

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)

H ■■■■ M ■■■■)

From demotion and reassignment from)
the position of Correctional Sergeant with)
the Transportation Unit at Sacramento to)
the position of Correctional Officer with)
California Rehabilitation Center at Norco)

SPB Case No. 02-0160

BOARD DECISION
(Precedential)¹

NO. 03-07

December 2, 2003

In the Matter of the Appeal by)

L ■■■■ S ■■■■)

From 60 calendar days suspension and)
reassignment from the position of)
Correctional Officer with the)
Transportation Unit, Department of)
Corrections at Sacramento to the)
position of Correctional Officer with)
California Institute for Men, Department)
of Corrections at Chino)

SPB Case No. 02-0079

APPEARANCES: Michael D. Lackie, attorney, on behalf of appellants, H ■■■■ M ■■■■ and L ■■■■ S ■■■■ Monrow Mabon, Staff Counsel, Department of Corrections, on behalf of respondent, Department of Corrections.

BEFORE: Ron Alvarado, Vice President; Sean Harrigan and Maeley Tom, Members.

DECISION

This case is before the State Personnel Board (Board) after the Board rejected the Proposed Decisions of the Board Administrative Law Judge (ALJ) modifying the demotion and reassignment of H ■■■■ M ■■■■ from the position of Correctional Sergeant to

¹ Pursuant to Government Code §§ 19582.5 and 11425.60, this decision is designated as precedential in part and certified for partial publication in accordance with the Board's resolution adopted December 2, 2003.

the position of Correctional Officer to a demotion for one year, plus reassignment, and modifying the 60 calendar days' suspension and reassignment of L [REDACTED] S [REDACTED] r from the position of Correctional Officer to a 30 calendar days' suspension, plus reassignment.² In this Decision, the Board adopts substantially the ALJ's findings of fact and conclusions of law in both cases and, in the published portion of this Decision, further concludes that appellants have not established that the Department of Corrections (Department or CDC) violated their rights under the Public Safety Officers Procedural Bill of Rights Act (POBOR).³

BACKGROUND

Factual Summary

Appellant M [REDACTED] was the Extradition Bureau Sergeant with the Department's Transportation Unit. The Extradition Bureau transported prisoners to and from different parts of the country. Appellant S [REDACTED] was an Extradition Bureau Officer under M [REDACTED]'s supervision. Most of the incidents at issue in this proceeding occurred on February 5, 2000 and November 3, 2000 while appellants and five other correctional officers under M [REDACTED]'s supervision were traveling between Sacramento and Ontario after receiving training; no inmates were present. As described in detail in the factual findings set forth in the portion of this Decision not designated as precedential, appellant

² Both appeals, together with a third, L [REDACTED] C [REDACTED], SPB Case No. 02-0159, were consolidated for hearing before the ALJ. After the ALJ granted a motion to dismiss all but one of the charges against L [REDACTED] C [REDACTED], the Department withdrew the adverse action against C [REDACTED]. The ALJ issued separate Proposed Decisions in the M [REDACTED] and S [REDACTED] matters. After the Board rejected both of those Proposed Decisions, they were again consolidated for oral argument and decision.

³ Gov. Code, § 3300, et seq.

M [REDACTED]: 1) failed to take appropriate action as a supervisor when he observed appellant S [REDACTED] driving erratically enroute to the Sacramento airport after consuming alcohol; 2) was under the influence of alcohol at the Sacramento airport; 3) failed to take appropriate corrective action when, at the Ontario airport, he observed appellant S [REDACTED] remove the keys from a private vehicle and start the vehicle, and laughed when the owner of the vehicle arrived; 4) used profanity while seated next to a 12-year-old girl on the airplane; and 5) dishonestly denied that he had consumed alcohol on the two days in question.⁴ Appellant S [REDACTED]: 1) drove erratically enroute to the Sacramento airport after consuming alcohol; 2) was under the influence of alcohol at the Sacramento airport; 3) removed the keys from a private vehicle and started the vehicle, and laughed when the owner of the vehicle arrived; and 4) dishonestly denied engaging in the charged conduct.⁵

