

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	SPB Case No. 98-0304
)	
NHUT MINH NGUYEN)	BOARD DECISION
)	(Precedential)
From 30 working day suspension from the)	
position of Offset Press Assistant with the)	No. 99-01
Office of State Publishing, Department of)	
General Services at Sacramento)	February 2, 1999

APPEARANCES: Kathleen O'Connor, Labor Relations Representative, California State Employees Association, on behalf of appellant, Nhut Minh Nguyen; David Beales, Staff Counsel, Department of General Services, on behalf of respondent, Department of General Services

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

DECISION

This case is before the State Personnel Board (SPB or Board) after the Board rejected the Proposed Decision to consider the issue of penalty. Appellant received a 30 working day suspension for attempting to leave the State Printing Plant (SPP) with two packages of state paper towels hidden in his laundry bag and for lying to SPP's security guard about the contents of that bag. In this decision the Board finds that the 30 working day suspension imposed by respondent, the Department of General Services (Department or DGS), is warranted in light of the proven misconduct, even though more than half of the legal causes for discipline asserted in the Notice of Adverse Action (NAA) are dismissed.

BACKGROUND

Factual Summary¹

(DGS's Policies and Procedures)

On June 13, 1994, the State Printer, Celeste Maia Cron, issued a memorandum (Cron Memo) addressing theft in the SPP. The Cron Memo advised that thefts of personal and state property had occurred, and that stealing was grounds for termination. The Cron Memo was distributed to all plant superintendents and supervisors and posted on 13 bulletin boards in the work and break areas of the plant.

On November 1, 1994, Cathie Naegle (Naegle), the SPP Human Resources Manager, issued another memorandum (Naegle Memo) about thefts. The Naegle Memo advised that thefts had escalated since the Cron Memo had been issued. As a result, the security contractor had been asked to initiate inspections of "packages, boxes, lunch coolers, tote bags, etc.," on a random basis, as SPP employees entered and left the plant, effective immediately. The Naegle Memo was posted on the bulletin boards at the plant.

Press Room Superintendent Carl Sterkel (Sterkel), appellant's second line supervisor, personally posted both the Cron Memo and the Naegle Memo on the bulletin board in the Press Room where appellant works. Both memos were still posted in mid-December 1997 and as of the hearing before the Chief Administrative Law Judge (CALJ).

¹ The findings of fact are taken substantially from the Proposed Decision.

Sterkel conducts monthly staff meetings of Press Room employees. At these meetings, he continually emphasizes that taking state property by SPP employees is not allowed, absent a signed permission slip from a supervisor. Appellant was present during at least five meetings where theft was discussed and oral warnings were given that any theft would result in formal adverse action, which could include termination.

In June 1995, DGS established a constructive intervention policy to correct employee performance problems and maintain an empowering work environment. The policy calls for informal, progressive discipline, as a general rule, in addressing steps to take when an employee's performance or conduct does not meet established standards, and results in a negative effect on the work unit, the work itself, or customer satisfaction. Page 2 of the policy notes, however:

Some conduct is so unacceptable, illegal, or inappropriate (an employee threatens violence, is caught stealing, or is intoxicated while at work) that the situation demands immediate attention and should be considered urgent.

Sterkel testified that the constructive intervention policy was designed to address performance problems, and was not applicable to theft for which a zero tolerance policy was established in 1994.

(December 19, 1997 Incident)

Appellant works a 6:30 a.m. to 2:30 p.m. shift at SPP. His work location is one to two minutes away from his supervisor's office. At approximately 2:30 p.m. on December 19, 1997, after the end of his shift, appellant entered the lobby to leave the plant. He was carrying a large plastic bag. Security guard Stephen D. Guthrie (Guthrie) asked appellant to come over to his location so that he (Guthrie) could check the contents of appellant's bag.

Appellant told Guthrie that he had only dirty uniform clothes in his bag. Guthrie asked appellant to remove some clothes so he could inspect the bag.

After appellant took some clothes out of the bag, Guthrie observed two unopened packages of white paper towels.² Guthrie removed the two packages of towels and took possession of them. Appellant told Guthrie that, "It might cost me my job if you report it." Appellant also informed Guthrie that antifreeze had spilled in his car, which was parked in the employee parking lot,³ and he planned to use the towels to clean up the spill.

