

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 36863
)
 PAUL M. VIRGA) **BOARD DECISION**
) (Precedential)
)
 From demotion from the position) **NO. 96-05**
 of Data Processing Manager II)
 to the position of Associate)
 Programmer Analyst (Specialist))
 with the Secretary of State)
 at Sacramento) April 1-2, 1996

Appearances: Loren E. McMaster, Esq., on behalf of appellant, Paul M. Virga; Charles D. Sakai, Legal Counsel, Department of Personnel Administration, on behalf of respondent, Secretary of State.

Before: Lorrie Ward, President; Floss Bos, Vice President; Richard Carpenter and Alice Stoner, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) after the Board rejected the attached Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Paul M. Virga (appellant) from demotion as a Data Processing Manager II to Associate Program Analyst (Specialist) with the Secretary of State (Department). The appellant was demoted by the Department for being incompetent, inefficient, and inexcusably neglectful of his duties in that, among other things, he produced very little substantive work product during 1994 after spending almost a thousand hours on a project known as the PIERS project. The ALJ found that appellant was indeed incompetent, inefficient and inexcusably neglectful of his assigned duties during 1994 and that his poor performance warranted his demotion. The ALJ chose, however, to modify the demotion to a temporary one-year demotion on

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the grounds that the Department failed in its duty to administer progressive discipline to appellant prior to imposing the demotion.

The Board rejected the Proposed Decision, asking the parties to present arguments as to what the appropriate penalty should be under all of the circumstances. After reviewing the record, including the transcript, exhibits¹ and the written and oral arguments of the parties, the Board finds substantial evidence to support the findings of fact and conclusions of law set forth in the ALJ's attached Proposed Decision and therefore adopts this decision as its own, with the exception of the discussion on pages 20 and 21 concerning the Department's failure to administer progressive discipline. The Board finds, contrary to that discussion, that the Department need not have administered progressive discipline to the appellant, under the circumstances of this case, in order to justify his permanent demotion and thus sustains appellant's permanent demotion from the position of Data Processing Manager II to Associate Program Analyst (Specialist).

DISCUSSION

Motion To Introduce Additional Evidence

Just prior to the submission of this case to the Board, the appellant filed a motion to augment the administrative record with three additional exhibits: Exhibits AA, BB and CC.

¹ As shown below, three additional exhibits were presented to the Board by the appellant after the hearing before the ALJ and have been admitted into evidence.

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Exhibit AA is a memorandum dated August 4, 1995 from Chief Deputy Secretary of State Robert Lapsley to the Office of Information Technology stating that an agreement had been reached and that the Office would complete seven outstanding PIERS "over the course of the next five months." Appellant argues that this document is relevant to show that the PIERS assignment was not important to the Department based on the fact that the project was not assigned to anyone after appellant failed to complete it and was still not completed as of August 4, 1995.

Exhibit BB is a memorandum from Robert Lapsley dated September 6, 1995 announcing the appointment of David B. Gray to the position of Division Chief for Information Technology at the Office of the Secretary of State. The appellant submitted this document to the Board alleging that it contradicted the Department's prior evidence that such a person needed to be hired right away in 1994 as completion of the PIERS project was deemed "critical".

Finally, Exhibit CC is a memorandum from Judy Riley to appellant dated September 21, 1995, asking the appellant to complete all outstanding PIERS. The appellant contends that this document belies the Department's assertion that completion of the PIERS was critical, since they were still not completed late into 1995. Appellant also asserts that this document belies the Department's allegation that appellant was too incompetent to be relied upon to complete the task.

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The Department did not object to the introduction of these exhibits into evidence at the hearing before the Board, and the Board took appellant's motion under submission. Finding no objection to the admission of these exhibits into evidence, the Board grants appellant's motion and considers these documents to be part of the record.²

Progressive Discipline And Its Impact On The
Issue of the Appropriate Penalty

When performing its constitutional responsibility to review disciplinary actions [Cal. Const. Art. VII, section 3(a)], the Board is charged with rendering a decision which is "just and proper." (Government Code section 19582.) In determining what is a "just and proper" penalty for a particular offense, under a given set of circumstances, the Board has broad discretion. (See Wylie v. State Personnel Board (1949) 93 Cal.App.2d 838.) The Board's discretion, however, is not unlimited. In the seminal case of

² While we conclude that this evidence is admissible before the Board, we do not find that it sways our opinion, as expressed in this decision, that there exists a preponderance of evidence to support appellant's demotion. Neither the fact that the Department did not quickly reassign the task of completing the PIERS, nor the fact that the Department ultimately handed the task back to appellant late in 1995, alters our conclusion that appellant was given the project in 1994 of working toward completion of the PIERS, a project on which he contends he spent almost a thousand hours, but failed to produce substantive work product during that time.

