BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **WILLIAM ACEVES, JR.** From 3 months suspension and dismissal from the position of Senior Computer Operator with the California State University at Los Angeles	)	SPB Case No. 26436 and 27305 **BOARD DECISION** (Precedential) **NO. 92-04** February 4, 1992

Appearances: Catherine M. Wynne, Attorney, representing respondent, California State University at Los Angeles

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 William Aceves (appellant or Aceves), a Senior Computer Operator who had been suspended for three months and, in a subsequent disciplinary action, dismissed from his position at California State University, Los Angeles (respondent or University). The ALJ sustained both the three-month suspension and the dismissal upon the grounds that appellant's failure to report to work was disruptive and without excuse and his misconduct constituted a failure to perform the normal and reasonable duties of his position.

The Board determined to decide the case itself, based upon the

record and the written arguments.[1] After review of the entire record, including the transcript and brief submitted by the respondent, the Board sustains the three-month suspension, but overturns the dismissal for the reasons set forth below.

FACTUAL SUMMARY

Appellant was employed at the University for 14-1/2 years, having begun working there in 1972. He was appointed a Computer Operator in 1975 and a Senior Computer Operator in 1978. Prior to the problems leading up to the three-month suspension in July 1989 and subsequent dismissal in December of that year, appellant had had no adverse actions. He was considered an excellent computer operator.

Aceves' absenteeism problems began during the course of a nine-month period, during which time he was assigned to the graveyard shift. He was responsible for operating the computer to perform batch work production from 11:00 p.m. until 7:00 a.m. The testimony at hearing established that the graveyard shift was a difficult shift and it was unusual for an employee to be assigned to the graveyard shift for such a long period of time: normally,

[1]Appellant did not submit a written argument on rehearing. The parties did not request oral argument.

employees are assigned to that shift for no more than three to four months. After four months on the graveyard shift, Aceves was having a difficult time with the schedule and continually requested a shift change.

The Three-Month Suspension

Aceves admits that between June 7, 1988 and July 1, 1989, he was absent without leave on twenty (20) occasions.

On February 1, 1989, appellant, while working alone, was discovered to be asleep at 6:30 a.m. He was counselled concerning this incident.

On April 11, 1989, appellant called in that he was going to be "a little late," and failed to appear at all, even though he was aware that the other graveyard shift computer operator was off sick.

At the time of the incidents that formed the basis for the three-month suspension, appellant's supervisor was Christopher Rapp (Rapp). Rapp had supervised appellant on and off for three to four years. Although he counselled appellant for excessive absenteeism at least five or six times over this three-to-four year period, he never discussed with appellant appellant's alcohol problem, the Employee Assistance Program (EAP) or any similar program for the

treatment of alcoholism.

Marilyn Plummer (Plummer), the EAP coordinator, testified that in April 1989, when Aceves came into her office for another reason and inquired generally about the alcoholism programs available through EAP, she discussed the programs with him. She did not, however, provide him with any written information. Aceves testified that he does not recall making any such inquiries. On May 3, 1989, appellant did not report to work for his scheduled shift. As a result, student registration for the next day was delayed because he failed to start up the on-line computer registration program. Appellant received a written reprimand on May 19, 1989 from Rapp, his supervisor, for this incident.

On June 30 and July 1, 1989, appellant was again working days. On both days, appellant left for his scheduled lunch period at 12:30 p.m. but did not return for the remainder of his shift, leaving his shift inadequately staffed.

On June 30, 1989, appellant came to work to pick up his paycheck. Peter Quan (Quan), the assistant vice president for information resource management operations, who directly oversaw the computer center, was appellant's supervisor at the time. Quan testified that appellant was unreasonably angry and belligerent.

He expressed the belief that Quan had held up his paycheck. Quan testified that appellant had "a distinct alcoholic smell to him." Quan asked appellant if he had been drinking and appellant admitted that he was drunk. Although appellant then proceeded to discuss his personal problems with Quan, Quan did not refer him to the EAP program. In fact, during the time that Quan supervised appellant, he discussed appellant's attendance problems with him at least four formal times, but never discussed the University's EAP programs with appellant or referred him to the personnel office for information about them.

On July 29, 1989, Aceves was suspended for three months. At the time of the suspension, Aceves inquired at Kaiser about entering a program to treat his alcoholism problem. At appellant's Skelly hearing, appellant's representative requested that the discipline be imposed for no more than one month so that Aceves would not lose the health benefits that would allow him to enroll in an alcohol treatment program at Kaiser. The University denied that request. Aceves testified that, having been suspended and having been docked pay for his absences, he did not have the funds to enroll in the Kaiser program during the term of his suspension.

