Petition for writ of mandate filed. Writ denied 4/20/99.
BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the matter of the Appeal by R[redacted] L[redacted] From dismissal from the position of Youth Counselor with Fred C. Nelles School, Department of the Youth Authority at Whittier	Case No. 98-3463 (96-3493) **BOARD DECISION** (Precedential) **NO. 98-08** September 1 - 2, 1998

APPEARANCES: Christine Albertine, Legal Counsel, California Correctional Peace Officers Association, on behalf of Appellant; Melanie A. McClure, Staff Counsel, Department of the Youth Authority, on behalf of Respondent.

BEFORE: Florence Bos, President; Richard Carpenter, Vice President; Lorrie Ward, Ron Alvarado and James Strock, Members

DECISION

Respondent, Department of the Youth Authority (Department), dismissed appellant, R[redacted] L[redacted], from his position as a Youth Counselor with Fred C. Nelles School. In this decision, the Board finds that the Department proved by a preponderance of the evidence that appellant's conviction for reckless driving and his violent behavior toward his fiancée constituted sufficient cause for discipline and sustains the dismissal.

PROCEDURAL HISTORY

This matter is before the Board on a petition for rehearing.

BACKGROUND

Appellant was employed as a Youth Counselor with Fred C. Nelles School from August 1989 until his dismissal. Appellant has no previous adverse actions. Appellant's 1996 performance evaluation indicated improvement needed in security

operations, escorting and transporting wards, interpersonal skills and operating under adverse conditions.

In the NAA, as cause for dismissal, the Department charged appellant with the following misconduct:

1. Failing to respond to an emergency TAC alarm within the required three minutes.

2. Driving under the influence of a controlled substance in violation of law on September 13, 1995.

3. Exhibiting slow and slurred speech, appearing sedated, swaying from side to side, displaying poor coordination, demonstrating severe horizontal nystagmus and hesitating or forgetting the officer's questions during a field sobriety test administered by a police officer.

4. Being arrested and convicted of a violation of Vehicle Code § 23103 (Reckless Driving) after entering a plea nolo contendere.

5. Biting, choke-holding and grabbing his fiancée Sheila Romo (Romo) on September 22, 1995, during an argument at the couple's residence.

6. Being charged with criminal conduct in the assault upon Romo.

7. Failing to pay a fine required by a diversion program as ordered by the court.

The Department alleged that this conduct violated Government Code section 19572, subdivisions (c) inefficiency, (d) inexcusable neglect of duty, (k) conviction of a felony or conviction of misdemeanor involving moral turpitude, (m) discourteous

treatment of the public or other employees, (o) willful disobedience, and (t) other failure 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 appellant's employment.

FACTUAL SUMMARY[1]

TAC Alarm

Youth Counselor [redacted] C[redacted] (C[redacted]) testified that, on August 30, 1995, appellant was working an overtime shift with C[redacted] and Youth Counselor C[redacted] (C[redacted]). On this shift, C[redacted] assigned appellant as the primary TAC and C[redacted] as the secondary TAC. Staff assigned as TAC are required to respond to emergencies, including possible escapes, group disturbances, drills and similar events. An employee assigned as the primary TAC is required to respond first to a TAC alarm.

The least senior employee is generally assigned to be the primary TAC. Appellant was the least senior staff on duty that day. A TAC alarm was called. C[redacted] began to lock down the wards. C[redacted] observed that appellant was not responding to the TAC alarm. C[redacted] saw appellant in a side office with his head on the desk. According to C[redacted], after he (C[redacted]) called out several times to appellant, appellant "woke up." C[redacted] testified that appellant was "groggy" and his eyes were red.

C[redacted] continued to lock the wards down. By the time he entered the Youth Counselor's Office, he had locked all 13 rooms with two wards in each room. When C[redacted] entered the office, appellant and C[redacted] were there looking at a map to

[1] The Board substantially adopts the ALJ's findings of fact.

determine to which location they should go in response to the TAC alarm. C[redacted] testified that he was not sure where appellant was to go in response to the TAC alarm and told appellant and C[redacted] to call control to determine the location of the emergency. C[redacted] called control to determine that location. Appellant went to his locker to get his security gear. The TAC alarm was called off before C[redacted] determined where he and appellant were to go in response to the TAC alarm.

According to C[redacted], while staff assigned as TAC are expected to respond to an emergency within two or three minutes after an alarm sounds and appellant did not respond within two to three minutes, the Department does not have a set TAC response time requirement.