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Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194, the California Supreme Court noted:

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) 15 Cal.3d at 217-218.

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 factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board considers are those specifically identified by the Court 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. (Id.)

As set forth in the attached Proposed Decision at pages 18 and 19, the penalty of demotion is appropriate under all of the circumstances. Grave harm inures to the public service when high-ranking employees fail to assume responsibility for timely completion of their assignments. We concur with the ALJ that appellant presented no legitimate excuse as to why he failed to produce substantive work product evidencing progress towards completion of the PIERS project after admittedly spending almost one thousand hours on it during 1994. Moreover, not only does the evidence reveal that appellant failed to follow through towards

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completion of the PIERS project, but it also reveals that appellant performed very little work of any benefit for the Department during 1994 while accepting his salary at the expense of taxpayers. As the ALJ rightly concluded, formal discipline is warranted against appellant and demotion is an appropriate penalty to impose.

We disagree with the ALJ that the mere absence of prior discipline or warnings in this case mandates modification of the penalty of permanent demotion.

In the case of R. [REDACTED]. N. [REDACTED] (1992) SPB Dec. No. 92-07, the Board addressed its view concerning the principle of progressive discipline:

Historically, the SPB has followed the principles of progressive discipline in exercising its constitutional authority to review disciplinary actions under the State Civil Service Act. The principles of progressive discipline require that an employer, seeking to discipline an employee for poor work performance, follow a sequence of warnings or lesser disciplinary actions before imposing the ultimate penalty of dismissal. R. [REDACTED]. N. [REDACTED] at p. 6.³

As we later stated in the case of Mercedes Manayao (1993) SPB Dec. No. 93-14:

The purpose of progressive discipline is to provide an employee with an opportunity to learn from prior mistakes and to take steps to improve his or her job performance, prior to the imposition of harsh discipline. Manayao at page 11.

³ Progressive discipline is not required prior to dismissing an employee for serious willful misconduct. N. [REDACTED] at p. 6, fn. 3.

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In Manayao, the Board dealt with the issue of whether the principle of progressive discipline requires a department to prove it administered a lesser form of formal discipline prior to demoting an employee on the basis of poor work performance. We held in that decision that it was not incumbent upon a department to make such a showing and that, in Manayao's case, the informal warnings and counselling sessions she had received constituted sufficient progressive discipline to justify Manayao's demotion.

In the instant case, however, appellant received neither counselling, warning nor prior discipline prior to being served with a permanent demotion. While we believe that, in general, some form of counselling, warning or prior discipline is generally advisable before a department, based on work performance problems, demotes an employee permanently from his or her position, the Department was not remiss, in the instant case, from imposing a permanent demotion in the first instance.

For one, we are not dealing here with a traditional case of poor work performance where an employee is performing his or her work to the best of his or her ability, ignorant of the fact that his or her method of performing the work is incorrect or at odds with department policy. Such a situation indeed would generally warrant that a department counsel or warn the employee as to his or her mistakes, allowing the employee sufficient time to correct the situation, prior to imposing a permanent demotion. In this case,

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appellant was not operating under some misapprehension as to the proper means of performing his duties or having difficulties successfully accomplishing his duties. Appellant simply stopped putting forth any effort to perform his assigned work, while attempting to give the Department the impression through his timesheets that he was busily working towards completion of the PIERS project. We view this conduct as more akin to a case of employee misconduct than a traditional case of poor work performance. Accordingly, in this case, the traditional purpose of progressive discipline would not have been furthered by providing appellant with a series of warnings or disciplinary actions, to assist him in learning from his mistakes so he could improve the quality of his work performance.

