CALIFORNIA
STATE
PERSONNEL
BOARD

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Governor Edmund G. Brown Jr.

K. S. v. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION Appeal from Demotion	Case No. 17-0511 BOARD DECISION AND ORDER **(Precedential)** **NO. 17-02** **November 2, 2017**

BEFORE: Kimiko Burton, President; Lauri Shanahan, Vice-President, and Patricia Clarey, Richard Costigan, and Maeley Tom, Members.

DECISION AND ORDER

This case is before the State Personnel Board (SPB or Board) for consideration after the case was heard and decided by an SPB Administrative Law Judge (ALJ). We have reviewed the ALJ's Proposed Decision sustaining the demotion. The Board has decided to adopt the attached Proposed Decision as a Precedential Decision of the Board, pursuant to Government Code section 19582.5. The findings of fact and Proposed Decision of the ALJ are hereby adopted by the State Personnel Board as its Precedential Decision.

THE STATE PERSONNEL BOARD

Kimiko Burton, President
Lauri Shanahan, Vice-President
Patricia Clarey, Member
Richard Costigan, Member
Maeley Tom, Member

I hereby certify that the State Personnel Board made and adopted the foregoing Board Decision and Order, and I further certify that the attached is a true copy of the Administrative Law Judge's Proposed Decision adopted as a Precedential Decision by the State Personnel Board at its meeting on November 2, 2017.

SUZANNE M. AMBROSE
Executive Officer

K[redacted] S[redacted] v. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION Appeal from Demotion	Case No. 17-0511 Proposed Decision

STATEMENT OF THE CASE

This matter came on regularly for hearing before Douglas A. Purdy, Administrative Law Judge (ALJ), State Personnel Board (SPB or Board), on August 22 and 23, 2017, in San Diego, California. The matter was submitted at the conclusion of the hearing after oral closing arguments on August 23, 2017.

Appellant, K[redacted] S[redacted] (Appellant), was present and represented by Wayne Quint III, Staff Counsel, California Correctional Peace Officers Association.

Respondent, California Department of Corrections and Rehabilitation (Respondent or CDCR), was represented by Halorin Thurman, Attorney, CDCR. Susan Garcia, Employee Relations Officer, CDCR, appeared as Respondent's party representative.

Respondent demoted Appellant from his position of Correctional Lieutenant to the position of Correctional Officer (CO) effective on March 31, 2017. In the Notice of Adverse Action (NOAA), Respondent alleged Appellant borrowed money from two CO's with whom he had a supervisory relationship and failed to repay those CO's; and that he repeatedly failed to turn in his monthly time sheets during the period from September 2015 through August 2016.

Appellant admits to engaging in the alleged conduct, but argues one of the borrowing incidents is time-barred by Government Code section 19635, his conduct when borrowing money did not constitute cause for discipline, and the penalty is too harsh.

ISSUES

The issues to be resolved are:

1. Did Respondent prove by a preponderance of the evidence that Appellant committed conduct constituting cause for discipline under one or more of the following subdivisions of Government Code section 19572: (b) incompetency, (c) inefficiency, (d) inexcusable neglect of duty, (e) insubordination, (m) discourteous treatment, (o) willful disobedience, or (t) other failure of good behavior?
2. If Appellant's conduct constitutes cause for discipline under Government Code section 19572, what is the appropriate penalty?

FINDINGS OF FACT

A preponderance of the evidence proves the following facts:

1. After completing the CDCR Academy, Appellant began employment as a CO in September 1995. Appellant promoted to Correctional Sergeant in April 2001. In November 2001, Appellant transferred to Richard J. Donovan State Prison (RJD). In July 2006, Appellant promoted to Correctional Lieutenant at RJD. Appellant remained continuously employed as a Correctional Lieutenant at RJD until his demotion.

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CDCR General Policies

2. California Code of Regulations, title 15, section 3391 requires each CDCR employee to be professional in his dealings with fellow employees, and to avoid irresponsible conduct that could discredit himself or CDCR.

3. CDCR's Department Operations Manual (DOM) section 33030.3.1 requires CDCR employees to demonstrate professionalism and integrity.

4. DOM section 33030.3.3 states the "Law Enforcement Code of Ethics." This policy states that peace officers are held to a higher standard on and off duty, and that peace officers must keep their public and private life unsullied.

5. At all relevant times, Appellant was aware of the policies described above.

6. At all relevant times, the Employee Assistance Program (EAP) was available to CDCR employees. EAP offered various counseling services, including counseling for divorce and personal finances. Under some circumstances, a manager could direct an employee to contact the EAP.