Appellant testified that, on August 30, 1995, although he was not formally told that he was Primary TAC, he assumed he would be because he was the least senior employee in the unit. He denied that he was sleeping when the TAC alarm sounded. Instead, he testified that he was preparing case notes in the side office. He stated that, when he heard the TAC alarm, he closed his files and exited. He testified that the Primary TAC is required to respond to a designated location as quickly as possible. Appellant agreed with C[redacted] that there is no time specifically set by which a TAC must respond. He admitted that more than five minutes had elapsed before the alarm was called off and he had not yet fully put on his gear or responded to the location. He testified that neither he, C[redacted], nor C[redacted] knew where to respond.

The Board finds that C[redacted] testimony as to whether appellant was sleeping when the TAC alarm sounded is more credible than appellant's since C[redacted] had no reason to lie.

Reckless Driving

On September 13, 1995, appellant lost control of his automobile. The vehicle jumped the curb onto an embankment on the left side of the road, stopping in a series of bushes and trees.

Police Officer K[redacted] E[redacted] (E[redacted]), testified at the hearing that, when he arrived at the accident scene, he found that appellant's speech was slurred and, when appellant stood, he swayed back and forth and side to side. E[redacted] testified that appellant had difficulty responding to questions pertaining to the accident. The officer administered a field sobriety test, which appellant failed.[2] E[redacted] stated that he did notsmell alcohol on the appellant's breath. The officer arrested appellant because he believed appellant had been driving under the influence of drugs. E[redacted] stated, however, that he did not see appellant driving the car and that he gave him the field sobriety test sometime after the accident occurred.

Appellant denied that he was under the influence of alcohol or drugs at the time of the accident. He testified that he took a narcotic (vicodin), a sedative (flourinal), and possibly a tranquilizer (meprobamate) several hours before the accident because of back pain. Appellant contended that these medications were prescribed by a doctor and were to be taken as needed for a 1992 back injury. Appellant stated that he took

[2] The field sobriety test consisted of five separate tests: walking a line, standing erect, finger count, one-foot balance and a finger-to-nose test.

these medications again immediately following the accident. Although he was not certain exactly how many pills he swallowed, appellant thought he took at least two vicodin, two flourinal and two tranquilizers right after the accident, but prior to the arrival of the police, to relieve the pain he felt due to the accident.

The Department presented no evidence to contradict appellant's claims as to when he took the drugs in question. The Department also submitted no evidence to counter appellant's assertions that he had doctors' prescriptions for these drugs and that the drugs were taken in compliance with these prescriptions. In the absence of such evidence, the Board has no way of assessing whether appellant's use of the drugs in question was in violation of the law or the instructions set forth in legally obtained prescriptions. Although it may seem suspect that legally prescribed drugs taken in accordance with doctor's instructions[3] would cause a person to become so inebriated that he would be unable to pass a field sobriety test, without any evidence to contradict appellant's contentions, the Board cannot find that appellant failed the field sobriety test due to drug misuse or abuse.

Appellant testified that he lost control of his vehicle and it swerved to the left because he had a flat tire on the right side. E[redacted] testified that, even though he had not witnessed the accident, based upon his experience in motor vehicle accident investigations, the accident was not caused by a flat tire. Upon review of the skid marks, location of the vehicle, and the damage caused to the car, E[redacted] concluded that appellant swerved out of control while driving at a high rate of speed. According to

[3] Appellant was not questioned about whether his doctor's instructions placed any restrictions upon his driving while he was using these drugs.

E[redacted], the tires "blew out" when appellant hit the curb. The Board finds that E[redacted] careful analysis of how the accident occurred is more credible than appellant's explanation.

Appellant was arrested and booked by the West Covina Police Department. On May 13, 1995, appellant pled nolo contendere and was convicted of a violation of Vehicle Code section 23103 (Reckless Driving). According to the court docket, the "court accepted the prosecutor's statement that drugs were involved in the incident." Appellant was sentenced to 365 days of jail (suspended), three years summary probation, a fine of $300.00, a state penalty fund assessment of $510.00, and a $100.00 fee to the state restitution fund.

Spousal Abuse

On September 22, 1995, appellant had an argument with Romo. Disregarding Romo's objections, appellant allowed his daughter's friend to sleep over at appellant and Romo's residence. Romo was angry over his decision.

When appellant arrived home in the afternoon, Romo disconnected the garage door opener to impede appellant's entry. Appellant eventually entered the house and followed Romo upstairs into their bedroom where a fight ensued.

West Covina Police Officer Kenneth Ferguson (Ferguson) testified at the hearing that he received a radio call in the evening of September 22, 1995, to respond to a domestic violence dispute at appellant's residence. When he arrived, appellant answered the door. Appellant told the officer that he did not need any assistance and

could leave. According to Ferguson, appellant was loud and smelled of alcohol. Ferguson insisted upon speaking to the "female."