Procedural Summary

Based upon the charged misconduct, the Department demoted appellant M [REDACTED] from the position of Correctional Sergeant to the position of Correctional Officer, and reassigned him from the Transportation Unit at Sacramento to the California Rehabilitation Center at Norco. The Department suspended appellant S [REDACTED] from the position of Correctional Officer for 60 calendar days, and reassigned him from the Transportation Unit at Sacramento to the California Institute for Men at Chino. In his

⁴ Because it was not a violation of departmental policy for appellant to consume alcohol during these times, so long as he was not intoxicated, all charges concerning only the consumption of alcohol were dismissed.

⁵ Although some of the charges concerning the underlying conduct were dismissed, appellants were still obligated to respond truthfully when asked about that conduct.

Proposed Decisions, the ALJ recommended modifying the demotion of appellant M [REDACTED] to a demotion for one year, and recommended modifying the suspension of appellant S [REDACTED] from 60 calendar days to 30 calendar days.⁶ At its meetings on January 23, 2003 (M [REDACTED]) and February 3, 2003 (S [REDACTED]), the Board rejected the ALJ's Proposed Decisions to reconsider the issue of the appropriate penalty under all the circumstances, but did not limit the issues that could be raised by the parties. In addition to arguing the issue of penalty, on rehearing, appellants argued that their rights under POBOR had been violated in that the Department failed to notify them of the proposed disciplinary actions within one year after discovery of the alleged misconduct.

ISSUES

1. Were appellants' rights under POBOR violated?
2. What is the appropriate penalty for the proven misconduct?

[Portions of Decision not designated as precedential are omitted.]

DISCUSSION

POBOR Issue

Appellants assert that the adverse actions must be revoked because the Department failed to serve the notices of adverse action within the one-year limitations

⁶ The Proposed Decisions recommended that the reassignments of both appellants be sustained.

period set forth in Government Code section 3304, subdivision (d). Government Code section 3304, subdivision (d), provides, in pertinent part:

Except as provided in this subdivision and subdivision (g), no punitive action ... shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct. This one-year limitation period shall apply only if the act, omission, or other misconduct occurred on or after January 1, 1998. In the event the public agency determines that discipline may be taken, it shall complete its investigation and notify the public safety officer of its proposed disciplinary action within one year ... (emphasis added.)⁷

Appellants contend that the Department was obligated to serve the notice of adverse action within one year after M■■■■'s subordinate correctional officers witnessed that misconduct. The Department discovered the misconduct in or around January 2001, when two of the six correctional officers under appellant M■■■■'s supervision—Dewayne Wade and Darryl Robinson—called Sergeant Michael Moseley of the Department's Extradition Bureau and told him that they had concerns about appellants and O■■■■ consuming alcohol while on duty. They also described the "car keys" incident. Moseley prepared a written memorandum dated January 16, 2001 documenting the information he had received from Wade and Robinson and submitted it to his supervisor, Lieutenant Greenlee. The memorandum states that Wade and Robinson contacted Moseley on January 12, 2001. The Department assigned the matter for investigation by Gerald Jansen, who interviewed the witnesses and prepared

⁷ Government Code section 19635 sets forth a three-year limitations period within which state employers must take formal disciplinary action against state civil service employees.

a report.⁸ There is no evidence in the record that any of the other officers present during the incidents, including appellants and O [REDACTED], made any report concerning these incidents. Because the two correctional officers waited until January 2001 to report incidents that occurred in February and November 2000, appellants contend that the adverse actions must be dismissed due to the Department's failure to serve notices of adverse action within one year of the discovery of the misconduct by those correctional officers. The Department investigated the allegations and served notices of adverse action on January 7, 2002.