The Dismissal

After the suspension ended on October 3, 1989, Aceves was absent without leave two more times, once on November 17, 1989 and once on December 2, 1989.[2] After the December 2 absence, Aceves realized the severity of his problem. On December 5, 1989, appellant was counselled by his then supervisor, John Lucan (Lucan), expressed remorse at his actions, stated he had an alcohol problem, and asked to speak with Plummer, the EAP coordinator. Within the next week, he saw an EAP counselor. The counselor advised him to enroll in the Kaiser 14-day program for the treatment of alcoholism. Aceves went to Kaiser on December 5, picked up the paperwork and approached his supervisor to see if he could work the program around his work schedule. On December 6, Lucan, after consulting with the University's Human Resources Department, agreed Aceves should participate in the program, but told him he should take vacation time to do the program full time, obtain and be prepared to provide verification of participation and

[2]The Notice of Adverse Action also charged appellant with being absent without leave on December 8, 1989, but the parties stipulated at the hearing that appellant was given sick leave for that day. Appellant testified that the absence was due to a foot injury.

completion of the program upon his return to work, and to report to the supervisor to work his shift upon his completion of the program.

Aceves did complete the 14-day program on December 20, 1989 and returned on the scheduled day with the required verification that he had completed the program. He was told to go home and report the next day to personnel. He did as he was told and, when he returned, was served with a notice of dismissal.

ISS

This case raises the following issue for our determination:

Under what circumstances may alcoholism and an employee's demonstrated willingness to undergo rehabilitation be regarded as a mitigating factor in a disciplinary case?

DISCUSSION

In reviewing disciplinary actions, 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 a determination of whether the discipline imposed is appropriate under all the circumstances. Among the factors the Board considers are those specifically identified by the Court in the seminal case of Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194 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. at p. 218.)

In this case, we must decide whether the pattern of misconduct charged justified first the three-month suspension and then the dismissal.

Harm to the Public Service

In the case under consideration, the actual harm to the public service resulting from Aceves' unapproved absences consisted primarily of delay in the providing of computer services by the computer center to the University and its student population, and the resulting inconveniences attributable to the delay. Although such delay in the provision of computer services certainly constitutes a cognizable harm to the operation of the University, that harm is not of such a nature that would counsel against our consideration of mitigating circumstances in assessing whether the discipline imposed was warranted.

Circumstances Surrounding the Misconduct

We find that the circumstances surrounding Aceves' misconduct mitigate its seriousness. Significantly, as of the time of Aceves'

discharge, he had been employed by the state for 14 1/2 years. Undisputed evidence established that, prior to the incidents that formed the basis for the adverse actions at issue, Aceves had never had an adverse action and was considered an excellent Senior Computer Operator.

Aceves contends that his absenteeism and performance problems were attributable to his problem with alcohol. Aceves is an admitted alcoholic. His drinking problem manifested itself through work performance and attendance problems while he was assigned, during an untypically long period of time, to the graveyard shift.

The record does not establish exactly when the University first became aware that Aceves' problems at work were attributable to his alcoholism.[3] The record does establish that, during the period of time preceding Aceves' dismissal, none of Aceves' supervisors counselled him regarding getting treatment for his alcohol problem nor did they refer him to the University's EAP program.

Aceves was counselled orally and in writing, however, about

[3]The testimony does establish, however, that in June 1989, when appellant came into work to pick up his paycheck, appellant did have a confrontation with his supervisor during which appellant admitted he was drunk.

his deteriorating work habits during the year preceding the three-month suspension. He was warned in writing, on more than one occasion, that future occurrences of the behaviors documented in the counselling memoranda and reprimands would result in "progressive disciplinary action." Despite these repeated warnings, Aceves' took no action to cure his work performance deficiencies by seeking treatment for his alcoholism. He testified that he was in denial at this point in time, and did not recognize that he was an alcoholic. The Department was justified in serving Aceves with a three-month suspension in order to alert him as to the seriousness of his work habits problem.

While we believe that the Department was justified in imposing a three-month suspension as discipline for Aceves' work performance problems, we find the subsequent dismissal, after two more unauthorized absences, unwarranted under all the circumstances. Certainly as of the time of appellant's Skelly pertaining to the three-month suspension, in August 1989, the Department was aware that Aceves was an alcoholic as his representative requested that the suspension be reduced to a one-month suspension so that Aceves could maintain his benefits to enroll in an alcohol rehabilitation program. The question thus arises as to whether the University

should have considered Aceves' admitted alcoholism as a mitigating factor in its assessment of whether dismissal was warranted based on the two unauthorized absences that occurred within a month after Aceves' return from the suspension.