While appellant stepped outside with Ferguson's backup officer, Ferguson proceeded to the kitchen where he spoke with Romo. Romo was upset. She told Ferguson that appellant had assaulted her. She showed Ferguson her injuries: red marks on her hips, redness on her neck, and a bite mark on her right shoulder. According to Ferguson, Romo stated that she had incurred the injuries in the bedroom as follows: appellant had grabbed her in a chokehold he had learned at work; when she started to black out, she bit appellant in the arm and kicked him in the shins to get away; appellant then grabbed her at her waist, a hold he learned to control "kids" at work; he pulled her to the ground and bit her shoulder.

Ferguson photographed Romo's injuries and advised her to leave the house to allow some "cooling off" time. Romo told Ferguson that she would be staying at her mother's home across the street. Ferguson did not arrest appellant at the time because of appellant's involvement in law enforcement.

Less than five minutes later, Ferguson received another radio call to respond to a domestic violence dispute at appellant's residence. Ferguson returned to the scene.

He spoke with Romo at the carport. She appeared frightened. According to Ferguson, Romo told him that there had been a further argument and that she was afraid of appellant remaining in the house. Appellant was arrested and booked for violation of Penal Code section 2735 (Spousal Abuse).

According to appellant, he did not attempt to hurt Romo in any fashion. He was trying to apologize and caress her. Appellant testified that Romo was very angry, and kicked him several times. He testified that he grabbed her waist to gain his balance when she kicked him in the groin. He testified that he did not release her until she kicked him again in the head, pushing him across the room.

According to appellant he only extended his fingers and arms at chest level to push her away. He denied trying to choke her. He testified, that while Romo's back was towards him, she bit the upper part of his arm while he was trying to leave. He admitted that he then bit her between her shoulder blades. According to appellant, he and Romo fell on the bed, where he placed his hands around her throat area with his forefingers directly below her jaw, and his thumbs below her chin. Appellant asserted that he did this to prevent Romo from biting him again.

Appellant testified that he did not simply leave the scene when he saw that Romo was upset, since he did not think she would become that physical. He stated that she had "stopped before on other occasions." He testified that he called the police both times on September 22, 1995. Appellant denied drinking.

During the hearing before the ALJ, Romo told a very different story from the one Ferguson testified she told on the night she fought with appellant. At the hearing, Romo testified that she had provoked appellant. She testified that appellant had never struck her. She testified that she kicked him, threw a telephone at him, and pushed him. When he threatened to end the relationship, she became incensed.

Romo further testified that she bruises easily. She testified that she allowed appellant to hold her for a moment and then got angry again and bit him. He then bit her only to get her to stop biting him. According to Romo, appellant called the police on both occasions.

Romo admitted that she may have told the police when they arrived that appellant assaulted her, and that she showed the officer her bruises. She stated that she only did so because she was excited and upset at the time. During the hearing, she denied that appellant used any force of any sort towards her. Romo was still living with appellant at the time of the hearing.

Failure to Pay Fine for Diversion

As a result of his arrest for spousal abuse, appellant participated in a diversion program, in lieu of a criminal trial. On at least two occasions, appellant failed to appear in court or pay a $100.00 fine in connection with the program. A bench warrant was issued on both occasions, and later lifted by the court.

Appellant testified that he represented himself pro per and was confused with the fines and court dates. Appellant attempted to remedy the problem once informed and ultimately completed the program successfully in July 1996.

DISCUSSION

Failure to Respond to TAC alarm

The Department charged appellant with failing to respond to a TAC alarm within the required three minutes. While the Department established that appellant did not respond within three minutes to the TAC alarm as charged, there was no evidence

presented that appellant was required to respond within three minutes or that, if a time frame had been established, that appellant's failure to respond was unreasonable under the circumstances. The evidence established that none of the participants knew where appellant was supposed to respond and, by the time they had identified the location of the disturbance, the alarm had been called off.[4] The Board has found that, when an employee is to be held accountable for particular conduct, the employee must have clear notice that such conduct is required.[5] The evidence fails to support this charge in the NAA. This charge is, therefore, dismissed.

Reckless Driving

Government Code section 19572(k). The NAA charged appellant with driving under the influence of controlled substances in violation of the law and being convicted of the misdemeanor charge of reckless driving under Vehicle Code section 23103 after he entered a plea of nolo contendere. The Department alleged that such conduct constituted cause for discipline under Government Code section 19572(k).

