

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 31763
)
 LORI ANN MILLS) **BOARD DECISION**
) (Precedential)
 From 1 step reduction in salary)
 for 5 pay periods as a Teacher)
 (Elementary Education) (Correction) **NO. 93-36**
 Facility) at the Preston School of)
 Industry, Department of the Youth)
 Authority at Ione.) November 30, 1993

Appearances: Joan Marie Maredyth, Attorney, on behalf of Appellant, Lori Ann Mills; Jay Aguas, Deputy Director, Department of Youth Authority, on behalf of Respondent, Department of Youth Authority at Ione.

Before Carpenter, President; Stoner, Vice-President; Ward, Bos and Villalobos, Members.

DECISION

Members Ward, Bos and Villalobos:

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the attached Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Lori Ann Mills from a 1 step reduction in salary for 5 pay periods in the position of Teacher (Elementary Education)(Correctional Facility) at the Preston School of Industry, Department of the Youth Authority. The discipline was imposed based on the fact that the appellant had been convicted of driving under the influence.

In the attached Proposed Decision, the ALJ sustained the salary reduction, rejecting appellant's argument that there is no

nexus between appellant's drunk driving conviction and her position

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as a teacher for juvenile offenders. The Board rejected the Proposed Decision in order to examine more closely the issue of nexus.

After a review of the entire record, including the transcript and written arguments of the parties, and having listened to oral arguments, the Board adopts the ALJ's findings of facts and conclusions of law. The Board further addresses the issue of nexus as follows.

In its earlier precedential decisions, the Board has attempted to draw a line as to when an off-duty incident of driving under the influence constitutes cause for discipline as a "failure of good behavior...outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment." [Government Code, §19572(t)]. The law is clear that in order to establish cause for discipline under §19572(t), the appointing power must show a "nexus" such that:

...the misconduct in question bears some rational relationship to the employee's employment and must be of such character that it can easily result in the impairment or disruption of the public service....'

(Yancey v. State Personnel Board (1985) 167 Cal.App.3d 478, 483.)

The Board has found a nexus between the off duty misconduct of driving under the influence and employment as a Correctional

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Officer with the Department of Corrections. [Gary Blakely (1993) SPB Dec. No. 93-20] Likewise, the Board has found a nexus between driving under the influence and the position of Group Supervisor with the Department of Youth Authority. [M ██████ M ██████ (1993) SPB Dec. No. 93-11]. In both Blakely and M ██████ the Board relied heavily on the fact that the appellants were peace officers sworn to uphold the law and were therefore held to higher standard of conduct.

In another line of cases, however, the Board has also held that the mere fact that an employee works in a correctional facility and interacts with inmates is insufficient to establish nexus to the misconduct of off-duty driving under the influence. [See Charles Martinez (1992) SPB Dec. No. 92-09 (no nexus between driving under the influence and position of Materials and Stores Supervisor at Mule Creek State Prison); Daniel J. Kominsky (1992) SPB Dec. No. 92-19. (no nexus between driving under the influence and position of Supervising Cook)]

The instant case does not fall neatly into either of the two above-described lines of cases. While appellant does not hold a peace officer position, we cannot say that a conviction for driving under the influence bears no rational relationship to the assignment she had at the time of the incident.

Appellant held the position of Teacher of Elementary Education at the Preston School of Industry. As noted in the ALJ's Proposed

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Decision (See para. III), one month prior to the incident appellant had been selected to teach in a pilot program called the LEAD program. The LEAD program was described as a high-profile pilot program designed to test whether a military environment would have a greater positive effect on younger boys with prior drug histories than did existing programs. One hundred percent of the wards in the LEAD program had prior substance abuse histories. The program was being watched closely by the Governor, the Legislature and the media.

We find that appellant's conviction for off-duty driving under the influence does bear a rational relationship to her special assignment as a teacher in the LEAD program based on the fact that the LEAD program was specifically designed for juveniles with substance abuse problems. The fact that appellant was already committed to teach in the program at the time of the incident

is sufficient to establish the connection, even though there were no students yet assigned to the program at that time.

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 adverse action of a one-step reduction in salary for 5 pay periods is sustained.
2. This decision is certified for publication as a Precedential Decision (Government Code § 19582.5).

STATE PERSONNEL BOARD

Lorrie Ward, Member
Floss Bos, Member
Alfred R. Villalobos, Member

Richard Carpenter and Alice Stoner dissenting:

We disagree with our colleagues' conclusion that a nexus exists in this case. The appellant is not a peace officer, and is not sworn to uphold the law by virtue of her position. While we do not in any way condone the misconduct of driving under the influence, we decline to find that appellant's misconduct, for which she was duly punished under the criminal law, bears such a rational relationship to her work that she must be punished by her employer as well. If the misconduct was truly of such a nature as to cause discredit to the LEAD program, then we are hard pressed to understand why the Department did not simply remove appellant from that program after the incident rather than take her salary.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on November 30, 1993.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board

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BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

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(Elementary Education))
(Correctional Facility) at the)
Preston School of Industry,)
Department of the Youth Authority)
at Ione)

PROPOSED DECISION

This matter came on regularly for hearing before Thomas M. Sobel, Administrative Law Judge, State Personnel Board, on December 1, 1992, at Ione, California.

