

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 31444
)
R ██████ O ██████, ██████.) **BOARD DECISION**
) (Precedential)
From dismissal from the position)
of Correctional Officer at the) **No. 93-29**
Wasco State Prison-Reception)
Center, Department of Corrections)
at Wasco) September 7, 1993

Appearances: Steven Ybarra, Senior Law Clerk with Alcala Law Firm representing Appellant, R ██████ O ██████, ██████.; Mr. Bannell, Equal Employment Opportunity office, representing Wasco State Prison; James C. Waller, Attorney, representing respondent, Department of Corrections.

Before Carpenter, President; Stoner, Vice President; Ward, Bos and Villalobos, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected a Proposed Decision of an Administrative Law Judge (ALJ) in an appeal by R ██████ O ██████, ██████. (appellant or O ██████), a Correctional Officer had been dismissed from his position with the Department of Corrections (Department) at Wasco State Prison-Reception Center. The dismissal was based on allegations that appellant had worn a white sheet over his head in view of inmates while on duty.

The ALJ found that appellant's actions constituted discourteous treatment, other failure of good behavior and dishonesty, but reduced the penalty to a suspension to end the Monday following the Board's adoption of the Proposed Decision.

(C████, █████. continued - Page 2)

The Board determined to decide the case itself, based upon the record and oral and written arguments. The Board specifically asked the parties to submit arguments as to the appropriate penalty to be imposed under all the circumstances. After review of the entire record, including the transcript and written arguments submitted by the parties, and having heard oral arguments upon the matter, the Board concludes that the dismissal should be modified to a suspension for one year.

FACTUAL SUMMARY

Appellant became a Correctional Officer in 1985. He has one prior adverse action on his record, of a one step salary reduction for one year for failure to comply with a direct order and for responding to a direct order in a rude and discourteous manner.

On March 23, 1992, appellant was working in his assigned post, the Control Booth at Facility D. As Control Booth Officer, appellant was charged with the duty to "ensure the safe operation of the control panel and at all times to keep the Floor Officers within sight and when necessary to provide gun coverage in emergency situations." Facility D houses inmates who are on medications for psychiatric problems. Roughly thirty to thirty-five percent of the inmates in the unit are African American.

On the day in question, appellant was working with Officer M████ H████ (H████) in the booth. Officer J████ C████ (C████) was assigned to the floor of the same facility. Appellant had

received two old sheets which he had requested for the purpose of cleaning the glass in the control booth.

The record reflects that on two separate occasions, once in the morning and once in the afternoon, appellant wore one of the sheets so that it at least partially covered his head and body. Although the testimony is somewhat conflicting¹ as to how he wore the sheet on each occasion, the preponderance of the evidence establishes that on one occasion appellant definitely wore the sheet pretending to be a ghost; on the other occasion, he may have worn the sheet more like a toga. In any event, the distinctions in the testimony are without a difference: on both occasions appellant wore the sheet in a manner that could have been misconstrued as racially motivated.

¹ A comparison of appellant's statements in his investigatory interview and his testimony at the hearing reveals some inconsistencies, although the inconsistencies are not such as to compel a conclusion that appellant was intentionally being untruthful either at his interview or at the hearing. The main inconsistency is that in his interview, appellant reverses the timing of the events as described by H████. Appellant's description in his interview of how he was wearing the sheet in the morning matches H████ description of how he was wearing it in the afternoon--like a toga. Appellant stated at his interview that he was unclear as to the sequence of events that day--the events were unimportant to him at the time. We believe that appellant's statements and testimony reveal more confusion than dishonesty. The ALJ made no clear credibility finding as to appellant's testimony at trial: he only stated he believed appellant was dishonest at his investigatory interview. Notably, neither Lieutenant L.A. W████ or Lieutenant T.E. N████, who interviewed appellant, testified at the hearing: the transcript is therefore hearsay.

(C████, █████. continued - Page 4)

A review of the record testimony taken as a whole reveals substantial evidence to support the following chronology as the most likely reconstruction of the days events. At approximately 9:30 a.m., appellant placed one of the sheets over his head and body, held his arms out and moved them around, and began making "ghost sounds" such as "oooh" and "aaah." As C████ walked from the podium on the floor to his office, he observed appellant in the control booth with the sheet over his body. C████ was not concerned about the incident, figuring that C████ and H████ were just playing a game between themselves to break the monotony in the control booth. When questioned as to whether C████ appeared to be acting like someone in the Klu Klux Klan, C████ testified that "it was obvious that the man was a ghost."

Officer H████ likewise testified that he observed C████ dressed as a ghost in the morning, making ghost sounds. He asked something like, "What are you supposed to be, a ghost, Casper?" C████ responded in the affirmative. At the time of the incident, H████ did not perceive C████' actions as something that would cause problems among the inmates.

Officer H████ also testified that at approximately 1:00 p.m. the same day, C████ again had the sheet on, this time "draped over his shoulder possibly or presumably like a toga." H████ was on the telephone at the time, and told C████ to "quit screwing around," or words to that effect. He was not, however, concerned at the time about the effect C████' actions might have on the inmates.

