

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by ) SPB Case No. 30186  
)  
D. M. ) **BOARD DECISION**  
) (Precedential)  
From a 1-step reduction in salary )  
for 3 months from the position ) **NO. 93-28**  
of State Traffic Officer, )  
Department of the California )  
Highway Patrol at Humboldt County ) February 2, 1993

Appearances: Anthony M. [REDACTED], Esq., Legal Counsel representing appellant, D. M. [REDACTED]; William S. Clark, Deputy Attorney General, representing the California Highway Patrol, respondent.

Before Carpenter, President; Stoner, Vice President; and Ward, Member.

**DECISION**

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of an Administrative Law Judge (ALJ) in the appeal of D. M. [REDACTED] (herein appellant or M. [REDACTED]), a State Traffic Officer with the California Highway Patrol (CHP), from a 1-step reduction in salary for 3 months. M. [REDACTED] was charged with violation of Government Code section 19572, subdivisions (d) inexcusable neglect of duty, (q) violation of board rule 172,<sup>1</sup> and (t) other failure

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<sup>1</sup>Board Rule 172, contained in Title 2 of the California Code of Regulations, Article 8, "Examinations," sets forth the general qualifications for state employees, including "...thoroughness, accuracy, good judgment..." As we have previously noted, we do not believe that Board Rule 172 constitutes a separate grounds for discipline under Government Code section 19572, as the qualifications for state employment set forth therein are too vague to serve as a meaningful standard for discipline, except where the standards are repeated in Government Code section 19572. The charge of violation of Board Rule 172 is therefore dismissed.

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of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment for failing to initiate an investigation of a reported motorcycle collision by an intoxicated driver after his partner, H████████ M████████ (M████████) failed to do so.<sup>2</sup> The ALJ revoked the pay reduction taken against Officer M████████, finding that it was Officer M████████'s turn to take the lead on the investigation and that it was not Officer M████████'s place to counteract Officer M████████'s decision to take no action.

The Board rejected the ALJ's Proposed Decision and determined to decide the case itself, based upon the record, the written arguments, and oral arguments. After review of the entire record, including the transcripts and written and oral arguments presented by the parties, the Board sustains the original penalty of a 1-step reduction in salary for 3 months for the reasons set forth below.

#### **FACTUAL SUMMARY**

Officer M████████ first came to work as a State Traffic Officer for the CHP in 1964. He has no prior adverse actions and is

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<sup>2</sup>Officer H████████ M████████ received a 1-step reduction in salary for 5 months for his role in the incident and his appeal was consolidated for hearing with the instant appeal. The Board adopted the ALJ's Proposed Decision sustaining the pay reduction taken against Office M████████ at it meeting on September 8, 1992. In the Matter of the Appeal of H████████ M████████, SPB Case No. 30183.

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considered a good officer.

On March 31, 1991, at approximately 2:30 a.m., while on patrol with Officer M █████, appellant was called to the scene of an accident in Eureka by Deputy Sheriff Marvin Kilpatrick (Kilpatrick) from the Humboldt County Sheriff's Office. Kilpatrick, on patrol in a patrol car, had observed an apparently injured motorcycle rider sitting on his bike in the dark. He observed abrasions and bleeding on the rider's left hand and left side forehead. The rider stated that he had just dumped his motorcycle going around a turn at Hubbard and Myrtle. The rider also stated he did not have a license for the motorcycle. Kilpatrick smelled a strong odor of an alcoholic beverage about the rider and noted that the rider had bloodshot, watery eyes, and mildly slurred speech. Kilpatrick called the CHP based on an arrangement between the two agencies which designates the work of investigating and following through on traffic accidents to the CHP.

Beat partners in the CHP customarily take turns taking the lead (commonly referred to as an officer's "out") in issuing citations, investigating accidents, and investigating incidents of driving under the influence. The call in question was Officer M █████'s "out."<sup>3</sup> The custom is that the officer taking the lead makes the decisions on what action needs to be taken and the other

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<sup>3</sup>Officer M █████ testified that at the time of the incident he did not believe it was his "out," but by the time of the hearing he had conceded that it was his turn to take the lead.

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officer assists and provides back up.

When the CHP officers arrived at the scene, Deputy Sheriff Kilpatrick was waiting with Tonya Fleming, a student at the Redwood Police Academy who was participating in a ride-along. Kilpatrick overheard appellant tell Officer M████, "it's your 'out,' you take it." Kilpatrick observed Officer M████ approach the motorcycle rider. Officer M████ asked the motorcycle rider whether he wanted to make a report and the rider said "no." Appellant testified that he expected Officer M████ to proceed with an accident investigation, expected to assist by giving the driver a field sobriety test, and expected to investigate the scene where the accident occurred. Appellant further testified that since it was not his "out," he deferred to Officer M████'s decision not to make a report or an arrest:

I will not usurp my partner's decision-making policy.

If he wants to make the decision, that is his decision to make.

Thus, appellant stated that he did not make an investigation report of the incident, did not conduct a field sobriety test on the driver, and did not conduct an area investigation around the motorcycle, nor did he suggest that Officer M████ do so. Although he disagreed with Officer M████'s handling of the incident, appellant took no steps to handle the incident himself; neither did he contact his supervisor who was on-call to request assistance.