Time Sheet Policies and Practices

7. DOM section 31080.7.9 requires CDCR employees to submit a completed and signed employee time sheet by the third day after the end of each pay period. Employees were required to indicate on the time sheets when they had used accrued leave credits for absences. At all relevant times, Appellant was aware of this requirement.

8. At all relevant times, RJD's practice has been to attach each employee's time sheet for the month, reflecting RJD's records of hours worked, to the employee's pay warrant for that month.

9. When an employee submitted a time sheet, RJD's personnel office processed the time sheet and made entries in the office's computer system to indicate the time sheet was submitted. On a monthly basis, after the due date for time sheets had passed, the RJD personnel office used the computer system to determine which employees had not yet submitted time sheets. RJD's personnel office then used the computer system to generate automated letters to be sent to those employees to inform them that they needed to submit their time sheets. These form letters informed employees that failure to submit a completed time sheet may result in RJD determining the employee had not used leave credits for absences and had therefore been overpaid, which would then cause RJD to establish an accounts receivable process against the employee.

2008 or 2009 Discussion with Warden

10. Robert Hernandez (Warden Hernandez) was the RJD Warden from December 2001 through his retirement in December 2008, and continued working as the Acting Warden as a Retired Annuitant until April 2009.

11. At some point in 2008 or 2009, Warden Hernandez became aware that Correctional Sergeant Steven Vasquez (Sgt. Vasquez) filed a written complaint against Appellant because Appellant had borrowed money from Sgt. Vasquez and had not repaid him.

12. Shortly after learning of the complaint, Warden Hernandez spoke to Appellant about the matter. Warden Hernandez told Appellant that it was inappropriate for a supervisor to borrow money from a subordinate employee and that

Appellant needed to pay Sgt. Vasquez back. Warden Hernandez told Appellant not to borrow money from subordinate employees.

Prior Adverse Actions[1]

13. Respondent issued Appellant a 10-percent salary reduction for 13 months, effective on March 31, 2015, for borrowing money from CO Jeffrey Springer (CO Springer). This NOAA recited Warden Hernandez's direction to Appellant not to borrow money from CO's. Respondent also issued Appellant a 5-percent salary reduction for 24 months, effective April 30, 2015, for failing to submit his time sheets in a timely manner. Appellant appealed both adverse actions, and the parties entered into a stipulated settlement to resolve both appeals by consolidating both adverse actions into a single, combined official reprimand.[2]

14. In March 2016, Appellant received an adverse action of suspension for 15 work days for collecting money from CO's to purchase coupon books as part of a youth sports organization fundraiser, and failing to deliver the coupon books or refund the money to those CO's.

Appellant's Personal and Financial Stress

15. During the period from 2014 through 2016, Appellant's elderly father had serious health problems and Appellant was in the process of separating from and divorcing his wife with whom he had two sons. Appellant experienced

[1] Respondent did not introduce copies of any prior notices of adverse actions. The ALJ took official notice of Appellant's prior adverse actions on file with the SPB. In the instant NOAA, Respondent alleged Appellant received an adverse action in October 2013, but a search of SPB's files found no 2013 adverse action for Appellant.

[2] This proposed decision shall refer to the combined, stipulated adverse action as the 2015 Consolidated Reprimand.

financial difficulty arising from medical bills for his father, expenses related to his separation, and child support owed to the mother of his third son.

16. Appellant began gambling frequently at a nearby casino during this period, and often incurred financial losses through his gambling.

Loan from CO Lopez

17. At all relevant times, CO Richard Lopez (CO Lopez) worked at RJD, and often worked in the same area as Appellant. CO Lopez did not have a personal relationship with Appellant. CO Lopez did not socialize with Appellant outside of work, but Appellant and CO Lopez occasionally were both present at a social gathering of RJD employees.

18. On February 17, 2014, Appellant telephoned CO Lopez at home and told him he was having financial difficulties related to his divorce, child support, and other factors. Appellant asked CO Lopez if he could borrow $5,000. CO Lopez told Appellant he could not loan Appellant such a high amount of money.

19. On the following day, February 18, 2014, while CO Lopez was at work, Appellant called CO Lopez into his office. Appellant then asked CO Lopez if he was able to obtain the money for him. CO Lopez stated he might be able to lend Appellant a lesser amount, such as $1,500, and that he would see what he could do. Appellant then asked CO Lopez if he could "make it at least $3,000."

20. On February 19, 2014, Appellant again called CO Lopez into his office and asked if CO Lopez could loan him money. CO Lopez stated he could

possibly loan Appellant $1,500. Appellant asked CO Lopez if he would increase the amount to $2,000, and CO Lopez agreed.

