

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	SPB Case No. 36133
)	
DOUGLAS DURHAM)	BOARD DECISION
)	(Precedential)
)	
From demotion from the position)	
of Food Manager (Correctional)	
Facility) to the position of)	NO. 95-18
Supervising Cook II (Correctional)	
Facility) with Pelican Bay State)	
Prison, Department of Corrections)	
at Crescent City)	December 5-6, 1995

Appearances: Larry Svetich, Labor Representative, Corrections Ancillary Supervisors Organization, on behalf of appellant, Douglas Durham; Carol A. McConnell, Labor Relations Counsel, Department of Personnel Administration, on behalf of respondent, Department of Corrections.

Before: Lorrie Ward, President; Floss Bos, Vice President; Ron Alvarado, Richard Carpenter and Alice Stoner, 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 the appeal of Douglas Durham (appellant). Appellant was demoted by the Department of Corrections (Department) from the position of Food Manager (Correctional Facility) to the position of Supervising Cook II (Correctional Facility) with Pelican Bay State Prison. The Department took the adverse action after appellant was convicted of three misdemeanors in connection with his fraudulent registration of vehicles in Oregon while a California resident and for making false statements to the California Department of

(Durham continued - Page 2)

Motor Vehicles (DMV) regarding his state of residence. In his Proposed Decision, the ALJ sustained the demotion without modification, finding cause for discipline under Government Code section 19572,¹ subdivisions (f) (dishonesty), (k) (conviction of a misdemeanor involving moral turpitude) and (t) (other failure of good behavior, on or off duty, that causes discredit to the appointing agency).

The Board rejected the Proposed Decision, deciding to hear the case itself. After a review of the factual findings of the ALJ and the written arguments submitted by the parties², the Board agrees with the findings of fact in the attached Proposed Decision and adopts those findings as its own. The Board sustains appellant's demotion for the reasons stated below.

ISSUE

Whether appellant's convictions arising from his dishonesty in registering his automobile in Oregon when he was a California resident constituted cause for discipline under Government Code section 19572, subdivisions (f) (dishonesty), (k) (conviction of a misdemeanor involving moral turpitude and (t) (other failure of good behavior, on or off duty, that causes discredit to the appointing agency.)

¹All references herein are to the Government Code unless otherwise specified.

²No oral argument was requested.

DISCUSSION

Conviction of Misdemeanor Involving Moral Turpitude
[Government Code Section 19572(k)]

Conviction of a misdemeanor involving moral turpitude constitutes cause for discipline under Government Code section 19572, subdivision (k), which provides:

Conviction of a felony or conviction of a misdemeanor involving moral turpitude. A plea or verdict of guilty, or 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 meaning of this section.

Whether a crime involves moral turpitude is a question of law. Wilson v. State Personnel Board (1974) 39 Cal.App.3d 218, 221, review denied (citing Otash v. Bureau of Private Investigators (1964) 230 Cal.App.2d 568, 571). Case law has established, however, that, whatever else the term may mean, "a crime in which an intent to defraud is an essential element is a crime involving moral turpitude," as are offenses involving intentional dishonesty for purposes of personal gain. In re Hallinan (1954) 43 Cal.2d 243, 247-248. This definition of the term "moral turpitude," as it is used in section 19572, subdivision (k), was adopted by the court in Wilson v. State Personnel Board, 39 Cal.App.3d at 221 (upholding dismissal of employee convicted under Unemployment Insurance Code section 2101 for fraudulently obtaining unemployment insurance benefits while

(Durham continued - Page 4)

employed and making false statements regarding his employment status).

Conviction of a misdemeanor that, by the manner of its commission, involves moral turpitude also constitutes "conviction of a misdemeanor involving moral turpitude" within the meaning of section 19572, subdivision (k), regardless of whether moral turpitude is an essential element of the crime. Padilla v. State Personnel Board (1992) 8 Cal.App.4th 1136, 1140. Thus, in Padilla, the court upheld the dismissal of a motor carrier specialist with the California Highway Patrol based upon a nolo contendere plea to misdemeanor battery as conviction of a crime involving moral turpitude, where the underlying facts involved the employee's sexual molestation of his daughter.

