

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 28143
)
 G [REDACTED] J [REDACTED]) **BOARD DECISION**
) (Precedential)
From dismissal from the position of)
Youth Counselor with the Department) **NO. 92-01**
of the Youth Authority at the)
Herman G. Stark Youth Training School) January 7, 1992

Appearances: Ina Arnold, Senior Hearing Representative, California Correctional Peace Officers Association, representing appellant G [REDACTED] J [REDACTED]; Dan Doyle, Chief Counsel, Department of the Youth Authority, representing respondent, Department of the Youth Authority.

Before Stoner, Vice President; Burgener, Carpenter and Ward, 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 an appeal by G [REDACTED] J [REDACTED] (Appellant or J [REDACTED]) who had been dismissed from his position as a Youth Counselor at the Youth Training School (YTS), Department of Youth Authority (Department).

In sustaining the dismissal, the ALJ found that appellant was dishonest to the San Bernardino County Sheriff's Department (Sheriff's Department) when he failed to disclose information regarding an industrial injury and disability, was dishonest to his own Department when he denied he had made certain statements to the Sheriff's Department, and was dishonest when he received worker's compensation benefits under the false representation that he was disabled when he was not. The ALJ rejected appellant's claim that

(J [REDACTED] G. continued - Page 2)

there was no nexus between the alleged misconduct and appellant's job, stating that dishonesty is a character trait that does not require a finding of nexus.

The Board determined to decide the case itself, based upon the record and additional arguments to be submitted both in writing and orally. After review of the entire record, including the transcripts and briefs submitted by the parties, and after having listened to oral argument, the Board rejects the Proposed Decision of the ALJ, but affirms the dismissal, for the reasons set forth below.

FACTUAL SUMMARY

Appellant was appointed a Group Supervisor with the Department on October 31, 1985. He became a Youth Counselor on June 2, 1986.

Appellant has had two prior adverse actions. On June 19, 1989, he received an official reprimand for carrying a concealed weapon while on duty and for failure to follow his supervisor's instructions. On August 31, 1989, appellant's salary was reduced 1 step for 12 months for using excessive force against a ward.

Appellant applied for a position with the Sheriff's Department in either December 1988 or January 1989. On September 29, 1989, appellant suffered a work-related injury to his elbow. He was off work as a result of that injury through early March of 1990, at which time he returned to YTS in a limited-duty assignment.

(J [REDACTED] G. continued - Page 3)

On October 4, 1989, only five days after the injury, appellant was seen by a physician for San Bernardino County for a physical examination in connection with his application to be a Deputy Sheriff. At the time of the examination, appellant completed a medical questionnaire.¹ Appellant testified that he answered "no" in response to the question on the questionnaire as to whether he had any injury that would interfere with his ability to be a peace officer. Appellant also testified that he did not tell the County physician that he had suffered an injury just a few days earlier.

Several months later, on March 7, 1990, appellant was invited to a hiring interview with the Sheriff's Department. In an attempt to notify appellant of the interview, a Sheriff's Department employee telephoned YTS and was told that appellant was on industrial disability leave. Appellant subsequently had a conversation with Sergeant Tesselaar of the Sheriff's Department, in the presence of Senior Deputy Sheriff Bill Maddox, during which Tesselaar asked appellant about his injury. Tesselaar testified that appellant told him that he was off work because he had been injured while on duty, that his doctor would release him to go back to work whenever he wanted, and that he was "milking it." Tesselaar relayed this conversation to Maddox in J [REDACTED] presence and J [REDACTED] nodded affirmatively in apparent concurrence that the

¹The medical questionnaire completed by appellant was unavailable at the time of hearing.

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conversation had taken place as related by Tesselaar. According to Maddox, J [REDACTED] also stated that he was milking the injury because he just wanted to take a few more days off and, although he knew he should not have taken the extra time, he had been off for awhile so it was "no big deal."

The next day J [REDACTED] indicated to Maddox that he would prefer to attend the training academy on his own rather than through the Sheriff's Department since he could make more money if the State paid for it as retraining.

The Sheriff's Department did not hire appellant but did contact YTS to relate what appellant had said. YTS conducted an investigation. When appellant was interviewed by Sergeant R. Clayton Huckaby, assigned as a Special Investigator by YTS to investigate appellant's representations to the Sheriff's Department, appellant denied making the statements attributed to him by Tesselaar.

ISSUES

This case raises the following issues for our determination:

(1) Was appellant dishonest:

(a) when he represented to the Sheriff's Department that he was not physically injured?

(b) with respect to his worker's compensation claim?

(c) during his investigatory interview?

(2) Assuming appellant was dishonest with respect to his off-duty

(J [REDACTED] G. continued - Page 5)

representations to the Sheriff's Department, is there a nexus sufficient to justify discipline?

DISCUSSION

Allegations of Dishonesty With the Sheriff's Department

We agree with the ALJ that appellant was dishonest in his representations to the Sheriff's Department. Appellant's injury occurred only days before he was examined by the County physician in connection with his application for a position with the Sheriff's Department. At that time he did not disclose his elbow injury to that physician and stated in response to a question on a medical questionnaire that he knew of no medical reason that he could not perform the duties of a peace officer. Appellant testified that at the time he had his medical examination, he had not yet seen a State doctor about his elbow injury. Since he had elbow injuries before that had healed, appellant testified that he answered the questionnaire as he did because he was confident that this injury too would heal and would not preclude him from performing the duties that would be required of him. We believe that at this point in time, appellant did not intentionally defraud the Sheriff's Department.