The appellant, Lori Ann Mills, was present and was represented by Joan Marie Maredyth, her attorney.

The respondent was represented by Jay Aguas, Deputy Director, Department of the Youth Authority.

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

I

The above 1 step reduction in salary for 5 pay periods, effective July 31, 1992, and appellant's appeal therefrom comply with the procedural requirements of the State Civil Service Act.

II

Appellant began to work as a Teacher of Elementary Education at the Preston School of Industry in November 1990. Appellant's responsibilities as a teacher include providing instruction in academic subjects to wards in the custody of the department. Teachers are also expected to maintain order and supervise the conduct of wards and may be called upon to assume general custodial responsibilities in time of emergency. In general, teachers are expected to play an important role in the total rehabilitation process. Appellant is charged with intemperance and other failure of good behavior outside of duty hours. She has no prior adverse actions.

III

Sometime in spring 1992, appellant was selected to teach in a pilot program being conducted at the Preston School of Industry, called the LEAD program. LEAD is an acronym for Leadership, Esteem, Accountability, and Discipline and the LEAD program was designed to test whether an intense military environment can have a rehabilitative effect on wards in the juvenile justice system. The program is specifically aimed at youths with histories of substance abuse. Although planning for the program was underway in early spring 1992, the first students did not enter the program until September, 1992.

IV

On or about April 27, 1992 at approximately 11:35 p.m. appellant was driving a motor vehicle under the influence of

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alcohol. On June 8, 1992, she plead guilty to driving under the influence of alcohol; as a result, she was placed on 3 years probation, paid a fine of over \$1100.00, and was ordered to participate in the First Offender Alcohol Program. Appellant testified that she suffered additional consequences besides those contained in the adverse action: she was also required to perform nearly one hundred hours of community service and had to obtain counselling. Without a license, appellant has to pay someone to drive her.

V

Superintendent Greg Zermeno testified that he decided to take adverse action in this case because he believed that her participation in the LEAD program required her to be a role model for wards with substance abuse problems. Zermeno conceded that he was not aware that any wards knew of appellant's arrest and conviction, but that secrets are very hard to keep in the Youth Authority and that wards generally find out what has happened simply by overhearing staff conversations. While Zermeno acknowledged that appellant is not a peace officer, he contended that she was not being held to peace officer standards because a peace officer in a comparable position would have received a reduction in salary for a longer period of time.

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

Appellant initially contends there is no nexus between her job and the misconduct alleged as grounds for discipline. I disagree. Appellant's duty statement speaks of teachers as playing a role in the rehabilitative process. Indeed, in Parker v. State Personnel Board (1982) 120 Cal. App. 3d 84 the court of appeal countenanced the discipline of a youth guidance counsellor for off-duty possession of marijuana. Speaking of this case, our Board has recently opined: "there is clearly a nexus between a person whose job it is to counsel and guide young people convicted for crimes and that employee's possession of illegal drugs." Daniel J. Kominsky (1992) SPB No. 92-19

As a variant of the nexus argument, appellant also contends that her misconduct cannot be said to reflect upon either her employment or her employer because there was no proof that any of her students knew of her conviction. Indeed, the students did not even arrive until September, months after the incident in question and a month after her conviction. Although appellant admitted that other teachers knew of the incident, I do not believe that proof of embarrassment or harm to the department is necessary to justify discipline. Thus, in Nightingale v State Personnel Board (1972) 7 Cal. 3d 507, the Court described the legislative purpose behind Government Code Section 19572(t) as limiting discipline to "conduct which

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can be detrimental to the state service," which appears to imply that proof of actual harm is not required.

Appellant next contends that, as a teacher, appellant could only have been disciplined under the procedural requirements of the Education Code. Appellant was not being disciplined as a teacher: she was being disciplined as a state employee by her appointing authority, the California Youth Authority under specific provisions of the Government Code which apply to "any employee. . . whose name appears on any employee list." Government Code Section 19571 Indeed, if appellant's argument be accepted, it would follow that state lawyers could only be disciplined under whatever procedures apply to lawyer discipline and state nurses could only be disciplined under whatever procedures apply to them. Such a result seems plainly at odds with the system of disciplinary proceedings laid out in the Government Code for employee misconduct.

Appellant also contends that even if discipline be appropriate, the amount of discipline is too harsh considering the criminal penalties and other consequences she has already suffered. If, because of a nexus between appellant's misconduct and her employment, her appointing authority has an independent interest in disciplining her, it does not have to take into account any other penalties or consequences appellant has suffered at hands other than its own or through no cause of its own.

There remains the question of the appropriate level of

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discipline. Since our Board has stated that "harm or potential harm to the public service is almost certain to exist" where nexus is found, G. O. (1992) SPB No. 92-11, it is found that appellant's conduct harmed the public service. While I cannot conclude that any recurrence of similar misconduct is likely, the department's action is not so severe as to be considered an overreaction even if the misconduct never recurs.

* * * * *

WHEREFORE IT IS DETERMINED that the 1 step reduction in salary for 5 pay periods taken by respondent against Lori Ann Mills, effective July 31, 1992, 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: January 5, 1993.

THOMAS M. SOBEL

Thomas M. Sobel, Administrative Law
Judge, State Personnel Board.