(O [REDACTED], [REDACTED]. continued - Page 5)

At the time of two incidents described above, there were approximately four inmate porters on the floor. The facility was on lock-down status. The interior of the control booth would be visible to inmates in their cells if they were at their cell glass and looking through the glass. There was no noise or visible unrest by the inmates as a result of the activities of O [REDACTED], either on or after the day of the incident.

At least two African American inmates, however, complained to the prison's Muslim chaplain about the incident being some kind of scare tactic related to the Klu Klux Klan. The chaplain brought the incident to the attention of prison officials. The prison also received a letter of complaint from the Prison Law Office, an organization that represents inmates in legal actions against the Department.²

Appellant was dismissed for cause pursuant to Government Code section 19572, subdivisions (c) inefficiency, (f) dishonesty, (m) discourteous treatment of the public, (o) willful disobedience, and (t) other failure of good behavior during duty hours which is of such that it causes discredit to the appointing power or to the person's employment, and (w) unlawful discrimination, including

² The letter treated the incident as racially motivated and charged that appellant yelled obscenities at the inmates while he wore a sheet. Absolutely no evidence supports this allegation.

(continued - O [REDACTED], Jr. Page 6)

harassment of the basis of race, religious creed, color, national origin, etc.

ISSUES

This case presents the following issues for our determination:

- 1) Whether the causes for adverse action were established by substantial evidence?
- 2) What is the appropriate penalty in this case under all the circumstances?

DISCUSSION

We agree with the ALJ that, despite appellant's innocent intent, appellant exercised extremely poor judgment in placing a white sheet over his head and body in view of inmates inside a prison. Appellant should have known that the wearing of a white sheet has racial overtones and have been misinterpreted as a form of racial slur or intimidation. In fact, at least two black inmates reported that they were highly offended by appellant's actions. While appellant's motive may have been innocent, his insensitivity and lack of judgment and foresight constituted discourtesy to the public (inmates) and other failure of good behavior.

While appellant's responses during the investigatory interview varied in some respects from his testimony at the hearing, as noted above (see p.3, fn. 1) we are not convinced that the record

contains substantial evidence to support a finding of dishonesty.

Notably, the transcript of the interview is hearsay: neither of the investigating officers testified at the hearing. Even assuming we can consider the transcript, the transcript reveals appellant's admissions during the investigatory interview that he had the sheet over his head on two separate occasions. While he only intended to play a joke on his co-worker and did not realize at the time that his conduct could have been misconstrued, by the time of the interview he recognized that what he had done was unprofessional and committed not to pull any pranks in the future.

Finally, appellant's actions in covering his head in the control booth so that he was unable to see, even for a few seconds, violated his post orders as Control Booth Officer "at all times to keep the Floor Officers within sight." He also violated the department's rules requiring him to be in full possession of his faculties and prohibiting him from engaging in any "distracting amusement." (Title 15, California Code of Regulations, sections 3394 and 3395). Appellant's misconduct constituted inefficiency, willful disobedience and other failure of good behavior.

We do not find that appellant's misconduct constituted unlawful discrimination.

Penalty

When reviewing disciplinary actions, the Board is charged with rendering a decision which is "just and proper" under all the

circumstances. (Government code, section 19582). In the case of Skelly v. State Personnel Board (1973) 15 Cal.3d 194, the Supreme Court set forth the factors to be considered when assessing the appropriateness of the discipline imposed:

...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or 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 recurrence. (at p. 218).

In the instant case, while the record was devoid of any evidence that appellant's misconduct created any real disturbance, his actions were misconstrued by at least a few inmates and were brought to the attention of prison authorities, not only by the prison chaplain but also by the Prison Law Office. Appellant's misconduct certainly had the potential to create severe harm to the public service. Appellant was lucky in that his prank was not observed by a greater number of inmates who might have misinterpreted his actions, taken offense, and created a disturbance.

The evidence established that appellant was in fact playing a ghost and had no apparent intentions to intimidate or offend. We find significant the fact that appellant appears now to understand that his actions could have been misinterpreted as racially motivated and we believe he truly regrets his actions. We are therefore convinced that the likelihood of recurrence is low.

(C████, █████. continued - Page 9)

For all of the foregoing reasons, we believe that dismissal is not warranted in this case. Additionally, we note that the allegations in the adverse action that would tend to support a finding that appellant was racially motivated in his actions, such that the allegations that appellant was pointing his gun at the inmates while wearing the sheet, were not established by any evidence in the record whatsoever.

On the other hand, we note that appellant's conduct evidenced a serious lack of judgment and therefore justifies a harsh adverse action. Additionally, we note that appellant does have a prior adverse action on his record. A suspension for a period of one year is a just and proper penalty under all the circumstances. Appellant should be well aware that further incidents of serious misconduct might well justify dismissal.

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

1. The adverse action of dismissal of R████ C████ is hereby modified to a suspension for a period of one year;

2. The Department of Corrections and its representatives shall reinstate appellant R████ C████ and pay to him all back pay and benefits that would have accrued to him had he been suspended for a period of one year rather than terminated;

3. 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.

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

THE STATE PERSONNEL BOARD

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

* * * * *

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

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board