The issue of whether alcoholism should be treated as volitional misconduct, a treatable disease, or a disability to be reasonably accommodated, is one that continues to be hotly debated in both state and federal forums, in many different contexts. The federal Rehabilitation Act of 1973 imposes a duty upon covered agencies to "make reasonable accommodation" to the limitations of their "handicapped" employees unless they can show that to do so would impose "undue hardship" on their operations. (Title 29 U.S.C. section 791; 29 C.F.R. Section 1613.704). The federal case law is clear that alcoholism is a handicapping condition within the meaning of the Act. [Fuller v. Frank (9th Cir. 1990) 916 F.2d 558; Rodgers v. Lehman (4th Cir. 1989) 869 F.2d 253].

In deciding cases brought under the Rehabilitation Act of 1973, the federal courts have sanctioned a "reasonable accommodation" procedure for dealing with the problems of an alcoholic employee. The procedure, which requires the governmental employer to follow a progression of increasing severe responses to

the employee's alcoholism, was first enunciated by the court in Rodgers v. Lehman, supra, and was later embraced by our Ninth Circuit Court of Appeals in Fuller v. Frank, supra. The Ninth Circuit Court of Appeals described the "reasonable accommodation" procedure as follows:

> The employer should (1) inform the employee of available counselling services; (2) provide the employee with a "firm choice" between treatment and discipline; (3) afford an opportunity for outpatient treatment, with discipline for continued drinking or failures to participate; (4) afford an opportunity for inpatient treatment if outpatient treatment fails; and (5) absent special circumstances, discharge the employee for any further relapse. (916 F.2d 558, 561)

In the case of Rodgers v. Lehman, supra, a civilian employee of the Department of Navy was dismissed for alcohol-related absences. Burchell v. Department of Army, a companion case, decided simultaneously, involved another civil service employee who was fired from his position with the Department of the Army for poor job performance resulting from alcoholism. Both employees were afforded numerous counselling sessions and paid and unpaid leaves to deal with their alcohol problems over a period of several years. In fact, the court found that their employers treated them "with extreme tolerance and patience." Nevertheless, the court found that the government failed in its duty to reasonably

accommodate these employees as they were denied, without sound reason, the opportunity to participate in an inpatient treatment program before being discharged.

The Merit System Protection Board, which has jurisdiction over federal civil service employees, has likewise held that, in order to afford reasonable accommodation to an employee disabled by alcoholism, an agency must offer rehabilitation assistance and an opportunity to take sick leave for treatment, if necessary, before initiating any disciplinary action for performance problems related to that employee's alcoholism. [Ruzek v. GSA 7 M.S.P.B. 307, 311 (1981)].

Borrowing much of the language in the federal Rehabilitation Act of 1973, the California Legislature enacted Government Code section 19230, in which it declared it to be the policy of this state to encourage and enable disabled persons to engage in remunerative employment. [Government Code section 19230(a)] To that end, Government Code section 19230(c) requires state employers to:

> ...make reasonable accommodation to the known physical or mental limitations of an otherwise qualified disabled applicant or employee, unless the hiring authority can demonstrate that the accommodation would impose an undue hardship on the operation of its program....

Yet California has not gone so far as the federal government, in that California does not recognize alcoholism as a handicapping or disabling condition. Thus, the California Fair Housing and Employment Commission does not currently recognize alcoholism as a physical handicap for purposes of its mission "to assure discrimination-free access to employment opportunities notwithstanding any individual's actual or perceived physical handicap. [Title 2 California Code of Regulations, sections 7293.5, 7293.6(4)]

California has, however, recognized alcoholism as a mitigating factor in some contexts. Thus, in reviewing a recommendation of the State Bar that an attorney be disciplined for alcohol related misconduct, the California Supreme Court recently noted that, according to a consensus of the medical community, "alcoholism is a treatable disease" and may be considered as a "mitigating factor if it is causally related to the misconduct and the attorney has shown sustained rehabilitative efforts." In Re Kelley (1990) 52 Cal.3d 487; In Re Billings (1990) 50 Cal.3d 358.

In Jacobs v. California Unemployment Ins. Appeals Bd. (1972) 25 Cal.App.3d 1035, an appellate court held that an employee with

no capacity to abstain from drinking which adversely affected his work could not be disqualified from unemployment benefits on grounds of misconduct.

In 1984, the California Legislature enacted Labor Code section 1025 which provides:

> Every private employer regularly employing 25 or more employees shall reasonably accommodate any employee who wishes to voluntarily enter and participate in an alcohol or drug rehabilitation program, provided that this reasonable accommodation does not impose an undue hardship on the employer. (Emphasis added.)
>
> Nothing in this chapter shall be construed to prohibit an employer from refusing to hire, or discharging an employee who, because of the employee's current use of alcohol or drugs, is unable to perform his or her duties, or cannot perform the duties in a manner which would not endanger his or her health or safety or the health of others.