Guthrie then called the Press Room swing shift supervisor to come to the lobby. Naegle was also contacted and went to the lobby.

Sometime before 2:30 p.m. on December 19, 1997, Jerry Brown (Brown), a Lithographic Negative Examiner at SPP for about three months, observed appellant in the bathroom. Appellant was talking to another employee whom Brown did not know. According to Brown, appellant had at least one "bundle" of paper towels in his hand when he put the towels in a large plastic garbage bag in front of a locker. Brown heard the co-worker tell appellant that the towels were not his and that he (appellant) should put them back. Brown overheard appellant respond, "Don't worry about it. They're not yours", or words to that effect.

No evidence was presented about the monetary value of the paper towels.

² Each package contained 334 folded towels.

³ SPP employees park their personal vehicles in an employee parking lot that is adjacent to the plant. The employee parking lot is state property.

(Appellant's Defenses)

Appellant admitted that he placed two packages of state paper towels in his laundry bag without permission or authorization from an SPP supervisor.

According to appellant, before he left for work on December 19, 1997, he discovered a small leak in his car and put antifreeze in his car radiator. He put the cap back on the antifreeze bottle and left the bottle on the rear seat of his vehicle. During his lunch break, when appellant went to his vehicle, he saw that the antifreeze had spilled because its lid was loose. The liquid antifreeze had leaked onto the rear floor of appellant's car and extended to the front floor under the driver's seat. Appellant did not clean up the spill at that time because he thought it would take too long.

Appellant testified that he was ill with a fever that day and was not thinking clearly. He was worried about driving home safely because he believed that the antifreeze was toxic.⁴ Appellant testified that he did not tell anyone about the spill because he planned to use his dirty uniform clothes to clean it up. He stated that it was not until the last minute, right before the shift ended, while he was changing his clothes, that he decided to use the state paper towels to clean up the spill. Appellant testified that he did not mention his intent to use the state towels to a supervisor because supervisors were busy during the shift change. Appellant claimed that he intended to

⁴ Co-worker Stephen Cox testified that appellant did not look well and said he was sick. He also testified that appellant told him that there was a mess in his car. Naegle testified that appellant did not mention being sick after the towels were discovered and did not look ill. Sterkel testified that he discussed the incident with appellant about a week later, after he returned from vacation, and appellant did not initially mention the spilled antifreeze. Although appellant initially testified that he did not tell anyone about the spill, he later testified that he told the swingshift supervisor about it when he was in the lobby.

use one package of towels for the floor under the driver's seat and the second package for the rear floor, and to return any leftover towels.

Appellant claimed that he did not remember that the towels were in the laundry bag until the security guard asked to check his bag. After the towels were discovered, appellant told Guthrie that, "If you make a big deal about this, this might affect my job." Appellant also asked the security guard to let him go back and get a supervisor's note, but Guthrie would not let him do so.

Appellant testified that he believed that the towels were not for his personal use because he was going to use them in the SPP employee parking lot. Appellant claimed that taking the state towels without authorization or permission was not theft because only a couple of dollars were involved. According to appellant, there was no Department policy or rule about "incidental" personal use of state paper towels; he simply took the towels without thinking about them, and had no intent to hide anything. Appellant asserted that the co-worker who had made the "stealing" comment was just joking.

The CALJ credited Brown's testimony over appellant's, finding that Brown had no legitimate reason to fabricate his testimony to appellant's detriment because there was no controversy between them, and, unlike appellant, Brown had no personal interest in the outcome of this appeal. In addition, the CALJ found that appellant's own testimony was internally inconsistent. He initially testified that he did not mention the spilled

antifreeze to anyone, and then testified and presented other witnesses to indicate that he did tell someone. We adopt the CALJ's credibility findings.⁵

Appellant presented no evidence to support his contention that the "incidental" use of state towels to clean a personal vehicle while it was parked on state property in the SPP employee parking lot was not prohibited by Department policy. All Department witnesses testified that state paper towels were to be used inside the plant, not outside it.

While appellant may have been ill on December 19, 1997 and concerned about the toxicity of the spilled antifreeze, he was thinking clearly enough to place the towels in his laundry bag and put clothes over them to conceal their presence, as well as to misrepresent what was in the bag when the security guard asked to inspect it.

ISSUES

1. Did the Department prove by a preponderance of the evidence that appellant's conduct constituted cause for discipline under Government Code § 19572?
2. If so, what is the appropriate penalty in light of the proven misconduct?