Government Code section 19572(k) allows an employee to be disciplined for conviction either of a felony or a misdemeanor involving moral turpitude. This code section also provides that ""a conviction following a plea of nolo contendere to a charge of a felony or any offense involving moral turpitude is deemed to be a conviction within the meaing of the section."

---

[4] The Department demonstrated that appellant was sleeping on duty. He was not, however, charged with this misconduct.

[5] See E[redacted] D[redacted] (1993) SPB Dec. No. 93-32.

While appellant testified that he used prescription drugs several hours before and immediately after the accident, the Department presented no evidence which showed that appellant was driving under the influence of controlled substances at the time of the accident. The court's finding that "drugs were involved" in appellant's reckless driving is not sufficient standing alone to prove that appllant was "driving under the influence of controlled substances in violation of the law." Consequently, whether there exists legal cause for discipline under Government Code section 19572(k) depends upon whether a reckless driving conviction alone is a misdemeanor involving moral turpitude.

The meaning of "moral turpitude" has not been specifically defined by the Board or by the courts. One court has found that:

> terms such as "immorality" and "moral turpitude" constitute legal abstractions until applied to a specific occupation and given content by reference to fitness for the performance of that vocation.[6]

No court has found that reckless driving constitutes a crime involving moral turpitude; nor does reckless driving, on its face, appear to constitute such a crime. While the Board is permitted to consider the facts underlying a misdemeanor conviction to determine if these facts involve moral turpitude,[7] in this case, the Department established no basis for finding that these facts involved moral turpitude. Thus, no discipline can be sustained under Government Code section 19572(k) based on appellant's conviction for reckless driving.

Government Code section 19572(t). The NAA charged that appellant's conviction for reckless driving under Vehicle Code section 23103 also constituted other failure of good behavior under Government Code section 19572(t).

In order justify discipline under Government Code § 19572(t), the Department must show a failure of good behavior on the part of appellant which is of such a nature

---

[6] Brewer v. Department of Motor Vehicles (1970) 93 Cal. App. 3d 358. See also D[redacted] D[redacted] (1995) SPB Dec. No. 95-18 at p. 8. (whatever else moral turpitude may mean, when dishonesty is an element of the crime, the crime involves moral turpitude); Clerici v. Department of Motor Vehicles (1990) 224 Cal.App.3d 1016 (when element of crime includes an intent to corrupt others, the crime constitutes moral turpitude).

[7] Padilla v. State Personnel Board, 8 Cal. App. 4th 1136 (to find moral turpitude involved, Board allowed to look beyond the elements of crime of battery to the underlying factual basis of the battery to the fact that the employee fondled his daughter's breast).

as to cause discredit to the Department or appellant's employment.[8] For discipline to be sustained under Government Code § 19572(t), it:

> must be based on more than a failure of good behavior; it must be of such a nature as to reflect upon [appellant's] job... the misconduct must bear some rational relationship to [appellant's] employment and must be of such a character that it can easily result in the impairment or disruption of the public service. . . The legislative purpose behind subdivision (t) was to discipline conduct which can be detrimental to state service. . . . It is apparent the Legislature was concerned with punishing behavior which had potentially destructive consequences, rather than concentrating upon intentional conduct.[9]

The critical questions that must be addressed to sustain discipline under Government Code § 19572(t) are: (1) whether there is a rational relationship between appellant's failure of good behavior and his duties as a Youth Counselor and (2) whether his failure of good behavior may result in the impairment or disruption of public service in the Departmnt.[10]

Appellant was convicted of reckless driving. Even though the Department did not prove by a preponderance of the evidence that appellant was driving under the influence of controlled substances at the time of the accident, it did prove that appellant was driving at an excessive speed that clearly contributed to the accident. Given the penalty that was imposed upon appellant as a result of his conviction, the court obviously determined that appellant's reckless driving constituted a serious offense.

Appellant is a Youth Counselor for the Department. As set forth in the Board's specification for his class, appellant's job was to direct, counsel and supervise youthful

---

[8] **Warren v. State Personnel Board ("Warren") (1979) 94 Cal. App. 3d 95, 104.**
[9] **Stanton v. State Personnel Board (1980) 105 Cal. App. 3d 729, 739-40. (Emphasis in original.)**
[10] **See, Id. at p. 739.**

offenders in their daily living and activity programs. As a Youth Counselor, appellant is expected to set an example for wards to follow. As the Second District Court of Appeal stated in Ramirez v. State Personnel Board, 204 Cal. App. 3d 288, 293,

> One of the purposes of the Youth Authority is to rehabilitate those youths in its charge, with punishment as a rehabilitative tool... Rehabilitation has many facets, not the least of which is an attempt to teach that the law must be respected and obeyed... A youth counselor who does the very thing he is supposed to counsel against (disobedience of the law) cannot be said to be acting in the best interests of the Youth Authority or its wards.