No separate showing of "nexus" is required to impose discipline under subdivision (k). Wilson v. State Personnel Board, supra, 39 Cal.App.3d at 221. In Wilson v. SPB, the court stated:

There is no variety of public employment in which conviction of a crime involving moral turpitude would not reasonably be regarded by the appointing authority and the board as grounds for discipline. Moral turpitude reflects a trait of character that may continue, and affect an employee's performance of duties not related to the circumstances in which it was manifested. [citing Gee v. California State Personnel Board (1970) 5 Cal.App.3d 713, 719.] Id. at 221-222.

We recognize that some court decisions may be construed as implying that a "nexus" must be shown in every instance involving

(Durham continued - Page 5)

discipline of a public employee. See, e.g., Morrison v. State Board of Education (1969) 1 C.3d 214 (overturning dismissal of teacher for single act of noncriminal homosexual conduct); Brewer v. Department of Motor Vehicles (1979) 93 Cal.App.3d 358 (reversing denial of vehicle salesperson's license to convicted child molester); Vielehr v. State Personnel Board (1973) 32 Cal.App.3d 187 (holding that conviction of tax representative trainee for off-duty possession of marijuana, without more, does not constitute other failure of good behavior that causes discredit to the agency, under section 19572, subdivision (t)). However, because none of these decisions involved interpretation of Government Code section 19572, subdivision (k), we do not find them controlling in this case. Moreover, in none of these cases did the conduct involving moral turpitude consist of fraud. For example, the court in Brewer v. Department of Motor Vehicles recognized that, unlike in Wilson v. SPB, no issue regarding honesty and integrity was involved and noted, "Obviously, honesty and integrity are the primary traits of good moral character that must reasonably relate to the occupation of vehicle salespersons." 93 Cal.App.3d at 366.

Furthermore, even if a "nexus" were required between the conviction and the appellant's employment, we conclude that the conviction of a crime involving intent to defraud the State of California establishes any requisite nexus for purposes of

(Durham continued - Page 6)

discipline under section 19572, subdivision (k). Unlike isolated instances of off-duty drunkenness or petty theft, fraud committed by State employees against the State of California has a direct bearing on their employment, even where the fraud is perpetrated against an agency of the State other than the agency by which they are employed. The State has a clear interest in employing honest employees who do not exhibit a tendency to defraud the State,³ and need not tolerate those who engage in behavior constituting moral turpitude.

Appellant in this instance engaged in repeated instances of fraud against his own employer, the State of California. The ALJ found that, during the period 1992-1993, appellant willfully and unlawfully registered a 1975 Ford van in Oregon, without paying California vehicle registration fees. During this time period, appellant owned a home in Smith River, California, which was undergoing extensive repairs, although he frequently spent nights at a rented residence in Brookings, Oregon, when it was impossible for him to sleep in his Smith River home. At all relevant times, appellant held a California driver's license, never held an Oregon driver's license, and intended to return to his home in California once the repairs were completed. The ALJ

³All State employees are required to possess the general qualifications of integrity, honesty and good judgment, among others. Title 2, California Code of Regulations, section 172.

(Durham continued - Page 7)

further found that, in October 1993, appellant registered a 1994 Mazda pick-up truck in Oregon, and then returned to live in his home in California approximately one month later. Finally, the ALJ found that, when registering his 1994 Mazda, appellant falsely reported to the DMV that his residence was in Oregon, rather than in California, thus enabling him to obtain a Commuter Permit.