While recognizing the custom of beat partners alternating the

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responsibility of taking the lead in handling calls while on patrol, CHP witnesses testified that CHP policy is that if partners cannot come to an agreement as to whose "out" it is, they are expected to communicate with each other so that one of the officers handles the incident pending the dispute being resolved. In this case, the evidence established that the two officers did not communicate, with each other as to how the incident was to be handled at the scene of the incident.

CHP witnesses further testified that an investigation report should have been completed based on the fact that the motorcycle rider was injured and was possibly under the influence. The circumstances dictated that a complete investigation occur and that the incident be documented: there was no room for the exercise of discretion regarding whether or not the incident should have been documented. The appellant conceded the situation warranted an investigation and that a proper investigation was not done. The officers' failure to handle the incident properly resulted in a complaint by the Sheriff's Department to the CHP.

#### **ISSUE**

This case raises two main issues:

- 1) Whether appellant's failure to take action under the circumstances constituted inexcusable neglect of duty and/or other failure of good behavior during duty hours that was of such a nature as to cause discredit to the Department or appellant's

employment?

2) If the charges against appellant are established, what is the appropriate penalty?

## **DISCUSSION**

### The Charges

Appellant's failure to take any action concerning the incident that occurred on March 31, 1991, constituted both inexcusable neglect of duty and failure of good behavior within the meaning of Government Code section 19572, subsections (d) and (t).

Appellant argues that since it was not his "out," he had no duty to investigate an incident that he concedes should have been investigated. The testimony of Sergeant Bruce Nelson (Nelson) established that notwithstanding whatever informal arrangement beat partners might have worked out with respect to taking turns handling incidents arising during a shift, the CHP expected, bottom line, that incidents warranting investigation would be investigated. In responding to a question regarding the policy for taking turns handling various types of incidents he stated:

"I don't think we had directed that [an incident] be handled in any specific way as long as it was handled."

Nelson further testified that in the event of a dispute between the officers as to who was going to handle a particular incident, the proper procedure was as follows:

...obviously I would expect them to communicate and one of them would take it. And then later, if there was still a dispute we could discuss it ourselves. If they

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couldn't come to that agreement at a traffic accident scene, then I'd expect them to call me or the on-call sergeant. I wouldn't expect it to get that far. I'd expect it to, somebody to do something, then later we'll straighten that out.

Similarly, Mert Baarts (Baarts), Humboldt Area Commander at the time of the incident, testified that both M █████ and appellant were equally culpable for the incident that occurred. He stated that appellant had two options to deal with the negative situation created by M █████ failing to investigate the incident:

If his partner refused to take the investigation, I personally felt that Officer M █████ could have noticed his supervisor at home...We had an on-call supervisor who would have responded to the scene and made the necessary decisions to make sure that we were doing the job that we're expected to do.

Or, he could have handled the investigation to conclusion himself and noticed the supervisor the next day that, hey, we had some problems out here and I'd like somebody to intervene and deal with this.

The Department established, by a preponderance of the evidence, that appellant had a duty to take some action in the face of M █████'s refusal to investigate, and that he inexcusably neglected that duty.

The Department likewise established that appellant's inaction caused discredit to the CHP and appellant's employment. Notably, the ride-along in the Deputy Sheriff's patrol car, a student at the Redwood Center Police Academy, testified as to her reaction to the CHP's inaction:

I was, at the time,...disgusted that they didn't take action. I felt they should have wrote a ticket or

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something. He didn't even have a license for amotorcycle. And he was, in my opinion, intoxicated.

Additionally, subsequent to the incident under consideration, the CHP received a letter from the Humboldt County Sheriff's Office complaining of the handling of the incident. The CHP had a long-term agreement with the Humboldt County Sheriff's Office whereby the CHP would handle investigations in unincorporated areas as well as DUI cases. Humboldt Area Commander Baarts testified that incidents such as the incident in question strain relationships between allied agencies that must work together due to scarce resources. Appellant was at least partially responsible for the discredit visited upon the CHP as a result of the mishandling of the March 31 incident. The charge of violation of Government Code section 19572, subsection (t) was established.

#### The Penalty

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 unlimited. In the seminal case of Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194,

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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 potential harm to the public service arising out of a CHP officer's failure to investigate a possible accident, especially one involving a DUI offense, is obvious. As the Humboldt Area Commander testified:

By failing to investigate, lawsuits could have come in against the County for defective roadways. Lawsuits could have come in against the owner of the motorcycle.

We would have been subjected maybe to some litigation down the road for failing to investigate that. We would have had to go in after the fact and try to piece everything together which would have been very, very difficult.

Obviously, appellant's attitude of "it's not my out" has the potential to result in serious consequences to the CHP as well as to the public at large, especially if that attitude surfaces in an

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even more critical situation. For example, if a motorcycle rider hits and injures a pedestrian, and assuming appellant's partner fails to make a report, will appellant contend he has no responsibility to take over and assure that a proper investigation ensues?

Although a recurrence of the misconduct at issue here appears unlikely given appellant's affirmations at the hearing, we find that the harm to the public service that ensued from appellant's "it's not my out" attitude is serious enough to justify our upholding of the relatively minor disciplinary action of the 1-step reduction in salary for 3 months imposed by the CHP. The pay reduction is sustained.

#### **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 a 1-step reduction in salary for 3 months is sustained;

2. 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

\*Member Floss Bos was not on the Board when this case was originally considered. Member Clair Burgener, who heard and considered this case, is no longer on the Board as his term expired

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January 15, 1993. There is currently a 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 February 2, 1993.

GLORIA HARMON  
Gloria Harmon, Executive Officer  
State Personnel Board