There is clearly a rational relationship between appellant's reckless driving and his employment as a Youth Counselor. Since Youth Counselors are peace officers, they are held to a higher standard of behavior than non-peace officers.[11] Peace officers may be disciplined for violating laws they are employed to enforce.[12] Both the Board and the courts have found a nexus between unlawful conduct committed off-duty by peace officers employed by the Department and such peace officers' employment.[13] There was sufficient evidence in the record to establish a connection between appellant's misconduct and his official duties as a Youth Counselor for the Department.

There was also sufficient evidence in the record to establish that appellant's failure of good behavior may result in the impairment or disruption of public service in the Department. Employees in appellant's position must maintain their credibility with

---

[11] **See, J[redacted] R[redacted] (1993) SPB Dec. No. 93-04.**
[12] **Hooks v. State Personnel Board (1980) 111 Cal. App. 3d 572, 577.**
[13] **See, e.g., M[redacted] M[redacted] (1993) SPB Dec. No. 93-11.**

wards, some of whom may have been incarcerated for crimes relating to reckless driving or other reckless behavior.[14] Appellant must also maintain credibility with other peace officers, such as the local police. Appellant's reckless driving could have a significant adverse impact upon his credibility with his wards and the respect of other peace officers. A peace officer who breaks the law he is sworn to uphold discredits himself and his employer.[15]

Even though reckless driving may not be a crime involving moral turpitude under Government Code section 19572(k), the Department has established that: (1) there is a nexus between appellant's reckless driving and his employment as a Youth Counselor and (2) such behavior may result in the impairment or disruption of public service in the Department so as to justify discipline under Government Code section 19572(t).

Spousal Abuse

Appellant argues that, since the court certified that appellant had successfully completed a diversion program, pursuant to Penal Code section 1001.9, neither the record of his arrest, nor the facts underlying his arrest, may be used as evidence against him in a disciplinary action. He contends that the spousal abuse charges against him must, therefore, be dismissed.

The Department asserts that Penal Code section 1001.9 does not prohibit the Department from disciplining appellant based upon the same facts which gave rise to his spousal abuse arrest for two reasons. First, the Department contends that Penal Code section 1001.9 does not apply to peace officers. Second, the Department argues

[14] **See, Parker v. State Personnel Board (1981) 120 Cal. App. 3d 84, 87.**
[15] **R[redacted] H[redacted] (1193) SPB Dec. 93-22.**

that, even if Penal Code section 1001.9 does apply to peace officers, appellant was not charged with being arrested or with having a record of an arrest; he was charged with the conduct of battering his fiancée, which was discovered by the Department before appellant completed diversion. The Department argues that discipline based upon such conduct is not protected by Penal Code section 1001.9.

Scope of Penal Code section 1001.9. Penal Code section 1001.9[16] provides:

> (a) Any record filed with the Department of Justice shall indicate the disposition in those cases diverted pursuant to this chapter. Upon successful completion of a diversion program, the arrest upon which the diversion was based shall be deemed to have never occurred. The divertee may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or diverted for the offense, except as specified in subdivision (b). A record pertaining to an arrest resulting in successful completion of a diversion program shall not, without the divertee's consent, be used in any way that could result in the denial of any employment, benefit, license or certificate.
>
> (b) The divertee shall be advised that, regardless of his or her successful completion of diversion, the arrest upon which the diversion was based may be disclosed by the Department of Justice in response to any peace officer application request and that, notwithstanding subdivision (a), this section does not relieve him or her of the obligation to disclose the arrest in response to any direct question contained in any questionnaire or application for a position as a peace officer, as defined in Section 830.

Penal Code section 1001.9(b), therefore, provides that, even though the successful completion of a diversion program may otherwise cause an arrest to be

---

[16] The Department argues that, since appellant was initially charged with spousal abuse, the diversion statute relating to spousal abuse (which was repealed in October 1995) was the relevant diversion statute in this case. A review of the record indicates that the spousal abuse charge against appellant was dismissed and appellant completed diversion on a misdemeanor count that was not dismissed. The diversion statute applicable to misdemeanor charges, and therefore pertinent in this matter, is Penal Code section 1001.9.

deemed to have never occurred, an applicant for a peace officer position who has successfully completed a diversion program must still disclose the arrest in an application.

The Department argues that this exemption, covering an applicant for a peace officer position, should be read to exempt already employed peace officers from all the protections of Penal Code section 1001.9. In support of this argument, the Department points to Labor Code section 432.7, which broadly restricts employers from asking about or using information regarding an applicant's successful diversion. Labor Code section 432.7 specifically exempts from its coverage both "persons seeking employment as peace officers and persons already employed as peace officers." The Department argues that the exemption in Labor Code section 432.7 for already employed peace officers should be read into Penal Code section 1001.9.

