BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 33938
	)	
RICHARD STANTON	)	**BOARD DECISION**
	)	(Precedential)
	)	
From 2 working days' suspension from the position of Tree Maintenance Leadworker with the Department of Transportation at Fresno	)	**NO. 95-02**
	)	
	)	January 4, 1995

Appearances: Mark Kyle, Attorney, International Union of Operating Engineers, on behalf of appellant, Richard Stanton; Stephen J. Booth, Representative, Department of Transportation, on behalf of respondent, Department of Transportation.

Before Carpenter, President; Lorrie Ward, Vice President; Alice Stoner, Floss Bos and Alfred Villalobos, 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 Richard Stanton (appellant or Stanton) from a two working days' suspension from the position of Tree Maintenance Leadworker with the Department of Transportation at Fresno. (Department). After a hearing, the ALJ revoked the two days' suspension finding that appellant's single insubordinate act was insufficient grounds for the Board to find insubordination under Government Code § 19572 (e). The Board rejected the ALJ's Proposed Decision and determined to decide the matter itself.

After a review of the entire record, including the transcript, the stipulated facts, and the written and oral

arguments of the parties, the Board sustains appellant's suspension for the following reasons.

FACTUAL SUMMARY

Appellant was appointed a Tree Maintenance Worker on October 20, 1970. On November 1, 1981, appellant was appointed a Tree Maintenance Leadworker. Appellant has no prior adverse actions.

According to the State Personnel Board specifications governing the Tree Maintenance Worker Series dated February 8, 1989, the minimum qualifications for appellant's job classification require that he possess a Class 3 driver's license. In January of 1989, the legislature revised the Vehicle Code to revamp the driver's license classifications. (Vehicle Code § 12804.9 (b).) The new law replaces Classes 1, 2 and 3 with Classes A, B and C. Although the new classifications are loosely comparable to the old classifications, the new classifications are more than a simple name change. Both the old and new classifications are based on the amount of weight and number of axles of various vehicles. The new law primarily changed some weight and axle requirements. One result of the change is that some vehicles formerly driven by drivers holding Class 3 licenses can no longer be driven by drivers holding only Class C licenses.

As noted in the stipulated facts below, after the Vehicle Code was amended, appellant voluntarily applied for a Class B license. To qualify for a Class B license, an applicant must acquire a medical certificate and carry it with him at all times he is driving vehicles that require a Class B license. (Vehicle Code § 12804.9 (c).) The Department paid for both the Class B license and the medical examination.

On August 16, 1993, appellant told his direct supervisor that he lost his medical certificate. His supervisor assigned appellant to mowing grass.

At the hearing, the parties stipulated to the truth of the allegations set forth in the Notice of Adverse Action which read as follows:

> On August 17, 1993 you called Fresno Region Manager Pat Van Allen stating you were being harassed by your Supervisor Ron Maurer for not driving equipment you were assigned to operate. You repeatedly stated that not getting the 5% salary pay increase was not right. Pat Van Allen advised you there was nothing he could do to make the pay issue get resolved any sooner. You stated your job did not require Class "A" or "B" license. Pat Van Allen advised you the equipment you were operating and your job duties had not changed but that DMV requirements had, therefore Pat Van Allen gave you the following options:
>
> 1. Go to DMV, get your lost medical certificate replaced as you said it was lost and you thought it was expired, and do the job as you have done in the past.
>
> 2. Without the trucks the tree work would be done using ropes, saddles and climbing in the trees. Your

response was that using boom trucks was safer and the rules state the safest method available must be used. Pat replied that your refusal to get the medical card made the boom truck method unavailable and you took that method away.

3. Be assigned to Maintenance where the situation could accommodate your Class "C" license and where you could be productive and supervised by a Maintenance Supervisor.

You claimed this was harassment. You were reminded you voluntarily got the Class "B" license and medical using state time and money to pay for the license. You were also reminded of the unnecessary disruption caused by you leaving the trucks in Bakersfield when you claimed your medical has expired or was lost and this caused undue hardship to your crew members in having to ferry the trucks back to Visalia.