We find, however, that when appellant met with representatives of the Sheriff's Department on March 7, 1990, after being off on disability for some time, he was less than honest. Sergeant Tesselaar specifically asked him about his injury, and instead of

(J [REDACTED] G. continued - Page 6)

disclosing that he had been off work for several months with a serious injury, appellant made light of the problem, indicating that he could go back to work at any time and that he was "milking" the injury. He indicated to Deputy Sheriff Maddox that although he knew it was wrong, he just wanted to take a few extra days off. In fact, appellant had been medically examined in connection with his worker's compensation claim on March 6, 1990, only a day earlier. At that time, he told Dr. Sophon that he continued to have "slight, sharp pain in the tip of his left elbow, which becomes worse on sudden movement of this joint" as well as stiffness in the joint. As a result of that examination, the doctor issued a report dated March 19, 1990, in which he concluded that appellant's injury had become permanent and stationary and that appellant would not be able to return to his usual and customary duties as a Youth Counselor. Although Dr. Sophon's written report was not issued at the time appellant had his conversation with Tesselaar, appellant was nevertheless representing one thing to his doctor and YTS, that he was still having problems with his elbow, while representing something else, that he was fully recovered, to the Sheriff's Department.

In his testimony at the hearing, appellant attempted to explain the discrepancy in his representations by asserting that Dr. Sophon had indicated to him orally that he would release appellant to full duty if the Department would allow him to wear a

(J [REDACTED] G. continued - Page 7)

brace. According to the appellant, the Department refused to allow appellant to return to duty with a brace. Appellant further testified he believed he could perform the duties of a Deputy Sheriff if he wore a protective brace and that he informed Sergeant Tesselaar of that fact. Appellant's testimony in this regard is self serving, wholly uncorroborated, and therefore not convincing. Notably, Dr. Sophon's report made no mention of the use of a brace.

As of the date of the hearing, March 14, 1991, appellant still had not been released by his doctors to return to work and had applied for a disability retirement. Appellant's representations to the Sheriff's Department that he was fully recovered and that he could return to work at any time were patently false.

Allegations of Dishonesty with YTS

Notwithstanding the ALJ's finding that appellant was dishonest when he received worker's compensation benefits under the false representation that he was disabled when he was not, the Department concedes in its brief on rehearing that it is not charging appellant with dishonesty in connection with his receipt of worker's compensation benefits. In fact, the parties stipulated to striking the allegation in the adverse action that appellant had falsified his application for worker's compensation benefits. The contention, as described by the Department, was and is:

...that Appellant was untruthful in his representations to and concealments (sic) from San Bernardino County regarding his medical condition and his ability to perform the duties of a deputy sheriff.

(J [REDACTED] G. continued - Page 8)

Since the Department neither charged appellant with defrauding the worker's compensation system, nor attempted to prove that he did so, we decline to find appellant was dishonest with respect to his application for worker's compensation benefits.

The Department did, however, establish that appellant was dishonest at his investigatory interview when he denied that he had made the statements attributed to him by the Sheriff's Department.

Nexus

Although the appellant's dishonesty with the Sheriff's Department occurred off-duty, we find sufficient nexus to justify discipline for that dishonesty.² Appellant, a sworn peace officer, was applying for employment with another law enforcement organization. As a peace officer, appellant is held to a high moral standard of conduct. (Paulino v. Civil Service Commission (1985) 175 Cal.App.3d 962). Instead of acting in accordance with that standard, appellant represented to the Sheriff's Department that he was fully recovered from his injury but was defrauding his employing law enforcement agency so he could take a few more days off work. In making such representations, appellant discredited not only himself but also his Department, as the Department was made to appear naive and uninformed as to the medical status of its

²We do not agree with the ALJ that nexus is never required in a case where an employee is charged with dishonesty. In cases where the employee is a peace officer, however, nexus may be more easily established than in cases where the employee holds a non peace officer position.

own officer.

Furthermore, the Department has a legitimate concern over appellant's apparent willingness to bend the truth for his own convenience or personal gain. The ALJ took official notice of the job specifications of a Youth Counselor. A review of those job specifications reveals that the actions and opinions of a Youth Counselor can impact the liberty of the wards committed to the Youth Authority. The Department must feel confident that its Youth Counselors are not acting based on improper motives when they make allegations of misconduct on the part of the wards, administer discipline, and issue progress reports to institutional management or the Youthful Offender Parole Board. Dishonesty has been described as a "continuing character trait." (Paulino, supra, 175 Cal.App.3d at 962). A Youth Counselor's reputation for honesty obviously impacts his or her credibility with management, staff, and wards alike. A nexus clearly exists between appellant's off-duty dishonesty and on-duty activities.

CONCLUSION

Appellant was dishonest to the Sheriff's Department when he stated that he was fine and could go back to work any time he wanted. Appellant was dishonest in his investigatory interview when he denied making those statements to the Sheriff's Department. Thus, appellant has demonstrated his propensity to be dishonest in two separate but related incidents. As noted above, dishonesty is

(J [REDACTED] G. continued - Page 10)

a serious offense. Furthermore, this is appellant's third adverse action in less than one year. Dismissal is warranted.

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 adverse action of dismissal taken against G [REDACTED] J [REDACTED] is sustained;

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

STATE PERSONNEL BOARD*

Alice Stoner, Vice-President
Clair Burgener, Member
Richard Carpenter, Member
Lorrie Ward, Member

*President Richard Chavez 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 January 7, 1992.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board