⁵ See Linda Mayberry (1994) SPB Dec. No. 94-25, p. 7.

DISCUSSION

Legal Causes for Discipline

The NAA alleged that appellant's misconduct constituted cause for discipline under Government Code § 19572, subdivisions (b) incompetency; (c) inefficiency; (d) inexcusable neglect of duty; (e) insubordination; (f) dishonesty; (m) discourteous treatment of the public or other employees; (o) willful disobedience; (p) misuse of state property; (r) violation of the prohibitions set forth in accordance with Government Code § 19990; 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.

(Dishonesty)

In order for the Department to prove that appellant's conduct constituted cause for discipline under Government Code § 19572(f), dishonesty, it must show that appellant intentionally misrepresented known facts.⁶ Appellant's conduct in hiding the towels in his bag under his dirty work clothes and his lying to the security guard about the contents of that bag constituted dishonesty under Government Code § 19572(f).⁷ While SPP employees were permitted to use the Department's paper towels for their personal needs while at work, the Department's policies and procedures made clear that employees were not supposed to take those towels out of the plant without

⁶ M. S. (1994) SPB Dec. No. 94-19, p. 20.

⁷ Although appellant was technically off-duty when he was caught attempting to leave the plant with the paper towels, his off-duty dishonesty clearly has a rational relationship, or nexus, to his employment. See Hope Vasquez (1993) SPB Dec. No. 93-09; Douglas Durham (1995) SPB Dec. No. 95-18.

permission. Even though appellant's supervisor might have permitted appellant to take the paper towels to clean his car had appellant asked, appellant's attempt to sneak the paper towels out of SPP without obtaining such permission and his lying to the security guard clearly constituted cause for discipline under Government Code § 19572(f).

(Misuse of State Property)

The Board has defined misuse of state property under Government Code § 19572(p) to include either the theft of state property or the intentional use of state property or state time for an improper or non-state purpose, often, but not always, involving personal gain.⁸ Although appellant never actually used the paper towels for cleaning his vehicle as he intended because he was stopped before he left the plant, appellant's concealing the paper towels in his bag in an effort to remove them from SPP undetected constituted misuse of state property and, thus, cause for discipline under Government Code § 19572(p).⁹

(Willful Disobedience)

In order to establish willful disobedience under Government Code § 19572(o), the Department must show that appellant knowingly and intentionally violated a direct command or prohibition.¹⁰ Appellant was clearly notified by the posted Cron and Naegle Memos and during numerous staff meetings that anyone caught stealing Department property would be subject to discipline, including dismissal. Appellant's hiding the paper towels in his bag and his comments to the guard showed that he recognized that his

⁸ R. E. (1993) SPB Dec. No. 93-21, p. 11.

⁹ See M. M. (1995) SPB Dec. No. 95-01.

actions violated this prohibition and he would be subject to discipline if caught. The Department has shown by a preponderance of the evidence that appellant's misconduct constituted willful disobedience under Government Code § 19572(o).

(Other Failure of Good Behavior)

In order to establish other failure of good behavior under Government Code § 19572(t), the Department must show that appellant engaged in conduct that would reflect discredit upon himself or the Department.¹¹ Appellant's attempt to steal paper towels from the Department constituted a failure of good behavior which bears a rational relationship to his employment and is of such a character that it could result in the impairment or disruption of the public service.¹² The Department has shown by a preponderance of the evidence that cause for discipline existed under Government Code § 19572(t).

(Remaining Legal Causes for Discipline)

The facts of this case do not establish cause for discipline under Government Code § 19572 subdivisions (b) incompetency, (c) inefficiency and (d) inexcusable neglect of duty. Since there was no evidence that appellant engaged in mutinous, disrespectful or contumacious behavior, insubordination under Government Code § 19572(e) was not shown.¹³ The Department did not establish cause for discipline under Government Code § 19572(m) since there was no evidence that appellant was discourteous to the guard, other SPP employees or the public. Finally, appellant's

¹⁰ Ruth Houseman (1993) SPB Dec. No. 93-33. See also Coomes v. State Personnel Board (1963) 215 Cal.App.2d 770, 775.

¹¹ Nightingale v. SPB (1972) 7 Cal. 3d 507, 512-514.