Second, we consider in our decision the fact that appellant was a 36 year state employee who spent 13 of his last years as manager of an entire unit in the Department. An employee of that level and tenure is generally expected to work independently, with little guidance or supervision, and to take responsibility for assuring timely completion of projects assigned to him or her. A Department need not provide such an employee with a warning or prior disciplinary action prior to demoting him or her from a high-

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level position based on a failure to put forth even minimal work effort.⁴

Additionally, we note that while a permanent demotion is a harsh penalty, appellant has not been dismissed from state service. Furthermore, while the demotion is not truly temporary in the sense that its duration is unspecified, neither is it permanent in the sense that appellant can never again serve in the higher classification. If the appellant should once again show himself to be a productive, efficient employee, he can then apply for a promotion to his former position.

In conclusion, we find the penalty of permanent demotion was appropriate, under all the circumstances of this case.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Government Code section 19582, it is hereby ORDERED that:

1. The demotion of Paul M. Virga from the position of Data Processing Manager II to Associate Program Analyst (Specialist) with the Secretary of State is sustained.

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

⁴ While not mandated, the better practice would have been to monitor appellant's progress on a more regular basis.

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THE STATE PERSONNEL BOARD*

Lorrie Ward, President

Floss Bos, Vice President

Richard Carpenter, Member

Alice Stoner, Member

*Member Ron Alvarado was not present when this decision was adopted.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on April 1-2, 1996.

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

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BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal By)	
PAUL M. VIRGA)	Case No. 36863
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of Data Processing Manager II to)	
the position of Associate)	
Programmer Analyst (Specialist))	
with the Secretary of State)	
at Sacramento)	

PROPOSED DECISION

This matter came on regularly for hearing before Kymberly M. Pipkin, Administrative Law Judge, State Personnel Board, on March 27, April 3 and 12, 1995, at Sacramento, California.

The appellant, Paul M. Virga, was present and was represented by Loren E. McMaster, Esq.

Respondent Secretary of State was represented by Charles D. Sakai, Legal Counsel, Department of Personnel Administration.

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

I

JURISDICTION

The above demotion effective February 24, 1995, and appellant's appeal therefrom, comply with the procedural requirements of the State Civil Service Act.

II

EMPLOYMENT HISTORY

Appellant began working for the State of California as a Junior Clerk with the Franchise Tax Board on September 22, 1958. In March 1969, he transferred as an Associate Data Processing Staff Analyst to the Department of Justice, where he held a variety of positions in the data processing field over the next eleven years.

On January 1, 1980, he was promoted as a Data Processing Manager II (DPM II) by the Secretary of State (the department), and held this position until the demotion of two classification levels. No prior disciplinary action has been taken against appellant⁵ in over 36 years of state service.

III

ALLEGATIONS

As cause for the demotion, respondent alleged that appellant failed to prepare post implementation evaluation reports (PIERs) on various computerization projects during a two year special assignment.

Respondent alleged that appellant's conduct constitutes incompetency, inefficiency, and inexcusable neglect of duty, in violation of Government Code section 19572, subdivisions (b), (c) and (d), respectively.

⁵ Appellant received an official reprimand in 1987, which is not considered under Government Code section 19589.

IV

PROCEDURAL ASPECTS

Respondent called five witnesses and introduced eight exhibits which were received into evidence. Appellant testified on his own behalf, called three witnesses, and presented nineteen exhibits which were received into evidence. Witnesses were sequestered. The case was submitted for decision after closing oral argument at the end of the hearing on April 12, 1995.

V

FINDINGS OF FACT

Appellant has served as the manager for the Information Services Section (ISS) since January 1, 1980. Starting in 1985, ISS began to grow as automated database systems were implemented for most programs within the department's jurisdiction.

One year after implementation of a reportable automation project, the State Administrative Manual (SAM) requires a department to submit a PIER to the Office of Information Technology (OIT). A PIER evaluates the original program goals; defines each functional requirement; describes the design and objectives of the system; and documents the extent to which the design and objectives were met or modified. A PIER also analyzes the program costs and benefits, the degree to which anticipated cost controls were met, and makes recommendations to reflect current system needs.

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As the ISS manager, appellant was responsible for completion of PIERs. No PIER was ever submitted to OIT for the department's six reportable automation projects during appellant's tenure. Inadequate staffing precluded appellant from working on the PIERs when they were due.