21. After work, Appellant followed CO Lopez to CO Lopez's bank, and waited in the parking lot. CO Lopez went into his bank and withdrew $2,000 in cash. CO Lopez then handed the money to Appellant, and Appellant stated he would repay CO Lopez the following month.

22. Over the course of the next few months, CO Lopez periodically asked Appellant about repaying the loan, and Appellant stated various reasons he could not repay CO Lopez at that time.

23. In January 2015, CO Lopez again asked Appellant to repay the loan. When Appellant stated he could not repay the $2,000, CO Lopez asked Appellant if he could make installment payments, and Appellant agreed. Although CO Lopez asked for higher installment payments, Appellant stated he could pay CO Lopez $100 per month, and CO Lopez agreed.

24. Appellant paid CO Lopez $100 in January 2015. In February 2015, Appellant did not make a payment. In March 2015, Appellant paid CO Lopez $200 to cover the months of February and March 2015. After March 2015, Appellant made no further payments to CO Lopez.

25. As of the date of hearing, Appellant had only repaid CO Lopez $300 of the $2,000 he borrowed.

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Loan from CO Mack

26. At all relevant times, CO Otis Mack (CO Mack) worked at RJD, and Appellant supervised him at times. CO Mack did not have a close social relationship with Appellant, and did not socialize with Appellant outside of work.

27. In late April or early May 2016, Appellant telephoned CO Mack at home and asked to borrow $200 from him. CO Mack felt sorry for Appellant, and agreed to the loan.

28. CO Mack told Appellant where he lived, and then went to his bank to withdraw $200. Shortly thereafter, Appellant drove to CO Mack's residence to pick up the money. Appellant told CO Mack he promised he would pay him back the next pay period.

29. Over the course of several months, CO Mack asked Appellant on several occasions to repay the loan. On each occasion, Appellant provided an excuse as to why he could not repay the loan.

30. As of the date of hearing, Appellant had not repaid CO Mack any of the $200 he borrowed.

Appellant's Time Sheets

31. Appellant did not turn in his completed and signed time sheets in a timely manner for the pay periods from September 2015 through August 2016.

32. For each pay period from September 2015 through August 2016, Respondent mailed to Appellant's home address a notice informing him that he had failed to turn in his time sheet and that Respondent may need to establish an accounts receivable process. Appellant did not respond to these notices.

33. In December 2016, an employee in RJD's personnel office spoke with Appellant and told him he was missing time sheets. Approximately two days after this conversation, Appellant turned in completed, signed time sheets for all pay periods in 2016. However, as of the date of hearing, Appellant had not turned in completed, signed time sheets for the pay periods from September 2015 through December 2015.

Appellant's Efforts to Stop Gambling

34. In August 2016, Appellant contacted the EAP and began to see a therapist regarding his gambling. In September 2016, Appellant began to see a different therapist who was covered by his insurance, and continued to see this new therapist on a weekly basis.

35. In October 2016, Appellant began to attend Gamblers Anonymous meetings, usually two-to-three times per week.

Service of NOAA

36. Respondent served the instant NOAA on Appellant on March 9, 2017. The effective date of the NOAA was March 31, 2017, and Appellant filed his appeal in this matter on April 6, 2017.

CREDIBILITY DETERMINATION

Warden Hernandez testified that after he reviewed the complaint by Sgt. Vasquez, he spoke to Appellant about the matter. Warden Hernandez testified that he told Appellant that he needed to immediately pay back the money he owed to Sgt. Vasquez and directed Appellant not to borrow money from subordinate employees.

Appellant denied that such a conversation took place. Resolving this conflict requires a credibility determination using the criteria provided by Evidence Code section 780.

When determining credibility, the trier of fact may consider "any matter that has any tendency in reason to prove or disprove the truthfulness of [the witness's] testimony," including witness demeanor; character of testimony; extent of the witness's ability to perceive, recollect or communicate any matter about which she or he testifies; the existence or nonexistence of bias, interest or motive; the existence or nonexistence of any fact testified to by the witness; and the witness's attitude toward the action or testimony. (Evid. Code, § 780, subds. (a), (b), (c), (d), (f), (i) & (j).)