There is no sound basis for such an interpretation. Courts have found that "[t]he Legislature's intent is best deciphered by giving words their plain meanings."[17] Accordingly, the Board is "required to give effect to statutes according to the usual, ordinary import of the language employed in framing them."[18]

[17] **Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 376.**
[18] **People v. Belleci (1979) 24 Cal.3d 879, 884.**

The Legislature has itself directed that, when construing a statute, a court 's responsibility is to:

> simply ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all. [19]

There is no language in Penal Code section 1001.9 that provides that already employed peace officers are not entitled to the protection of the statute. The Board declines to read language into a statute where it does not exist. Even though appellant is a peace officer, he is, nonetheless, entitled to the protection of Penal Code section 1001.9 to the extent it is applicable.

Applicability of Penal Code section 1001.9. Having found that appellant is entitled to the protection of Penal Code section 1001.9 to the extent it is applicable, we must determine whether this code section protects appellant from discipline under the facts of this case.

The Department argues that it did not use appellant's arrest record to dismiss appellant, but, instead, relied upon proof of appellant's misconduct. For his part, appellant argues that the facts underlying his arrest, as reported by the arresting officer, cannot be used as a basis for discipline because these facts are part of the arrest record that may not be disclosed once diversion is successfully completed.

[19] **Code of Civil Procedure Section 1858.**

The courts have not directly decided this issue. They have, however, provided some guidance. In B.W. v. Board of Medical Quality Assurance,[20] a licensed physician was arrested for possession of cocaine. He completed a diversion program under Penal Code section 1000.5,[21] a drug diversion statute, which is similar in all particulars to the statute at issue here. Sometime after B.W. successfully completed the diversion program, the Board of Medical Quality Assurance (MQA) took disciplinary action against him and revoked his physician's license. B.W. appealed on grounds that Penal Code section 1000.5 provides that, upon successful completion of a diversion program, the record pertaining to the arrest "shall not, without the divertee's consent, be used in any way which could result in the denial of any employment, benefit, license or certificate."

The court agreed, finding that, prior to B.W.'s completing diversion, MQA could have used information in B.W.'s arrest record to initiate either disciplinary proceedings or an investigation into the matter to develop additional information. MQA did not do either. Instead, MQA waited to initiate disciplinary action until seven months after B.W. had successfully completed the diversion program. In addition, MQA used "information from [B.W.]'s arrest record as the sole basis for such proceedings."[22] The court found that MQA improperly used B.W.'s arrest record to discipline B.W. after he had successfully completed diversion in violation of Penal Code section 1000.5.

---

[20] (1985) 169 Cal. App.3d 219.
[21] Renumbered in 1996 as Penal Code section 1000.4.
[22] Id. at 233.

In contrast, in Sandoval v. State Personnel Board, [23] which also construed Penal Code section 1000.5, the court of appeal sustained the dismissal of two correctional officers after they were arrested in separate incidents for drug possession. In Sandoval, the employing department took action against the officers before they successfully completed a diversion program. The court sustained the dismissals, finding that the protection of Penal Code section 1000.5 attached only after diversion was successfully completed.[24]

From B.W. and Sandoval, the following principles emerge: an employing department may use information in the arrest record as a basis for adverse action any time before the divertee completes diversion. In addition, before diversion is completed, an employing agency may use the information in the arrest record as the basis for an investigation to be conducted into the underlying facts. Even after the diversion is complete, the information developed by such an investigation may be used in a subsequent disciplinary proceeding. Thus, we reject appellant's argument that, once appellant completed diversion, he could no longer be disciplined for the underlying misconduct.

The record is clear that the Department completed its investigation of appellant's conduct underlying his arrest for spousal abuse before appellant successfully completed his diversion program. By a memorandum dated February 2, 1996, Theresa K. Chavira, Acting Superintendent, wrote to James Barnett, Assistant Deputy

[23] (1990) 225 Cal. App. 3d 1498.
[24] Id. at p. 1503.

Director, Institutions Camp Branch, recommending that appellant be disciplined for spousal abuse based upon the following description of the incident:

> On September 22, 1995 Mr. I[redacted] was arrested by the West Covina police Department for spousal abuse. Testimony indicates Mr. I[redacted] had placed his girlfriend, whose residence is the same as Mr. I[redacted], in a choke hold and to free herself she bit and kicked him. At some point in the struggle Mr. I[redacted] bit her in the back.