Appellant stipulated that he "willfully and unlawfully, and with intent to defraud, falsified a Commuter Permit issued by the California Department of Motor Vehicles." Moreover, he plead nolo contendere to knowingly making false statements to the DMV, falsifying a certificate of ownership, and registering a vehicle in a foreign jurisdiction without the payment of appropriate fees and taxes to the State of California, in violation of Vehicle Code sections 20, 4463, and 8804, respectively. Accordingly, because the facts upon which the convictions under the Vehicle Code were based involved dishonesty and intentional action to defraud the State of California, we conclude that appellant's convictions were for crimes involving moral turpitude.⁴

⁴We disagree with the ALJ's conclusion that, because a violation of Vehicle Code section 8804 (registration in foreign jurisdiction of a vehicle owned by resident and operated in California without payment of appropriate California fees and taxes) does not necessarily involve dishonesty or intent to defraud, appellant's conviction under that section does not constitute conviction of a crime involving moral turpitude. Under Padilla, we must go beyond the bare elements of the crime to determine whether, under the facts of the case, the manner of commission of the crime involved moral turpitude. Here, the facts clearly indicate that the manner in which appellant violated Vehicle Code section 8804 involved moral turpitude.

(Durham continued - Page 8)

Furthermore, regardless of whether a separate nexus is required, appellant's convictions based upon intentional fraud against the State of California constitute cause for discipline under section 19572, subdivision (k).

Effect of Nolo Contendere Plea

Imposing discipline after a plea of nolo contendere is proper in this case.⁵ Although the courts have limited the admissibility of nolo contendere pleas in civil and administrative actions, use of such a plea is permissible where specifically authorized by statute. Cartwright v. Board of Chiropractic Examiners (1976) 16 Cal.3d 762; County of Los Angeles v. Civil Service Commission (Cal.App. Oct. 23, 1995) 95 Daily Journal D.A.R. 14321. Section 19572, subdivision (k), specifies 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 meaning of that section. Therefore, discipline under subdivision (k) based upon a nolo contendere plea is proper.

⁵A plea of nolo contendere, or "no contest," is the same as a plea of guilty for purposes of a criminal conviction. Penal Code § 1016.

(Durham continued - Page 9)

Dishonesty and Other Failure of Good Behavior
[Government Code Section 19572, subdivisions (f) and (t)]

While case law holds that a nexus is not required to establish cause for discipline under subdivision (k), the law clearly requires a showing of nexus between the employee's conduct and his or her state employment to establish cause for discipline under subdivisions (f) and (t). H [REDACTED] V [REDACTED] (1993) SPB Dec. No. 93-09; Vielehr v. State Personnel Board, supra. Under the circumstances of this case, we conclude that appellant's conviction of crimes involving intentional fraud against the State of California constitutes a sufficient nexus to warrant discipline under Government Code section 19572, subdivisions (f) (dishonesty) and (t) (other failure of good behavior, on or off duty, that causes discredit to the appointing agency).⁶ We, therefore, need not and do not reach the issue of whether, apart from appellant's misdemeanor convictions involving moral turpitude, additional facts establishing a "nexus" between appellant's conduct and his state employment exist.

⁶This case is also distinguishable from H [REDACTED] V [REDACTED] in that, in V [REDACTED], the appellant's conviction of a single instance of off-duty shoplifting had no appreciable effect on either her agency or the state. This case is more akin to G [REDACTED] J [REDACTED] (1992) SPB Dec. No. 92-01, in which we sustained the imposition of discipline against an employee who made fraudulent claims for workers compensation benefits against the State.

PENALTY

We are mindful of our obligation to render a decision that in our judgment is just and proper. Government Code section 19582. While we have broad discretion in determining a just and proper penalty, Wylie v. State Personnel Board (1949) 93 Cal.App.2d 838, our discretion is not unlimited. As set forth in the California Supreme Court case of Skelly v. State Personnel Board (1975) 15 Cal.3d 194, there are several factors for the Board to consider in assessing the propriety of the imposed discipline:

...[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. Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. Skelly, 15 Cal.3d at 217-218.