Appellant generally testified in a clear manner and candidly admitted conduct that did not portray him in a good light. However, Appellant exhibited some difficulty recalling details and appeared to be evasive at times. Although Warden Hernandez had difficulty recalling specific dates of events that occurred several years ago, he demonstrated a specific recollection of his discussion with Appellant. Warden Hernandez testified in a clear, consistent, and unexaggerated manner. Warden Hernandez's testimony is logical because Sgt. Vasquez filed a complaint against Appellant during the time period Warden Hernandez said he discussed the matter with Appellant. Warden Hernandez had been retired for more than eight years at the time of hearing, and had no apparent interest in the outcome of the matter. Also, Warden Hernandez displayed no animosity toward Appellant, and had no apparent motive to testify in a manner unfavorable to Appellant.

Accordingly, Warden Hernandez's testimony is credited over Appellant's testimony.

PRINCIPLES OF LAW AND ANALYSIS

In a disciplinary appeal, the appointing power must prove the charges against the employee by a preponderance of the evidence. (Evid. Code, § 115; *Lyle Q. Guidry* (1995) SPB Dec. No. 95-09.) However, the party asserting an affirmative defense has the burden of proving the elements of that affirmative defense. (*Ladd v. Warner Bros. Entertainment, Inc.* (2010) 184 Cal.App.4th 1298, 1310.) A preponderance of the evidence is "evidence that has more convincing force than that opposed to it." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324.) In determining whether there is a preponderance of evidence, the trier of fact may consider direct and circumstantial evidence, and consider reasonable inferences drawn from that evidence. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.)

Appellant's Affirmative Defense

During closing argument, Appellant raised for the first time, the contention that Government Code section 19635 prohibits Respondent from disciplining Appellant for borrowing money from CO Lopez because that conduct occurred more than three years before service of the instant NOAA. In essence, Appellant sought to strike the allegation regarding the loan from CO Lopez. Appellant's Prehearing and Settlement Conference (PHSC) statement, filed before the June 29, 2017 PHSC in this matter, made no mention of this defense. In addition, Appellant filed no motion to strike the allegation before the hearing.

Respondent objected to Appellant first raising this defense in closing argument because Appellant had neither filed a motion to dismiss this portion of the NOAA nor

identified this issue in his PHSC statement. Respondent argued that Appellant waived the affirmative defense.

Appellant filed his appeal in this matter with the SPB on April 6, 2017. Appellant did not file a motion to strike the CO Lopez allegation before the hearing, which commenced more than four months after Appellant filed his appeal.[3] At issue is whether Appellant forfeited his ability to raise the affirmative defense under Government Code section 19635 by failing to file a timely motion to strike.

In determining whether Appellant's failure to raise the affirmative defense at an earlier stage constitutes a forfeiture of that defense, the Board must first determine whether Government Code section 19635 is a statute of limitation or a statute of repose.

Statutes of limitation prescribe periods beyond which actions may not be brought. (*Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 532.) In medical malpractice actions, for example, "[t]he time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers [or reasonably should have discovered] the injury." (Code Civ. Proc., § 340.5.) Generally, a statute of limitation is procedural and merely affects the remedy, but does not affect the substantive right or obligation. (*Nelson v. Flinktote Co.* (1985) 172 Cal.App.3d 727, 733.) A party may forfeit an affirmative defense based on a statute of limitation if the party fails to timely and properly raise that defense. (See, e.g., *Vitkievicz v. Valverde* (2012) 202 Cal.App.4th 1306, 1314.)

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[3] SPB's regulations require that an appellant file a motion to dismiss or motion to strike within 90 days from the date the appeal was filed with the SPB. (Cal. Code Regs., tit. 2, § 60.1, subd. (a).) Failure to comply with this requirement may constitute sufficient ground to deny the motion. (Cal. Code Regs., tit. 2, § 60.1, subd. (k).)

Though similar to a statute of limitation, a statute of repose not only affects the remedy, but also extinguishes the underlying right of action after the time period has elapsed. (*Stuart v. American Cyanamid Co.* (2d Cir. 1998) 158 F.3d 622, 627.) A statute of repose nullifies the right, regardless of whether the right has accrued or the party is aware that any injury has occurred. (*Giest v. Sequoia Ventures, Inc.* (2000) 83 Cal.App.4th 300, 305.) A statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or injury has resulted. (*Ibid.*) Unlike a statute of limitation, a party cannot forfeit a defense based on a statute of repose. (*PGA West Residential Assn., Inc. v. Hulven Internat., Inc.* (2017) 14 Cal.App.5th 156, [221 Cal.Rptr.3d 353, 378-79].)

Government Code section 19635 states the following:

> No adverse action shall be valid against any state employee for any cause for discipline based on any civil service law of this state, unless notice of the adverse action is served within three years after the cause for discipline, upon which the notice is based, first arose. Adverse action based on fraud, embezzlement, or the falsification of records shall be valid, if notice of the adverse action is served within three years after the discovery of the fraud, embezzlement, or falsification.