From this memorandum, it is evident that the Department undertook an investigation of the facts underlying appellant's arrest for spousal abuse long before appellant completed diversion in July 1996.[25] Consistent with B.W. and Sandoval, the Department could properly have relied upon the results of its prior investigation to bring an adverse action against appellant after he had completed the diversion program under Penal Code section 1001.9.

Appellant's abuse of Romo. The ALJ who heard the testimony of the witnesses found that appellant abused his fiancée, Ms. Romo. In making this determination, the ALJ found that Romo did not testify truthfully at the hearing when she denied that appellant had used any force against her. Instead, the ALJ credited the testimony of the officer who responded to the September 22, 1995 call for assistance. The ALJ relied on Romo's out-of-court statements to the officer, finding those statements qualified as an exception to the hearsay rule as spontaneous exclamations.[26] The ALJ

---

[25] With its written arguments to the Board, the Department included an Administrative Investigation Report dated December 13, 1995 in support of its contention that the Department's investigation into the spousal abuse charges against appellant was completed prior to appellant's completion of diversion. Because this document was not admitted as an exhibit during the hearing before the ALJ, the Board has not relied upon it in reaching its decision.

[26] Evidence Code section 1240.

was also concerned about the inconsistencies between appellant's and Romo's testimony during the hearing. The Board accepts the ALJ's credibility determinations.[27]

However, even if the Board were to credit Romo's and appellant's testimony before the ALJ, both she and appellant admitted that appellant bit Romo during the course of their argument.

As set forth above, appellant is a Youth Counselor responsible for counseling and supervising youth offenders. His class specification provides that Youth Counselors must maintain "necessary discipline which may include verbal commands, and physical, mechanical, or chemical restraint of out-of-control youthful offenders." As part of his job as a Youth Counselor, he must respond appropriately to wards who may be aggressors. Clearly, if a ward were to bite appellant while appellant was attempting to bring such a ward under control, it would not be appropriate for appellant to, in turn, bite the ward.

Once again, there is clearly a rational relationship between appellant's misconduct off duty, in this case abusing and biting his fiancée, and his employment as a Youth Counselor. There was sufficient evidence in the record to establish a nexus between such misconduct and his official duties as a Youth Counselor for the Department.

Failure to Pay Fine as Cause For Discipline

[27] **See L[redacted] M[redacted] (1994) SPB Dec. No. 94-25, p. 7.**

(I[redacted] continued - Page 24)

The Department charged appellant with failing to pay a fine required by a diversion program as ordered by the court. The ALJ found that, although appellant was well aware of the significance of completing the diversion program, he was representing himself pro per and was unaware of the particular fines and dates for court appearances. There was no evidence to the contrary. Appellant apparently appeared in court in response to notices to appear. Thus, while there was some delay in appellant paying his fines, the Department failed to establish that this delay constituted actionable misconduct under Government Code §19572. This charge is, therefore, dismissed.

Penalty

When performing its constitutional responsibility to review disciplinary actions[28], the Board is charged with rendering a decision that is "just and proper."[29] 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 v. State Personnel Board ("Skelly")[30] 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 omitted.] Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence.

[28] Cal. Const. Art. VII, section 3(a).
[29] Government Code § 19582
[30] (1975) 15 Cal.3d 194, 217-218.

Harm or potential harm to the public service is almost certain to exist where, as here, the employee's off-duty misconduct is of such a nature that it causes discredit to the employer or appellant's employment within the scope of Government Code § 19572(t).[31] As noted above, courts have consistently recognized that peace officers bring discredit to their employment under Government Code § 19572(t) when they engage in misconduct off-duty which is contrary to the on-duty behavior they are employed to promote and uphold.[32]

Appellant's reckless driving and his aggressive behavior toward Ms. Romo are of particular significance given appellant's job responsibilities. Appellant's position involves counseling young offenders, some of whom may have engaged in illegal reckless behavior or abused loved ones themselves. Appellant's duties include ensuring wards follow all rules and laws; he is called upon be a role model for the wards under his care.[33] Given the sensitivity of appellant's position, appellant's illegal and improper conduct cannot be countenanced.

Appellant's misbehavior is irreconcilable with his job as a Youth Counselor for the Department.[34] The punishment of dismissal is not unreasonable under the circumstances of this case.

---

[31] J[redacted] G[redacted] (1998) SPB Dec. No. 98-03.
[32] G[redacted] O[redacted] (1992) SPB Dec. No. 92-11.
[33] M[redacted] M[redacted] (1993) SPB Dec. No. 93-11.
[34] Ramirez v. State Personnel Board, supra, 204 Cal App. 3d at p. 294.