Appellant's demotion to the position of Supervising Cook II is appropriate. Although it may have been appellant's practice to delegate the duties of dealing with vendors and bidders to subordinates, the position of Food Manager vested appellant with responsibility for the overall management and supervision of the food program on a 24-hour basis. The position involves substantial discretion in handling tasks such as requisitioning and receiving supplies and certifying the necessity of purchases. While appellant may have delegated some of these tasks in the past, we are concerned that, should he be allowed to retain his

(Durham continued - Page 11)

position at a managerial level,⁷ nothing would preclude him from asserting his authority to take control over these activities in the future and from exercising that authority in a dishonest manner.

As we have previously found, dishonesty is not an isolated or transient behavioral act, but rather a continuing trait of character. Gee v. State Personnel Board (1970) 5 Cal.App.3d 713, 179; G. [REDACTED] J. [REDACTED] (1992) SPB Dec. No. 92-01. Even though appellant's conduct in this case did not directly involve his job duties, his intentional fraud against the State of California is serious enough to suggest a significant likelihood of recurrence which would cause great harm to the public service. Therefore, the penalty of demotion is appropriate.

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 attached Proposed Decision of the ALJ is adopted to the extent it is consistent with this decision.

⁷ As to appellant's suggestion that the penalty imposed by the Department in this case would place him in a position with a greater potential for abuse, we do not assume that appellant's successor would follow appellant's practice of delegating such duties to subordinates, particularly where appellant is in the subordinate position. We note that the ALJ found that appellant's successor, Neotti, had dealt directly with suppliers during the twelve days of his employment in the Food Manager position prior to the hearing.

(Durham continued - Page 12)

2. The demotion of Douglas Durham from the position of Food Manager (Correctional Facility) to Supervising Cook II (Correctional Facility) with Pelican Bay State Prison, Department of Corrections, at Crescent City is sustained; and

3. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD

Lorrie Ward, President
Floss Bos, Vice President
Ron Alvarado, Member
Richard Carpenter, Member
Alice Stoner, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on December 5-6, 1995.

C. Lance Barnett Ph.D.
Executive Officer
State Personnel Board

(Durham continued - Page 1)

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal By)
DOUGLAS DURHAM) Case No. 36133
)
From demotion from the position)
of Food Manager (Correctional)
Facility) to the position of)
Supervising Cook II (Correctional)
Facility) with Pelican Bay State)
Prison, Department of Corrections)
at Crescent City)

PROPOSED DECISION

This matter came on regularly for hearing before Martin J. Fassler, Administrative Law Judge, State Personnel Board, on December 19, 1994, at Crescent City, California.

The appellant, Douglas Durham was present and was represented by Larry Svetich, Labor Representative, Corrections Ancillary Supervisors Organization.

The respondent, Department of Corrections, was represented by Carol A. McConnell, Labor Relations Counsel, Department of Personnel Administration.

The case was submitted on February 1, 1995, when each of the parties filed a reply brief.

Evidence having been received and duly considered, the Administrative Law Judge makes the following findings of fact and Proposed Decision:

I

The above demotion, effective August 31, 1994, and appellant's appeal therefrom, comply with the procedural

(Durham continued - Page 2)

requirements of the State Civil Service Act.

II

Appellant was appointed as a Supervising Cook I by the Department of Corrections (the department) in April 1984. He was appointed as a Material and Stores Supervisor I in October 1985, and as a Supervising Cook II in November 1985. He was appointed as Food Manager at California Correctional Institution at Tehachapi in June 1986, and as Food Manager at Pelican Bay State Prison (Pelican Bay) in July 1989 prior to the time inmates were assigned to the prison.