Stated differently, an adverse action that is not subject to the fraud, embezzlement, or falsification of records exception is invalid or null, unless served within the three years. Unlike a typical statute of limitation, Government Code section 19635 does not state in a procedural fashion that an appointing power must file or serve an NOAA within a specified period of time. Rather, like a statute of repose, Government Code section 19635 nullifies an adverse action that is not served within three years of the conduct giving rise to the adverse action. Except for actions based on fraud, embezzlement, or falsification of records, Government Code section 19635 does not

require that the appointing power have notice of the employee's conduct or that any injury arise before any time period commences. Like a statute of repose, Government Code section 19635 extinguishes the appointing power's right to take adverse action after three years, regardless of whether the appointing power had notice of the employee's conduct or injury actually occurred.

Therefore, Government Code section 19635 should be considered a statute of repose rather than a traditional statute of limitations. Because Government Code section 19635 should be considered a statute of repose, Appellant's failure to raise the affirmative defense in an earlier motion did not defeat his ability to raise the defense at hearing.[4]

Applying, Government Code section 19635 in this matter, it is clear that Government Code section 19635 prohibits Respondent from disciplining Appellant for obtaining the loan from CO Lopez. On February 19, 2014, Appellant obtained the loan from CO Lopez. On March 9, 2017, Respondent served the NOAA on Appellant. More than three years had elapsed between when the conduct occurred and when Respondent served Appellant with the NOAA. Respondent did not allege or prove that Appellant obtained the loan from CO Lopez as a result of fraud. Accordingly, the tolling provision is inapplicable. The portion of the adverse action based on Appellant obtaining the loan from CO Lopez is therefore invalid, and Appellant's motion to strike

[4] Although Appellant's failure to raise this defense in an earlier motion did not defeat his ability to raise the defense at hearing, the parties and the SPB likely would have benefitted if Appellant had filed a motion to strike in accordance with California Code of Regulations, title 2, section 60.1, subdivision (a). If Appellant had filed such a motion, the parties likely could have narrowed the scope of hearing to more efficiently litigate the matter. Disposing of issues at the pre-hearing motion stage generally avoids unnecessary litigation, and minimizes the waste of the parties' and SPB's time and resources.

this allegation is granted. Appellant's conduct with regard to initially obtaining the loan from CO Lopez is therefore not considered cause for discipline.

Although the act of obtaining the loan from CO Lopez falls outside the three-year statute of repose, the NOAA also charged Appellant with his conduct toward CO Lopez in January 2015 and thereafter. Specifically, the NOAA charged, and the evidence established, that Appellant agreed in January 2015 to make installment payments to repay CO Lopez, thereafter made two payments totaling $300, but made no further payments. This January 2015 conduct and the conduct thereafter occurred less than three years before the NOAA was served, and may be considered cause for discipline.

Incompetency

Incompetency exists when an employee fails to perform his or her duties adequately within an acceptable range of performance. (*Fortunato Jose* (1993) SPB Dec. No. 93-34.) Generally, incompetency connotes an overall absence of qualifications, fitness, or ability to perform one's duties, and not just a single act of misconduct. (*D.M.* (1995) SPB Dec. No. 95-10.)

For the reasons discussed below, in more detail with respect to inexcusable neglect of duty, insubordination, willful disobedience, and other failure of good behavior, Appellant failed to comply with directions and displayed bad judgment when he borrowed money from CO Mack. However, Respondent did not prove that this conduct was so inept that it indicated a lack of qualifications or fitness to perform the duties of Correctional Lieutenant.

On the other hand, Appellant failed to submit his signed, completed monthly time sheets in a timely manner for a period of one year. Appellant's 2015 Consolidated

Reprimand should have made clear to the Appellant of the need to submit his time sheets in a timely manner. For each pay period, RJD attached Appellant's time sheet to his pay warrant, and Appellant merely needed to ensure it was completed and signed, and turn it in. Appellant's repeated failure to perform this simple, routine task indicates a failure to perform his basic duties within an acceptable range of performance.

Thus, Appellant's failure to submit signed, completed monthly time sheets constitutes cause for discipline under Government Code section 19572, subdivision (b), and the charge of incompetency is sustained.

Inefficiency

Inefficiency generally consists of a continuous failure to achieve a set level of productivity or failure to produce an intended result with a minimum of waste, expense, or unnecessary effort. (*R.B.* (1993) SPB Dec. No. 93-21.)