Skelly Issue

Appellant contends that his Skelly rights were violated because his Skelly officer was not above the organizational level of the person initiating the action, and the person to whom his Skelly officer made his recommendation did not have the authority to modify or revoke the adverse action.

Appellant presented no evidence as to his first assertion: that his Skelly officer lacked authority to recommend a decision because he was not above the organizational level of Mr. I[redacted] supervisor. Since appellant bears the burden of proof as to a Skelly violation,[35] in the absence of any evidence to support appellant's assertion, the Board is compelled to rule against him.[36]

Appellant's second assertion is that his Skelly rights were violated because the person to whom his Skelly officer could make recommendations as to the proposed adverse action did not have the authority to modify or revoke that adverse action.

In Skelly,[37] the California Supreme Court set forth certain notice requirements that a public employer must fulfill to satisfy an employee's pre-removal procedural due process rights:

> As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.

---

[35] **S[redacted]-J[redacted] (1995) SPB Dec. No. 95-14, p. 7.**

[36] **The written arguments submitted by the Department indicate that appellant's allegations are incorrect: his Skelly officer was the Program Administrator of Business Services, which was several steps above the Treatment Team Supervisor whom appellant reported to.**

[37] **15 Cal.3d at p. 215.**

The issue that appellant has raised centers on the final safeguard, "the right to respond . . . to the authority imposing discipline." The Board has interpreted this provision in Skelly to require only that the individual who serves as the Skelly officer to whom an employee has the right to respond be "a reasonably impartial and non-involved reviewer 'who possesses authority to recommend a final disposition of the matter.'"[38]

The courts have not specifically addressed the issue of whether due process requires that the individual to whom the Skelly officer makes his or her recommendation have complete authority to modify the penalty without any further consultation. We do not believe that due process requires that the person who receives a recommendation from a Skelly officer have such unfettered authority. Courts have found that "due process is flexible and calls for such procedural protections as a particular situation demands."[39]

In this case, D[redacted] G[redacted] (G[redacted]), the Skelly officer, was an impartial reviewer as required by due process. He conducted the Skelly hearing and recommended to Brian Rivera (Rivera), the Superintendent of Fred C. Nelles School, that the penalty of dismissal be adopted without modification. Rivera agreed that the penalty was appropriate and, in a memo dated October 24, 1996, informed appellant of his decision.

---

[38] G[redacted] B[redacted] (1993) SPB Dec. 93-20 at p.11, citing Titus v. Civil Service Commission (1982) 130 Cal.App.3d 357 (emphasis in original).

[39] Binkley v. City of Long Beach, 16 Cal. App.4th, 1795, 1807 (citing Mathews v. Eldridge (1976) 424 U.S. 319, 334).

(I[redacted]- continued Page 28)

During the hearing before the ALJ, Rivera acknowledged that he did not have authority to modify the penalty unless he first consulted with the Deputy Director for Institutions and Camps. The fact that Rivera did not have authority, on his own, to modify the penalty is of no significance. First, in this case, Rivera did have the authority to affirm the Skelly officer's recommendation to sustain the penalty, which he did. Second, even if Gaydos had recommended a modification, there was no showing that his recommendation would not have been passed on, through Rivera, to the individual assigned to make the ultimate decision. The Department has apparently decided that the Skelly process should result in a modification of penalty only after consultation between levels within the Department. As long as the person or persons making the ultimate decision are informed of the recommendation of the Skelly officer and are reasonably impartial and non-involved reviewers, this method of decision making is not a Skelly violation. In this case, Rivera was vested with full authority to sustain the penalty upon the recommendation of the Skelly officer. This he did. There was no Skelly violation.

CONCLUSION

The Department proved by a preponderance of the evidence that appellant's misconduct of reckless driving and abusing his fiancée constituted other failure of good behavior under Government Code section 19572(t). The Board sustains appellant's dismissal.

ORDER

(I[redacted] - continued Page 29)

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is hereby ORDERED that:

1. The dismissal of R[redacted] L[redacted] from his position of Youth Counselor with the Fred C. Nelles School, Department of the Youth Authority at Whittier is hereby sustained.

2. The Board's decision in R[redacted] L[redacted], SPB Dec. No. 98-02, is hereby vacated.

3. This decision is certified for publication as a Precedential Decision. (Government Code § 19582.5).

STATE PERSONNEL BOARD

Florence Bos, President
Richard Carpenter, Vice President
Lorrie Ward, Member
Ron Alvarado, Member
James Strock, Member

* * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on September 1 - 2, 1998.

_____
Walter Vaughn
Executive Officer
State Personnel Board

[I[redacted]2.dec]