Pat advised you he had a DMV report that showed your medical had not expired. You then stated you didn't care whether your medical had expired or not you would not go to DMV for another one. Pat advised you he was instructing John Nail, Fresno West Avenue Area Superintendent to take you to DMV to get your medical card replaced. At this time you said, "I will not unless you put it in writing." Pat advised you this type of behavior is insubordination for refusing to follow instructions. You responded you would not refuse to follow the instructions if Pat put the order in writing. You repeatedly stated you were not being insubordinate but you would only do it if Pat put it in writing.

Pat advised you he only had one option left, which was to assign you to Maintenance under John Collum, Supervisor in the Visalia Maintenance Station. Again, you said this was harassment. You were told the Visalia Territory was involved in a major paving operation with several crews involved, and John Collum had productive work available.

On August 18, 1993, appellant was out on sick leave. On August 19, 1993, appellant reported to work with a valid medical certificate. Appellant testified that on the evening of the 17th he went to Valley Industrial Clinic where he received a certificate replacing the one he lost.

The Department charged appellant with insubordination pursuant to Government Code section 19572 subdivision (e)[1], solely based on his statements that he would only follow the Region Manager's instruction if the manager put the instruction in writing.

ISSUES

This case presents the following issue for discussion:

Whether one incident may properly constitute cause for discipline under Government Code § 19572, subdivision (e) insubordination.

DISCUSSION

The ALJ found that one act of insubordination is insufficient to support a finding of insubordination under the statute. The ALJ's finding is based on a definition of insubordination found in Coomes v. State Personnel Board. (1963) 215 Cal.App.2d 770. In Coomes, the court discussed

[1]The Department originally alleged Government Code § 19572, subdivision (o) willful disobedience as an additional cause for discipline. This charge was dismissed at appellant's Skelly hearing.

"insubordination" as a ground for discipline, the latter "willful disobedience." The two terms overlap. So far as they are distinguishable, dictionary definitions indicate that disobedience connotes a specific violation of command or prohibition, while insubordination implies a general course of mutinous, disrespectful or contumacious conduct. Id. at 775.

Based on the Coomes definition, the ALJ found that a single incident could not constitute insubordination because a single incident does not establish a "general course of . . . conduct." As discussed below, we think the ALJ's reading of Coomes is unnecessarily restrictive.

The issue in Coomes was not whether a single act could form the basis of a finding of insubordination. The issue was whether insubordination required intent, or, as described by the court, "volitional coloration which excludes the notion of accidental or negligent conduct."(Id.)

The facts of Coomes are reasonably straightforward. Coomes was a Psychiatric Technician dismissed for participating in the beating of a patient by restraining the patient while other employees beat him. Coomes was charged with both insubordination and willful disobedience.

In reviewing the record, the court found that the evidence demonstrated that other employees applied excessive and improper force. The record disclosed, however, that Coomes had used an

appropriate restraining technique. There was no evidence that Coomes saw the actions of his co-workers or that he continued to hold the patient after he became aware that his co-workers were beating the patient. As the court described it, there was no "guilty knowledge."

In analyzing whether Coomes' actions should be subject to discipline, the court noted that subdivision (o) willful disobedience specifically required a finding of willfulness but that insubordination had no such modifier. (Id. at 775.) The court was clearly concerned that if accidental or negligent conduct was enough, Coomes' participation in the beating would be sufficient to find insubordination. Despite the lack of modifier, the court determined that proof of intent was necessary to establish insubordination as well as willful disobedience.

The court's analysis is important not for what the court found, but for what the court failed to find. The court did not find that the single incident charged against Mr. Coomes was insufficient to establish insubordination. A close reading of the decision indicates that the charge of insubordination would have been established but for the requirement of intent read into the statute by the court. Thus, the court which defined insubordination as a "general course of mutinous, disrespectful or contumacious behavior" did not itself expressly limit the cause of action to require more than a single act.