RJD employees are expected to turn in their completed, signed time sheets within three days after the end of each pay period so that RJD's personnel office can properly process employees' pay. Appellant failed to timely turn in his monthly time sheets for one year. Appellant's continuous failure to complete a simple task impaired Respondent's ability to accurately determine Appellant's pay and caused RJD's personnel office to expend unnecessary time and effort mailing correspondence to Appellant in an attempt to gain his compliance.

Appellant's conduct constitutes cause for discipline under Government Code section 19572, subdivision (c), and the charge of inefficiency is sustained.

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Inexcusable Neglect of Duty

Finding inexcusable neglect of duty requires finding an employee intentionally or with gross negligence failed to exercise due diligence in the performance of a known official duty. (*U.W.* (1993) SPB Dec. No. 93-10.) To be subject to discipline for inexcusable neglect of duty, an employee must have actual or constructive notice of expected standards of conduct, unless the conduct is so clearly wrong that notice is not necessary. (*E.D.* (1993) SPB Dec. No. 93-32.)

Neither, California Code of Regulations, title 15, section 3391, nor DOM sections 33030.3.1 and 33030.3.3, explicitly requires Appellant to submit completed time sheets nor explicitly prohibits Appellant from soliciting loans from subordinate employees.

Appellant, however, had a known duty not to borrow money from subordinate employees. Warden Hernandez specifically directed Appellant not to borrow money from subordinate employees. In addition, the 2015 Consolidated Reprimand specifically punished Appellant for borrowing money from CO Springer. Furthermore, a supervisor's solicitation of personal loans from a subordinate employee is so clearly improper that specific notice is not necessary. Appellant should have known that asking a subordinate employee to borrow money may cause that employee to feel pressured to loan money to his supervisor, and may create the appearance that Appellant's supervisorial decisions could be affected because of the employee's decision whether to loan money. Thus, even if Appellant had not received explicit direction, he should have known he had a duty not to solicit personal loans from subordinate employees. Appellant breached this known duty when he asked CO Mack for a loan.

Appellant also had a known duty to turn in his monthly time sheets in a timely manner. Appellant was aware of the requirement under DOM section 31080.7.9, as the 2015 Consolidated Reprimand specifically punished Appellant for his earlier failure to submit time sheets in a timely manner. Despite his known duty to submit time sheets in a timely manner, Appellant repeatedly failed to do so for a period of one year.

Appellant's conduct therefore constitutes cause for discipline under Government Code section 19572, subdivision (d), and the charge of inexcusable neglect of duty is sustained.

Insubordination

To support a charge of insubordination, an employer must demonstrate that an employee engaged in mutinous, disrespectful, or contumacious conduct under circumstances where the employee has intentionally or willfully disobeyed an order or instruction that a supervisor is entitled to give and have obeyed. (*Flowers v. State Personnel Bd.* (1985) 174 Cal.App.3d 753, 760; *Richard Stanton* (1995) SPB Dec. No. 95-02.)

Appellant's 2015 Consolidated Reprimand explicitly punished Appellant for borrowing money from subordinate employees, and recited Warden Hernandez's instruction not to borrow money from subordinate employees. This 2015 Consolidated Reprimand also explicitly punished Appellant for failing to turn in his time sheets in a timely manner. Thus, the 2015 Consolidated Reprimand constituted clear instructions from CDCR management to submit his time sheets in a timely manner and not to borrow money from subordinate employees.

Despite these clear instructions, Appellant stopped submitting his time sheets for a period of one year beginning in September 2015, a few months after the 2015 Consolidated Reprimand. Appellant also borrowed money from CO Mack in April 2016, approximately one year after the 2015 Consolidated Reprimand. Such flagrant and intentional violation of CDCR's explicit instructions so soon after they were given constitutes cause for discipline under Government Code section 19572, subdivision (e), and the charge of insubordination is sustained.

Willful Disobedience

Willful disobedience is a knowing and intentional violation of a direct command or prohibition. (*R.H.* (1993) SPB Dec. No. 93-22.) Knowingly violating a policy on which an employee has received instruction also constitutes willful disobedience. (*Anthony M. Beatrici* (1995) SPB Dec. No. 95-11 at p. 7.)

Warden Hernandez specifically directed Appellant not to borrow money from subordinate employees. The 2015 Consolidated Reprimand specifically punished Appellant for conduct including borrowing money from CO Springer. Appellant therefore was clearly directed not to borrow money from subordinate employees. Nonetheless, he solicited a loan from CO Mack in late April or early May 2016.