III

As cause for this demotion it is alleged that:

(1) on two occasions, appellant registered a motor vehicle he owned while claiming to be an Oregon resident, rather than acknowledging his California residency, and that by doing so, he avoided the payment of California sales taxes and vehicle registration fees; (2) appellant was convicted of three misdemeanor violations of the California Vehicle Code in connection with these transactions, and his criminal prosecution and conviction were reported in the Crescent City newspaper; and (3) appellant twice told a subordinate employee that it was easy to use an Oregon post office box as a fake address, and offered to show that employee how to do so, to avoid paying vehicle registration fees and sales taxes.

It is alleged that appellant's conduct constituted dishonesty, conviction of a misdemeanor involving moral turpitude, and other failure of good behavior, on or off duty, that caused discredit to the appointing agency, within the

(Durham continued - Page 3)

meaning of Government Code section 19572, subdivisions (f), (k), and (t), respectively.

IV

The State Personnel Board (SPB) job specification for the position of Food Manager in a Correctional Facility includes the following:

[Food Manager] is responsible for the overall management and supervision of an organized food program on a 24-hour basis, plans, directs and coordinates all food service activities.

The same specification lists, among "Typical Tasks," the following:

In conjunction with the business manager, prepares budgets and quarterly food estimates; supervises the requisitioning, receiving, inspecting, storing and inventorying of supplies...selects and trains staff, evaluates their performance and takes or recommends appropriate action....

V

As Food Manager at Pelican Bay, appellant was responsible for planning, directing and coordinating all food service activities. He worked with the Pelican Bay Business Manager in preparing budgets and estimating food requirements. During appellant's five years as Pelican Bay Food Manager, he generally delegated to an employee under his supervision, either a Supervising Cook I or Supervising Cook II, the responsibilities for dealing directly with vendors selling food and equipment to Pelican Bay, or submitting bids for sale of food or equipment. Appellant carried out those responsibilities himself only during the "activation" phase of Pelican Bay's operation, prior to the arrival of inmates. Appellant's successor as Food Manager, George Neotti (Neotti),

(Durham continued - Page 4)

held the position only twelve days before the commencement of the hearing. During that brief period, he dealt directly with a few suppliers.

As part of the purchasing process, the Food Manager was required to certify that the purchase was necessary for operation of the food department. After the Food Manager's certification, each purchase required approval of the department's Office of Procurement, and, at Pelican Bay, a senior accounting officer, the Business Manager and the Associate Warden for Business Services.

VI

In October 1991, appellant had a conversation with Neotti, then a Supervising Cook II at Pelican Bay, regarding the registration of motor vehicles in Oregon. In response to a question from Neotti, appellant said that a person residing in California could purchase a motor vehicle in Oregon, and avoid payment of California sales tax and the California motor vehicle registration fee, by using an Oregon post office box as a mailing address. Appellant did not say that he had done so, or that he was planning to do so.

Neotti and appellant had a similar conversation some time during the spring of 1992, but Neotti was unable to specify the date.

Neotti was appointed as Pelican Bay Food Manager, succeeding appellant on December 1, 1994.

There is insufficient evidence to establish that in either of the two conversations, appellant encouraged or advised Neotti to use an Oregon post office box to evade

(Durham continued - Page 5)

payment of California sales taxes or motor vehicle registration fees.

VII

Appellant owns a home in Smith River, California. In 1992, appellant learned that his home would require extensive foundation and other repairs. The repairs began in 1992 and continued until late October 1993. During the period during which the repairs were being undertaken, appellant frequently spent nights at a rented residence in Brookings, Oregon, when it was impossible for him to sleep in his Smith River residence. From 1992 through 1994, appellant held a California driver's license, and never applied for or received an Oregon driver's license. Throughout that period, he intended to return to his home in Smith River when the repairs were completed.

VIII

During this period, appellant purchased in Oregon a 1975 Ford van. Appellant willfully and unlawfully registered the van in Oregon, without paying California vehicle registration fees. He commuted from Brookings to Pelican Bay in the van, and had a California Department of Motor Vehicles (DMV) commuter permit for that van. He sold the vehicle in January 1994.