The only other California court case relied upon by the ALJ to support the conclusion that a charge of insubordination cannot be predicated on a single incident is Neely v. California State Personnel Board (1965) 237 Cal.App.2d 487. In Neely, the court questioned the board's determination that a particular incident that occurred on April 17, 1963 constituted insubordination. The entire charge concerned the interaction described below.

After Neely was informed by memorandum that he had been relieved of his duties, Neely confronted his supervisor. Neely asked his supervisor "'What in Hell do you mean by this?'" The supervisor explained that he was not getting enough cooperation from Neely concerning reassignments he had asked Neely to make. Neely replied, "'Well in my estimation this is a shitty ass way of doing things.'" (Id.)

In its analysis, the Neely court adopted the definition of insubordination found in Coomes, emphasizing the words "general course of mutinous, disrespectful and contumacious conduct." Id. The court found that the board erred in finding insubordination based "entirely upon [the events of April 17, 1963]" (emphasis in original).(Id.)

The ALJ reads the court's emphasis to require more than one act of insubordination. A more complete reading of the decision, however, reveals that the court declined to find insubordination because Neely had already obeyed his supervisor's order to

reassign the cases. In considering all the circumstances (the entire course of conduct), the court found Neely's April 17, 1963 statements to be insufficient to constitute insubordination, not because there was only one incident, but because there was no refusal to obey a legitimate order.

Neither has the case law since Neely established any legal requirement that the Department prove more than one insubordinate act to establish insubordination as cause for discipline. In fact, several cases have based a finding of insubordination on a single incident. [See Flowers v. State Personnel Board (1985) 174 Cal.App.3d 755 (one incident of failing to submit to a sobriety test when ordered to do so constituted insubordination); Martin v. State Personnel Board, 132 Cal.App.3d 460 (correctional officer found to be insubordinate for one incident of refusing to work her scheduled hours); Fout v. State Personnel Board (1982) 136 Cal.App.3d 817 (CHP officer found to be insubordinate for refusing to cooperate during an administrative investigation); Black v. State Personnel Board (1955) 136 Cal.App.2d 904 (insubordination found when state employee purposely communicated confidential information after he was specifically ordered not to release the information)].

Our holding today, that a single incident may be sufficient to constitute insubordination, is, likewise, consistent with our own precedent. In Robert R. Watson (1994) SPB Dec. 94-10, we Watson, as here, the appellant ultimately obeyed his supervisor's

found that appellant's initial refusal to conduct a hearing constituted insubordination. (Watson at 28.) Notably, in order.[2]

In summary, to support a charge of insubordination, an employer must show mutinous, disrespectful or contumacious conduct by an employee, under circumstances where the employee has intentionally or willfully refused to obey an order a supervisor is entitled to give and entitled to have obeyed. (Coomes, 214 Cal.App.2d at 775; Fortunato Jose (1993) SPB Dec. No. 93-34 at p. 4; See also Caveness v. State Personnel Board (1980) 113 Cal.App.3d 617, 629.) A single act may be sufficient to constitute insubordination if it meets the above test.

Appellant was ordered to go to the DMV with another employee to get his medical certificate. In giving the order, the Region Manager explained that appellant could not efficiently perform his job functions without the certificate. Appellant stated he would not comply until the Region Manager put the order in writing. Appellant has no right to put conditions on his obedience. Appellant's initial refusal to obey his supervisor's order constitutes insubordination. The Department's assessment

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[2]As noted in Coomes, there is an overlap between willful disobedience and insubordination. We do not here decide whether Stanton was willfully disobedient. This question is not now before the Board since willful disobedience is no longer charged.

of a two working days' suspension is appropriate under the circumstances.

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 two working days' suspension against appellant Richard Stanton is sustained.

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

THE STATE PERSONNEL BOARD*

Richard Carpenter, President
Lorrie Ward, Vice President
Alice Stoner, Member
Alfred R. Villalobos, Member

*Member Floss Bos was not present and therefore 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 January 4, 1995.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board