¹² J. G. (1998) SPB Dec. No. 98-03, p.7.

attempt to steal paper towels in order to clean his car does not constitute the type of engagement in an incompatible activity required to trigger discipline under Government Code § 19572(r).¹⁴ These legal causes for discipline are, therefore, dismissed.

Penalty

We turn next to the issue of the appropriate penalty under all the circumstances. When performing its constitutional responsibility to review disciplinary actions,¹⁵ the Board is charged with rendering a decision that is "just and proper."¹⁶ The Board has broad discretion to determine a "just and proper" penalty for a particular offense, under a given set of circumstances.¹⁷ The Board's discretion, however, is not unlimited. As the California Supreme Court noted in Skelly v. State Personnel Board (Skelly):¹⁸

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)¹⁹

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 relevant factors to assess the

¹³ Richard Stanton (1995) SPB Dec. No. 95-02, p. 7.

¹⁴ See Ruth M. Houseman (1993) SPB Dec. No. 93-33, pp. 11 – 14.

¹⁵ Cal. Const. Art. VII, § 3(a).

¹⁶ Government Code § 19582.

¹⁷ See Wylie v. State Personnel Board (1949) 93 Cal.App.2d 838.

¹⁸ (1975) 15 Cal.3d 194.

¹⁹ 15 Cal.3d at 217-218.

propriety of the discipline imposed by the appointing power. Among the factors the Board considers are those specifically identified 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.²⁰

The Board's authority to modify or revoke an adverse action is codified in Government Code § 19583, which provides, in relevant part:

The adverse action taken by the appointing power shall stand unless modified or revoked by the board. If the board finds that the cause or causes for which the adverse action was imposed were insufficient or not sustained, or that the employee was justified in the course of conduct upon which the causes were based, it may modify or revoke the adverse action....

The court in Department of Parks and Recreation v. SPB²¹ explained the standards set forth in Government Code § 19853 as follows:

There are ... three bases for modification or revocation of the appointing power's imposition of discipline: (1) the evidence does not establish the fact of the alleged cause for discipline; (2) the employee was justified; or (3) the cause for discipline is proven but is insufficient to support the level of punitive action taken.

The CALJ in her Proposed Decision found that the Department proved by a preponderance of the evidence that appellant had engaged in the charged misconduct and that such misconduct was not justified by appellant's proffered defenses. She also found that there was a likelihood of recurrence in this case since appellant had not acknowledged any responsibility for wrongdoing. But the Proposed Decision reduced

²⁰ Id.

²¹ (1991) 233 Cal. App. 3d 813, 827.

the penalty from a 30 working day to a 30 calendar day suspension based primarily upon the dismissal of many of the asserted legal causes for discipline.

While it is true that more than half the legal causes for discipline asserted in this case were not applicable, all of the factual charges were sustained. Under the standards for reviewing discipline set forth above, it is clear that the controlling consideration in determining whether discipline is appropriate is not how many legal causes set forth in Government Code § 19572 may be established, but whether, under all the circumstances, the misconduct underlying the discipline warrants the penalty imposed.

While the Board strongly encourages appointing powers to carefully analyze a case before asserting legal causes for discipline in a notice of adverse action to insure that the chosen legal causes are applicable to the facts alleged, the Board will not reduce the penalty imposed by the Department in this case solely because some of the asserted legal causes for discipline have been found to be inapplicable. Since the Department has proved by a preponderance of the evidence that: (1) appellant engaged in the misconduct alleged in the NAA; (2) that misconduct constitutes cause for discipline under one or more of the asserted legal causes and is not justified; and (3) in light of all the relevant factors enumerated in Skelly, the nature of the misconduct supports the imposed level of discipline, in accordance with Government Code § 19583, the Board will not modify the penalty the Department imposed upon appellant in the NAA.

CONCLUSION

The 30 working day suspension imposed by the Department upon appellant is appropriate in light of the factual charges that were proven and all the relevant Skelly factors, and is, therefore, 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 30 working day suspension of Nhut Minh Nguyen from the position of Offset Press Assistant with the Office of State Publishing, Department of General Services, at Sacramento is hereby sustained.
2. This decision is certified for publication as a Precedential Decision pursuant to Government Code §19582.5.

STATE PERSONNEL BOARD

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

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on February 2, 1999.

Walter Vaughn
Executive Officer
State Personnel Board