The issue raised by appellants' argument is whether rank and file correctional officers can be considered "persons authorized to initiate an investigation" within the meaning of Government Code section 3404(d) based solely upon their status as CDC employees, rather than on their having any specific investigatory authority. We do not believe that they can. Appellants rely on the Department's Operations Manual (DOM), which states:

Every employee of CDC with knowledge of employee misconduct shall report such act and cooperate fully in the investigative process. Failure to report or refusal to cooperate shall be grounds for adverse personnel action.⁹

Thus, appellants contend, because the correctional officers were obligated to report the misconduct, they were "persons authorized to initiate an investigation" within

⁸ The record does not indicate who made the decision to initiate an investigation or when it was commenced. The investigative report was not offered into evidence in this proceeding.

⁹ In addition, appellant relies on another section of the DOM that requires the immediate reporting of misconduct which may result in injury or a dangerous situation.

the meaning of POBOR, and their failure to comply with the DOM requirements bars the Department from pursuing this action.

Appellants have offered no authority to support their position that the discovery of employee misconduct by correctional officers may be imputed to the Department merely by virtue of the fact that correctional officers under appellant M■■■■'s supervision—and working on the same crew with appellant S■■■■—witnessed that misconduct. While the officers may have been obligated by departmental policy to report the misconduct, appellants have provided no evidence to suggest that they were authorized to initiate or conduct any investigation on behalf of the Department. Moreover, as noted by the Department, the officers were understandably reluctant to report their supervisor and colleague and feared retaliation if they did so.

POBOR has been described as “primarily a labor relations statute” that “provides a catalog of basic rights and protections that must be afforded all peace officers by the public entities which employ them.”¹⁰ In determining the legislative intent of POBOR, the court in CCPOA v. State stated:

In construing statutes, the fundamental goal is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, we first look to the words of the statute, giving the language its usual, ordinary import. When the language is clear and unambiguous, there is no need for construction. But when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the legislative history, the ostensible object to be achieved, public policy, and the statutory scheme of which the statute is a part. A

¹⁰ California Correctional Peace Officers Association v. State of California (2000) 82 Cal.App.4th 294 (hereinafter “CCPOA v. State”).

statute should be construed whenever possible so as to preserve its constitutionality.¹¹

The requirement, set forth in Government Code section 3304, subdivision (d), that disciplinary action be taken within one year of the discovery of the alleged misconduct by a person authorized to initiate an investigation, was added in 1997.¹² Recently, in Jackson v. City of Los Angeles¹³ the Second District Court of Appeal had occasion to consider the meaning of the phrase “a person authorized to initiate an investigation,” as used in that subdivision. In Jackson, the court found that an Administrative Order issued by the Office of the Chief of Police of the Los Angeles Police Department in response to the amendment adding section 3304, subdivision (d), specifically identified “a supervisor (Sergeant I or Detective II or higher)” as “a person authorized to initiate an investigation” within the meaning of the statute. No evidence of such specific identification or authorization regarding CDC personnel appears in the record before the Board.¹⁴

We conclude that, for the limitations period set forth section 3304, subdivision (d), to come into play, and in the absence of any specific identification or authorization by the Department, the “person authorized to initiate an investigation” must be affirmatively vested with some authority to conduct or supervise an investigation into the alleged misconduct and to either take disciplinary action or to report the investigatory

¹¹ 82 Cal.App.4th 294, 307-308, citing People v. Woodhead (1987) 43Cal.3d 1002, 1007-1008 and Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1386-1387.

¹² Stats. 1997, c. 148. The section was renumbered in 1998.

¹³ ___ Cal.App.4th ___ (Aug. 28, 2003) Docket No. B159850, petition for review denied November 25, 2003.

¹⁴ See also Gov. Code, § 3303, describes the conditions that must be followed “[w]hen any public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action” (emphasis added).

findings to one who can act upon them. We will not presume that a mere witness to possible misconduct who has no such authority is vested with such authority *per se*, notwithstanding any obligation he or she may have to report the misconduct.