The 2015 Consolidated Reprimand also punished Appellant for his failure to submit his signed, completed time sheets in a timely manner. Clearly, this reprimand was a direction to submit signed, completed time sheets in a timely manner. Despite this clear direction, Appellant repeatedly failed to submit his time sheets for a period of one year.

Appellant's conduct constitutes cause for discipline under Government Code section 19572, subdivision (o), and the charge of willful disobedience is sustained.

Discourteous Treatment

Discourteous treatment generally includes conduct such as displaying hostility toward others, speaking in an abrasive tone, and having a brusque demeanor. (*Walker v. State Personnel Bd.* (1971) 16 Cal.App.3d 550.) In addition, discourteous treatment can include a flippant attitude, as well as rude, demeaning, and sarcastic comments. (*Michael Prudell* (1993) SPB Dec. No. 93-30.) However, mere failure to observe common amenities in a social setting does not constitute discourteous treatment. (*Blake v. State Personnel Bd.* (1972) 25 Cal.App.3d 541, 550.)

No evidence suggested Appellant displayed hostility toward anyone or acted in an abrasive, flippant, demeaning or sarcastic manner. Respondent contends that Appellant's failure to repay money owed to a subordinate employee after the employee's repeated requests to be repaid constitutes discourtesy. However, Respondent cited no authority for this interpretation of discourteous treatment.

Respondent did not prove Appellant's conduct constituted cause for discipline under Government Code section 19572, subdivision (m), and the charge of discourteous treatment is dismissed.

Other Failure of Good Behavior

Other failure of good behavior is misconduct that discredits the appointing authority or the appellant's employment, so long as there is a rational relationship between the misconduct and the appellant's employment. (*D.M.* (1995) SPB Dec. No. 95-10.) An appointing power need not prove the conduct is known to the public to prove the conduct discredits the appointing authority or the appellant's employment. (*Orlandi v. State Personnel Bd.* (1968) 263 Cal.App.2d 32, 36-37.)

As discussed above in more detail with respect to inexcusable neglect of duty and willful disobedience, Appellant disobeyed Warden Hernandez's directions and the directions contained in the 2015 Consolidated Reprimand. Appellant's failure to perform the simple task of submitting his time sheets in a timely manner reflected poorly on himself, his position as a supervisor, and CDCR. Soliciting a loan from CO Mack, an employee with whom he had no outside social relationship, also reflected poorly on himself, his position as a supervisor, and CDCR. If the public knew Appellant's conduct, it easily could create the appearance that Appellant abused his status as a supervisor to secure a personal favor from a subordinate employee, regardless of whether Appellant intended to do so.

Appellant's conduct constitutes cause for discipline under Government Code section 19572, subdivision (t), and the charge of other failure of good behavior is sustained.

Penalty

In determining the appropriate penalty, the SPB considers the extent to which the employee's conduct resulted in, or if repeated is likely to result in, harm to the public service; the circumstances surrounding the offense; and the likelihood of recurrence of the employee's conduct. (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194.) The harm or potential harm to the public service is the overriding consideration. (*Ibid.*)

Appellant's conduct resulted in substantial harm to the public service. Appellant failed to comply with Warden Hernandez's direction not to borrow money from subordinate employees, and failed to comply with the 2015 Consolidated Reprimand's clear direction

not to borrow money from subordinate employees. Failure to follow an employer's clear directions constitutes harm to the public service.

In addition, obvious harm arose when Appellant solicited a loan from CO Mack and failed to repay him, and when Appellant promised CO Lopez in January 2015 that he would repay the money he owed in installments and failed to do so. Whether intended or not, the mere act of soliciting a loan from a subordinate employee, particularly one with whom the supervisor does not have an outside social relationship, creates the possibility that the employee may feel pressure to loan the supervisor money because the supervisor has authority over the employee. It also may be difficult or awkward for the employee to demand repayment when the supervisor fails to repay the loan in a timely manner. In addition, the practice creates the possibility for a conflict of interest for the supervisor, or at least the appearance thereof. A supervisor's duties include decisions regarding assignments, evaluations of employees, and disciplinary or corrective actions. The borrower-lender relationship between the supervisor and employee may impact the supervisor's decisions, or at least raise questions about the supervisor's impartiality. Subordinate employees may believe they will receive favorable treatment if they loan money to the supervisor, and unfavorable treatment if they do not. Appellant's conduct easily could have led other CO's to believe Appellant was abusing his status as a supervisor, and thus undermine those CO's trust and respect for Appellant as a supervisor.