In October 1993, appellant purchased a 1994 Mazda pick-up truck in Oregon. He registered the vehicle in Oregon. Appellant returned to live in his Smith River home the day after Thanksgiving 1993.

(Durham continued - Page 6)

In January 1994, at the Crescent City DMV office, appellant was informed by a DMV employee that the registration fee for his 1994 Mazda in California would be approximately \$1,700. Appellant falsely reported to the DMV that his residence was 808 Pioneer Road, Brookings, Oregon, rather than his actual residence in Smith River, California. By reporting an Oregon address rather than a California address, appellant established an entitlement to a Commuter Permit for the Mazda. Appellant stipulated that by this conduct, he "willfully and unlawfully, and with intent to defraud, falsified a Commuter Permit issued by the California Department of Motor Vehicles." His conduct occurred no more than one day after he had registered a 1969 Datsun and a 1978 motorcycle with his Smith River address.

IX

On or about February 7, 1994, a criminal complaint was filed against appellant for violations of California Vehicle Code sections 20 (False Statements), 4463 (False Evidence of Documents, Devices or Plates), 6702 (Use of Foreign License Plates by Resident Business); and 8804 (Resident Registering Vehicle in Foreign Jurisdiction); and of Penal Code section 182(a)(4) (Conspiracy).

X

On or about March 28, 1994, appellant pled nolo contendere to misdemeanor violations of Vehicle Code sections 20, 4463, and 8804.

(Durham continued - Page 7)

Section 20 provides:

It is unlawful to use a false or fictitious name, or to knowingly make any false statement or knowingly conceal any material fact in any document filed with the Department of Motor Vehicles or the Department of the California Highway Patrol.

Section 4463 provides in pertinent part:

(a) every person who, with intent to prejudice, damage, or defraud, commits any of the following acts is guilty of a felony ...

(1) Alters, forges, counterfeits or falsifies any certificate of ownership...⁸

Section 8804 provides:

Every person who, while a resident, as defined in Section 516, of this state, with respect to any vehicle owned by him and operated in this state, registers or renews the registration for the vehicle in a foreign jurisdiction, without the payment of appropriate fees and taxes to this state, is guilty of a misdemeanor.

Based on appellant's plea of nolo contendere to the charges, he was found guilty of violating each of the three laws. The remaining criminal charges against him were dismissed. Appellant was fined one thousand dollars, placed on 24 months probation, and ordered to properly register all his vehicles.

XI

A report of appellant's prosecution and conviction appeared on the front page of the April 6, 1994 edition of the

⁸Although subsection (a) defines various actions as felonies, the parties' stipulation that appellant pleaded nolo contendere to a misdemeanor violation of section 4463 is accepted. Subsection (b) of the same section defines various actions as misdemeanors, but all of those actions are related to misuse of a disabled person placard, and therefore are unrelated to appellant's actions.

(Durham continued - Page 8)

Crescent City newspaper, The Triplicate. The article noted appellant's employment at Pelican Bay.

* * * * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT, THE ADMINISTRATIVE LAW JUDGE MAKES THE FOLLOWING DETERMINATION OF ISSUES:

Respondent has proven by a preponderance of the evidence that appellant was convicted of two misdemeanors involving moral turpitude.

California courts have held that criminal conduct which includes fraud or dishonesty falls within the definition of the phrase "moral turpitude." In In re Hallinan (1954) 43 Cal. 2d 243, the Supreme Court held:

Although the problem of defining moral turpitude is not without difficulty...it is settled that whatever else it may mean, it includes fraud and that a crime in which an intent to defraud is an essential element is a crime involving moral turpitude....It is also settled that the related group of offenses involving intentional dishonesty for purposes of personal gain are crimes involving moral turpitude.... We see no moral distinction between defrauding an individual and defrauding the government. [Citations omitted]. Id. at 247-248.⁹

Appellant's convictions for violating Vehicle Code sections 20 and 4463, in the factual circumstances described, establish that appellant was found guilty of misdemeanors which involve, as an essential element of each, dishonesty and intentional action to defraud the State of California of fees

⁹This standard and analysis have been cited in a number of later decisions, including In re Silverton (1975) 14 Cal. 3d 517, 523, and Carey v. Board of Medical Examiners (1977) 66 Cal. App. 3d 538, 542.

