning down."

After speaking with Mr. Texeira, appellant intended to follow the orders. As it turns out, however, the appellant did not. Shortly after speaking with Mr. Texeira, the appellant began talking with two fellow lieutenants present in the watch office about the visitor with the bullet. The lieutenants proceeded to show the appellant a memorandum which was attached to the prison's operating procedures manual. The memorandum was from a deputy attorney general in the Attorney General's office and was addressed to the Warden of the prison. The text of the memorandum discussed visitor searches, in particular, the right of visitors to refuse a search of their person and/or vehicle.

The appellant understood from his reading of the memorandum that visitors had the right to refuse to be searched. Appellant went back to where the visitor was located, and rather than search him and his vehicle as Mr. Texeira had ordered, the appellant advised the visitor of his right to refuse a search. The appellant subsequently refused to be searched and the appellant ordered him to leave the premises.

The Department charged the appellant with inefficiency, inexcusable neglect of duty and willful disobedience [Government Code section 19572, subsections (c), (d), and (o)].

Appellant claims to have disobeyed Mr. Texeira's orders because he believed he was responsible for following the law, as set forth in the deputy attorney general's memorandum. Moreover, the Appellant justifies his decision not to contact Mr. Texeira for advice on how to proceed in the face of conflicting information as Mr. Texeira had instructed him that he did not want to be bothered during the Warden's dinner.

On the other hand, the Department contends that appellant violated Mr. Texeira's orders as the Administrative Officer of the Day, and that as a result, a person who committed a felony was not arrested.

Testimony was presented at the hearing that a watch commander does not have discretion in the area of visitor searches and arrests, but that one must follow whatever decision is made by the

AOD. Mr. Texeira also testified that this incident brought him embarrassment as he had told the Warden at dinner that a visitor was in the process of being arrested for bringing contraband onto institution grounds.

The ALJ who heard the case found that appellant violated a direct order of a superior, and thus, was guilty of inexcusable neglect of duty. However, the ALJ did not find appellant guilty of willful disobedience, as he concluded that the appellant did not set out to intentionally disobey the orders of his superior.[1] Rather, the ALJ determined that appellant simply failed to carry out a direct order of his superior after receiving conflicting information.

Despite finding sufficient evidence to support the charge of inexcusable neglect of duty, the ALJ modified the penalty of a 5% reduction in salary for one year to an official reprimand, citing mitigating factors in appellant's favor. The mitigating factors considered by the ALJ include Mr. Texeira's statement to the appellant not to contact him unless the institution was burning down, and appellant's clean work record.

**ISSUE**

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[1] The ALJ's proposed decision made no finding concerning the charge of inefficiency. After reviewing the record, the Board finds insufficient evidence to support the additional charge of inefficiency.

What is the appropriate penalty in this case given the findings of fact by the Administrative Law Judge?

**DISCUSSION**

Upon reviewing the record, the Board agrees with the findings of fact as determined by the ALJ. Based upon these facts, the Board concurs with the ALJ's decision to dismiss the charge of willful disobedience.

> "A proper construction of section 19572 impels the view that... willful [disobedience] requires proof of intent or willfullness. The latter elements imply that the person knows what he is doing and intends to do what he is doing." Coones v. State Personnel Board (1963) 215 Cal.App.2d 770, 775.

In this case, we find that the circumstances surrounding the appellant's failure to obey the orders of the AOD indicate that the appellant was not acting out of a willful intent to disobey an order, but acted negligently when faced with conflicting information.

The Board also agrees with the ALJ's conclusion that appellant's failure to follow the orders of his supervisor without consultation constitutes inexcusable neglect of duty.

> "The phrase 'neglect of duty' has an accepted legal meaning. It means an intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty." Gubser v. Department of Employment (1969) 271 Cal.App.2d. 240, 242.

We find sufficient evidence to characterize the appellant's actions in failing to contact the AOD as grossly negligent.

While we find appellant to be guilty of inexcusable neglect of duty for his misconduct, we believe that a one-step reduction in salary for three months is a more appropriate penalty than either an official reprimand or one-year reduction in salary.

When performing its constitutional responsibility to "review disciplinary actions" [Cal. Const. Art. VII, section 3 (a)], the Board is charged with rendering a decision which, in its judgment is "just and proper". (Government Code section 19582). One aspect of rendering a "just and proper" decision involves assuring that the discipline imposed is "just and proper." In determining what is a "just and proper" penalty for a particular offense, under a given set of circumstances, the Board has broad discretion. The Board's discretion, however, is not limited. In the seminal case of Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194, the California Supreme Court noted:

> While the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, it does not have absolute and unlimited power. It is bound to exercise legal discretion which is, in the circumstances, judicial discretion. (Citations) 15 Cal.3d 194, 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.)

The Board finds harm to the public service occurred as a result of the appellant's actions. A man whom prison officials had reason to believe committed a felony was let free, contrary to the express orders of the AOD. More importantly though, is the potential for more serious harm to the public service if correctional officers are permitted the latitude to overrule a direct order of their superior, without first discussing the matter with their superior or some higher authority.

In this case, the appellant had no legal background and attempted to interpret and apply a legal memorandum brought to his attention by his peers. As the ALJ pointed out in his proposed decision, the legal validity of searches is a very complex area of the law. Appellant was not justified in making his own interpretation of the procedures to be followed without seeking the advice of Mr. Texeira, the person who gave the order to search the visitor and his car.

While we believe that the harm to the public service is serious enough to warrant a penalty greater than that of an official reprimand, we hesitate to reinstate the Department's penalty of a one-step reduction in salary for 1 year because of the circumstances surrounding the misconduct.

As previously noted, the record reveals that Mr. Texeira strongly discouraged the appellant from contacting him that evening with any questions. While we believe that it was incumbent on the appellant to contact Mr. Texeira before he proceeded to contradict his order, we nevertheless find that the Department must share some of the blame for the incident because of Mr. Texeira's inappropriate instructions to the appellant. It is this circumstance which the Board believes warrants modification of the Department's penalty to a one-step reduction in salary for 3 months.

**ORDER**

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Government Code sections 19582 and 19584, it is hereby ORDERED that:

1. The adverse action of a one-step reduction in pay for one year is modified to a one-step reduction in pay for 3 months.

2. The Department of Corrections shall pay to appellant all back pay and benefits that would have accrued to him had his pay been reduced for only 3 months as opposed to 1 year; and

3. This matter is hereby referred to an 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.

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

STATE PERSONNEL BOARD*

Richard Carpenter, President
Alice Stoner, Vice President
Lorrie Ward, Member
Floss Bos, Member

*There is one vacancy on the Board.

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on March 3, 1993.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board