Also, harm to the public service occurs when an employee ignores or refuses to obey a clear departmental policy. (*W.M.* (1994) SPB Dec. No. 94-26 at p. 11.) Here, Appellant repeatedly ignored CDCR's clear policy requiring employees to turn in signed,

completed time sheets in a timely manner. Appellant's failure caused RJD's personnel office to waste time and resources attempting to obtain Appellant's compliance with its time sheet policy.

The circumstances surrounding Appellant's conduct support a stern penalty. Appellant's status as a supervisor weighs in favor of a harsh penalty. As a supervisor, Appellant must demonstrate good judgment and set a good example for subordinate employees. Instead, Appellant ignored clear directives to refrain from borrowing money from subordinate employees and instructions to turn in his time sheets in a timely manner. Also, Appellant knew that he had not repaid CO Lopez for the loan in February 2014, but still solicited a loan from CO Mack, another subordinate employee.[5]

Appellant's conduct suggests a high likelihood of recurrence. The 2015 Consolidated Reprimand explicitly punished Appellant for failing to submit his signed, completed time sheets in a timely manner. Several months later, despite this clear message from Respondent, Appellant did not submit his September 2015 time sheet, and continued not to submit his time sheets for one year. The 2015 Consolidated Reprimand also explicitly punished Appellant for borrowing money from CO Springer. Furthermore, the March 2016 suspension punished Appellant for collecting money from CO's for fundraiser coupon books and failing to deliver the coupon books or refund the money to those CO's. Despite this prior punishment and failure to repay another CO, Appellant borrowed money from CO Mack in April 2016, and failed to repay him.

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[5] Although Appellant's conduct related to initially obtaining the loan from CO Lopez is not considered as cause for discipline, the Board may consider his failure to repay CO Lopez as a circumstance surrounding his conduct toward CO Mack.

At the hearing, Appellant expressed remorse for not repaying CO Lopez or CO Mack. However, Appellant did not appear to recognize the impropriety of soliciting personal loans from subordinate employees. Appellant's failure to recognize the impropriety of his action weighs in favor of a harsh penalty. (*Robert R. Watson* (1994) SPB Dec. No. 94-10.)

Appellant has sought counseling for his personal problems and attended support group meetings to control his gambling. The SPB may consider rehabilitative efforts when considering the likelihood of recurrence. (*G.O.* (1992) SPB Dec. No. 92-11.) However, evidence of rehabilitation may not result in mitigation of penalty where that rehabilitation does not outweigh the harm or potential harm to the public service. (*Ibid.*) Here, the serious harm to the public service outweighs any consideration that may arise from Appellant's rehabilitative efforts.

At the hearing, Appellant's counsel argued that RJD managers should have directed Appellant to EAP at an earlier stage. Although it is possible that Appellant may have benefitted from an earlier referral, the absence of an earlier referral does not relieve Appellant of culpability for his actions or otherwise weigh in favor of mitigation of the penalty. Appellant bears the responsibility for his conduct.

Demotion to a CO is particularly appropriate in this case because it removes Appellant from a supervisory position, and thus eliminates the possibility that employees might feel pressure to loan money to Appellant because of his supervisory status.

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For the reasons discussed above, demotion from the position of Correctional Lieutenant to CO is a just and proper penalty in this case.[6]

CONCLUSIONS OF LAW

1. Appellant's conduct constitutes cause for discipline under Government Code section 19572, subdivisions (b) incompetency, (c) inefficiency, (d) inexcusable neglect of duty, (e) insubordination, (o) willful disobedience, and (t) other failure of good behavior. Appellant's conduct does not constitute cause for discipline under Government Code section 19572, subdivision (m), discourteous treatment.
2. Demotion from the position of Correctional Lieutenant to the position of CO is a just and proper penalty.

ORDER

The demotion from Correctional Lieutenant to CO taken against Appellant is **SUSTAINED**.

DATED: September 15, 2017

Douglas A. Purdy
Administrative Law Judge
State Personnel Board

[6] As discussed above, Government Code section 19635 excludes as cause for discipline Appellant's conduct toward CO Lopez in February 2014, but does not exclude as cause for discipline Appellant's conduct toward CO Lopez that occurred in January 2015 and thereafter. However, to the extent that Government Code 19635 might also exclude as cause for discipline Appellant's conduct toward CO Lopez in January 2015 and thereafter because the underlying loan to CO Lopez occurred more than three years before service of the NOAA, such exclusion would not affect the penalty determination in this case. Based on the factors evaluated in the penalty discussion of this Proposed Decision, demotion is a just and proper penalty regardless of whether the SPB considers any of Appellant's conduct toward CO Lopez as cause for discipline.