(Durham continued - Page 9)

to which it was entitled. Conviction of appellant of each of these crimes, therefore, amounts to conviction of a misdemeanor involving moral turpitude.¹⁰

In a case in which discipline of a state employee is based upon conviction of a crime of moral turpitude involving off-duty conduct, it is not necessary to establish a rational relationship, or "nexus," between the off-duty conduct and the employee's duties to justify the imposition of discipline. Wilson v. State Personnel Board, (1974) 39 Cal.App.3d 218.

Appellant cites Brewer v. Department of Motor Vehicles (1979) 93 Cal.App.3d 358, Vielehr v. State Personnel Board (1973) 32 Cal.App.3d 187, 191, and H. V., SPB Dec. No. 93-09, at page 3, in support of his argument that to sustain the discipline the respondent must establish a "nexus" between the conduct underlying the conviction and his job responsibilities. None of these decisions, however, requires a conclusion different than the one reached here. In Vielehr, issued prior to Wilson, the discipline was imposed under section 19572(t), not under subsection (k), and thus the decision did not consider whether a nexus must be shown in a case in which discipline is imposed under subsection (k). Similarly, in V., discipline was imposed under subsections (f) dishonesty, and (t) other failure of good behavior, but not subsection (k). The V. decision did not refer to Wilson. Brewer concerned the revocation of a

¹⁰Appellant's conviction of violating Vehicle Code section 8804 does not necessarily involve dishonesty or intent to defraud. His conviction of that crime, therefore, is not necessarily conviction of a crime involving moral turpitude.

(Durham continued - Page 10)

vehicle salesman's license, rather than discipline of a state employee. The pertinent statute authorized the regulatory agency to refuse to issue a license to an applicant who "is not of good moral character," and did not refer to conviction of a crime involving moral turpitude. Because of these differences between the circumstances in Brewer and those here, Brewer is distinguishable. In addition, Brewer distinguished the Wilson decision on the ground that the facts in Brewer raised no issues of honesty or integrity. Id. at 364.¹¹

Section 19572(k) provides specifically that "a conviction following a plea of nolo contendere to any offense involving moral turpitude is deemed to be a conviction within the meaning of this section."

Appellant has been convicted of two crimes involving moral turpitude within the meaning of Government Code section 19572(k). For that reason, his discipline may be sustained.

The Allegation of Dishonesty

Dishonest conduct while off-duty may be the basis of discipline, if a nexus between the misconduct and the employee's employment is proven. Gee v. California state Personnel Board (1970), 5 Cal.App.3d 713, 718-719;

H. V. (1993) SPB Dec. No. 93-09, at p. 6.

The evidence establishes a rational relationship between appellant's off-duty conduct and his job responsibilities.

¹¹In dicta, the Brewer court noted, "We agree generally that all public servants are properly subject to discipline for acts of dishonesty." Id.

(Durham continued - Page 11)

Appellant knowingly and intentionally defrauded the State of California of more than \$1,700 by registering two of his vehicles in the State of Oregon rather than in California. As Food Manager for a state prison, appellant's responsibilities, as a state civil service employee, included oversight of repeated purchases of food and equipment from local merchants. Although appellant's practice was to delegate this work to lower-ranking supervisors, the responsibilities of the Food Manager position are significant and require trustworthiness. The institution is entitled to have a Food Manager whose honesty it can rely upon, and is entitled to remove an employee from that position when serious doubts arise regarding his trustworthiness. As the Court of Appeal noted in Gee, supra:

"Dishonesty" connotes a disposition to deceive.... Honesty is not considered an isolated or transient behavioral act; it is more of a continuing trait of character. Gee, supra, at pp. 718-719.