We are not prepared wholly to embrace the federal procedure for reasonable accommodation of alcoholism at this time. We do believe, however, that in the appropriate case, an employee's admitted alcoholism, and demonstrated willingness to undergo rehabilitation, should be considered a mitigating factor in the assessment of the propriety of discipline.

We find that Aceves' admitted alcoholism should have been considered as a mitigating factor in the University's assessment of

whether dismissal was warranted. In reaching this conclusion, we note the following factors: Aceves was a long-term employee; he was considered an excellent computer operator; prior to the problems leading to the three-month suspension, he had never had a formal adverse action; Aceves' misconduct, primarily absenteeism and tardiness, is considered serious primarily because of its excessiveness; his position as a computer operator is not one that carries a risk to his own safety or the safety of others. In these circumstances, we find the University's failure to recognize Aceves' alcohol problem as a mitigating factor and its failure to support Aceves' effort to seek rehabilitation and demonstrate improvement in his performance, unjustified.

During the year preceding Aceves' dismissal, none of Aceves' supervisors referred him to the University's EAP program, even though Aceves' mentioned he was having personal problems during his counselling sessions. The testimony at the hearing established that the EAP had not been well publicized at the time Aceves was having his performance problems. Although, the EAP coordinator may have briefly discussed the program with Aceves once while he was passing through her office for another purpose, she did not provide Aceves with any written materials about the program and Aceves

testified he does not even recall having the discussion. At the time of his three-month suspension, Aceves did inquire at Kaiser about entering a program to treat his alcoholism problem. Aceves' representative requested at the Skelly hearing that the suspension be reduced to one month so that Aceves' insurance would cover the cost of the program--the University refused to accommodate the request. At the hearing, Aceves expressed the feeling of resignation he experienced at the time his request for accommodation was denied:

> I didn't have any benefits. I had a job supposedly waiting for me. And at that time I guess I wasn't ready to quit once the suspension was approved. It was like I was trying, and then all of a sudden it was like my feet were cut off from me at that point. That's the way I looked at it at that time. (Rptrs. Transcript, Vol. II, P. 116)

Notably, the University did not refer Aceves to the University's EAP program; it did not recommend that Aceves attend either an inpatient or outpatient alcohol treatment program during the period of the suspension; nor did it specifically inform Aceves that if he did not get treatment for his alcoholism problem, he would be discharged. Although we do not suggest that the University is bound to take these steps in every case, we note the University's failure to take these steps in this case mitigate

Aceves' failure to show improvement in his behavior immediately following the suspension.

It was not until after Aceves completed his three-month suspension and was absent without leave on two more occasions that his supervisor finally referred him to see an EAP counsellor about his admitted alcoholism problem. The EAP counsellor advised Aceves to enroll in Kaiser's 14-day alcoholism treatment program. Aceves' supervisor discouraged Aceves from scheduling participation in an outpatient program around his work schedule, and recommended instead that he take vacation time to complete a full time program before returning to work. Aceves did indeed participate in and complete the program. He should have been given a reasonable opportunity to show improvement in his work habits after participation in the program. He was not given that opportunity.

The Skelly factors we must consider in determining whether termination of employment is appropriate weigh against sustaining the adverse action of dismissal. The harm to the public service attributable to Aceves' misconduct was not so serious as to justify taking away Aceves' employment without giving him a fair chance to improve his behavior. The mitigating circumstances surrounding Aceves' misconduct include his admitted alcoholism, his willingness

to enter a rehabilitation program, his longevity of service, and his record as an "excellent" computer operator prior to his alcoholism getting out of control. Having deprived Aceves of the opportunity to demonstrate that he was rehabilitated, the Department failed to demonstrate the likelihood of recurrence of Aceves' wrongful conduct in the future. The dismissal cannot be sustained.

CONCLUSION

For all of the above reasons, we find that the three-month suspension was appropriate and should be sustained, but that the dismissal of Aceves from his position with the University was unwarranted. Aceves should be reinstated to his position of Senior Computer Operator and, pursuant to Education Code section 89540, should receive back pay and benefits that would have accrued to him had he not been wrongfully terminated.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Education Code sections 89539 and 89540, it is hereby ORDERED that:

1. The above-referenced adverse action of a three-month suspension without pay is sustained;

2. The above-referenced adverse action of dismissal is reversed;

3. The California State University and its representatives shall reinstate appellant to his position of Senior Computer Operator and pay to him all back pay and benefits that would have accrued to him had he not been wrongfully terminated, from the date of his dismissal to the date he is reinstated; and

4. This matter is hereby referred to the Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due appellant.

5. 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
Lorrie Ward, Member
Richard Carpenter, 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

February 4, 1992.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board