In the cases previously decided by the Board finding that the adverse action was barred by the statute of limitations set forth in POBOR, the commencement of the limitations period has always been based upon discovery of the misconduct by a person “authorized to conduct an investigation” and has always involved the initiation of an investigation by a person in upper management within the department.¹⁵ While we do not believe that the statute of limitations necessarily begins to run only when the Warden initiates an investigation of employee misconduct,¹⁶ in the absence of any evidence that the three correctional officers who witnessed the misconduct in this case were authorized to initiate an investigation on behalf of the Department, we will not conclude that the statute of limitations in section 3304, subdivision (d), began to run upon the witnessing of misconduct by rank and file subordinate employees.

[Portions of Decision not designated as precedential are omitted.]

CONCLUSION

The Board does not construe POBOR to impute knowledge of alleged peace officer misconduct to a person authorized to investigate such misconduct merely by virtue of the fact that other employees who may have had a duty to report such

¹⁵ See, e.g., F. S. (2002) SPB Dec. No. 02-09 (notice of adverse action not served within one year after Warden was notified about the possible misconduct) (petition for writ of mandate pending, Sacramento Superior Court Case No. 03CS00941; G. M., SPB Dec. No. 03-06 (Warden instructed Associate Warden to conduct an investigation).

¹⁶ See, e.g., Haney v. City of Los Angeles (2003) 109 Cal.App.4th 1 (1-year statute of limitations began to run when sergeant in charge of facility learned of possible misconduct while investigating incident).

misconduct delayed reporting misconduct they witnessed. In the absence of any evidence that those employees were specifically authorized to initiate an investigation, the Board finds that the Department complied with its obligations under POBOR concerning timely service of the adverse action.

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 demotion of H ■■■ M ■■■ from the position of Correctional Sergeant with the Transportation Unit at Sacramento to the position of Correctional Officer with California Rehabilitation Center at Norco is modified to a demotion from Correctional Sergeant to Correctional Officer for one year, effective January 17, 2002;
2. The reassignment of H ■■■ M ■■■ from the Transportation Unit to the California Rehabilitation Center at Norco, effective January 17, 2002, is sustained;
3. The Department shall pay to H ■■■ M ■■■ all back pay and benefits, if any, together with interest at the rate of 7 percent per annum, that would have accrued to him had he been demoted to the position of Correctional Officer for one year, effective January 17, 2002, instead of permanently demoted;
4. The 60 calendar days' suspension of L ■■■ S ■■■ from the position of Correctional Officer with the Transportation Unit, Department of Corrections at Sacramento to the position of Correctional Officer with California Institute

for Men, Department of Corrections at Chino, is modified to a 30 calendar days' suspension;

5. The reassignment of L [REDACTED] S [REDACTED] from the Transportation Unit to the California Institution for Men at Chino is sustained;
6. The Department shall pay to L [REDACTED] S [REDACTED] all back pay and benefits, if any, together with interest at the rate of 7 percent per annum, that would have accrued to him had he been suspended for 30 calendar days instead of for 60 calendar days;
7. This matter is hereby referred to the Chief 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 appellants;
8. The following portions of this decision are certified for partial publication as a Precedential Decision pursuant to Government Code section 19582.5:
 - a. Page 1 through "ISSUES" at page 4;
 - b. The discussion of the POBOR Issue; and
 - c. The "CONCLUSION" through the end of this Decision.

STATE PERSONNEL BOARD¹⁷

Ron Alvarado, Vice President
Sean Harrigan, Member
Maeley Tom, Member

* * * * *

¹⁷ President William Elkins and Member Anne Sheehan did not participate in this decision.

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on December 2, 2003.

Walter Vaughn
Executive Officer
State Personnel Board

[M- -S- -dec]