Respondent has proven by a preponderance of the evidence that appellant acted dishonestly, and that there is a rational relationship between his dishonest conduct and the job responsibilities of food manager.

The Allegation of Other Failure of Good Behavior

An employee's off-duty conduct may be found to be grounds for discipline pursuant to Government Code section 19572(t) if it causes discredit to the agency for which he or she works. M. M. (1995) SPB Dec. No. 95-01.

Respondent has proven by a preponderance of the evidence that appellant's conduct caused discredit to the agency.

(Durham continued - Page 12)

Appellant held a highly visible position of considerable responsibility at a large state prison in a small community. His conviction for defrauding his employer, the State of California, was highly publicized. Oregon's lower vehicle registration fees are no doubt widely known among California residents of the communities close to the Oregon border. The conviction of a management employee of a state agency for defrauding the state of payments to which it is entitled inevitably brings discredit to the employer. The occurrence of such an event in a small community where, because of its proximity to Oregon, there is repeated temptation to deprive the state of vehicle registration fees and sales taxes, emphasizes the extent to which the agency is discredited by appellant's conduct.

The circumstances here are significantly different than in Charles Martinez (Martinez)(1992) SPB Dec. No. 92-09 and Daniel J. Kominsky (Kominsky)(1992) SPB Dec. 92-19. In each case, a Department of Corrections supervisor was disciplined for off-duty conduct apparently arising from abuse of alcohol. In each decision, the State Personnel Board (SPB) determined that there was no rational relationship or nexus between the appellant's job and the off-duty conduct. In neither case did the appellant hold a management position nor did either appellant hold a position which involved purchasing equipment and supplies or dealing with the public.

Appellant's Statement to Neotti

There is insufficient evidence to establish that appellant's statements to his subordinate Neotti constituted

(Durham continued - Page 13)

dishonesty or other failure of good behavior which caused discredit to the appointing authority. Accordingly, this charge is dismissed.

Penalty

The State Personnel Board "is the ultimate authority delegated by law to fix the level of appropriate disciplinary action in the state civil service." Ng v. State Personnel Board (1977) 68 Cal. App. 3d 600, at 605.

Under this authority, the Board independently reviews the facts of each case to determine whether the penalty imposed by the appointing power is "just and proper."

T. G. (1992) SPB Dec. No. 92-18, at p. 6.

Among the factors to be considered in determining the "just and proper" penalty are the extent to which the employee's conduct resulted in, or, if repeated, is likely to result in harm to the public service, the circumstances surrounding the misconduct, and

the likelihood of its recurrence. Skelly v. State Personnel Board
(1975)

15 Cal. 3d 194, 217-218.

The appellant's conduct resulted in significant discredit to the agency, as already described. If appellant were to repeat that conduct, or comparable conduct in his employment, his actions would cause significant discredit or harm to the agency.

Respondent has demoted appellant from a management position to a supervisory position of far less responsibility. It is a position in which appellant may be required to deal with private business entities on behalf of the state, if directed to do so by the institution's food manager or

(Durham continued - Page 14)

assistant food manager. His actions in this respect, however, will be closely supervised by a management employee within his own department. The penalty imposed is appropriate in the circumstances and is sustained.

* * * * *

WHEREFORE IT IS DETERMINED that the adverse action of demotion of appellant Douglas Durham, effective August 31, 1994, is hereby sustained without modification.

* * * * *

I hereby certify that the foregoing constitutes my Proposed Decision in the above-entitled matter and I recommend its adoption by the State Personnel Board as its decision in the case.

DATED: June 1, 1995

Fassler,

MARTIN J. FASSLER

Martin J.

Administrative Law Judge,
State Personnel Board.