In October 1993, the Department of Finance (DOF) and OIT denied the department's budget change proposals (BCP's) to augment staff for projected operations, citing the failure to submit PIERs as reason for the denial.

VI

To address the critical need to submit PIERs, Irene Griggs (Griggs), appellant's supervisor and Chief of Management Services, developed a two-pronged approach. She hired a consultant, Bob Podesta (Podesta), to draft the PIERs. Podesta worked from January 1 to September 22, 1993; Griggs was his contract manager.

Griggs also submitted a plan to the Department of Personnel Administration (DPA) to reorganize ISS. DPA approved the plan on February 16, 1993. The reorganization freed appellant from normal supervisorial duties for two years to address policy and planning concerns, and completion of the PIERs was one of his chief duties.

Griggs testified that she discussed the reorganization with appellant and Judy Riley (Riley)⁶ on February 17, 1993. Neither appellant nor Riley remembered such a meeting. Griggs' monthly attendance report for February 1993 reflects

⁶ Riley was known as Judy Broux at that time.

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that she was absent due to illness from February 16 through 26.

Riley was familiar with the reorganization package; she had input into the organization charts and reviewed some of the text.

She understood that appellant was being reassigned to complete the PIERS. Riley assumed supervision of ISS after Griggs issued a memorandum (memo) on March 16, 1993, to ISS staff about the reorganization.

Appellant acknowledged that he was relieved of his supervisory duties and reassigned to work on special projects in March 1993. He denied that Griggs gave him a copy of the reorganization plan and/or a new duty statement. He testified that Griggs did not tell him how long the special assignment would last, and/or that he would have primary responsibility for the PIERS.

Appellant also acknowledged that he received Griggs's March 16 memo on the reorganization which stated, in pertinent part:

"Paul, as our Data Processing Officer, will be working full time with me to jump through whatever hoops we must to document our projects (from FSR to PIER) to meet the OIT's requirements as defined in SAM. We now have 5 to 7 PIERS overdue and cannot make major enhancements to these systems until OIT knows how we've done so far. To assist Paul, we have contracted with Bob Podesta. You can look forward to seeing a great deal of these two.

"While Paul is working on these studies, Judy will assume full responsibility for the day-to-day operations of ISS and all staff will report (through their regular chain of command) to Judy. . . .

"We are very hopeful that this redirection of staff will enable us to present our needs to OIT and DOF to get the resources we need to more effectively

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address your application needs. . . ."

Appellant testified that he was to assist Podesta, rather than Podesta was to help him on the PIER's.

VII

During 1993, Griggs had only casual contact with appellant about the PIERs assignment and rarely met with both appellant and Podesta. Appellant and Podesta had little contact with each other. Appellant was given several special projects after his reassignment. He first worked on a proposal to hire a senior technical consultant, which took approximately 100 hours from February through April 1993. He next worked on a reconciliation of Teale Data Center billings from the 1992 election, which consumed several weeks.

The largest impact upon appellant's work output during 1993 was his excused absences due to medical problems⁷, rather than the special assignments.

VIII

Podesta prepared drafts for the printing, political reform and limited partnership PIERs during the contract period of January - September 1993. He left numerous "holes" in the drafts which were denoted by phrases such as "(EXPLANATION NEEDED)." Podesta and Griggs anticipated that appellant would complete these gaps, as he had superior

⁷ In 1993, appellant utilized 56 hours of leave credits in March; 88 in April; 64 in May; 56 in June; 96 in July; 120 in August; 104 in September; 160 in October; 152 in November; and 172 in December. He was not at work from early September through December 31, 1993.

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knowledge as to how the systems were developed.

After Podesta completed each draft PIER, he left a copy on appellant's desk. Podesta never received any feedback from appellant, nor did appellant ever meet with Podesta to review the drafts. Griggs never asked to meet with Podesta and appellant to discuss or review any of Podesta's drafts.

IX

Appellant returned to work on January 3, 1994, after a four month absence. Podesta was no longer under contract. Riley was still supervising ISS. On January 7, 1994, Griggs assigned appellant to develop a proposal to hire another consultant to work on the PIERs.

In early January 1994, Griggs requested ISS staff to submit a weekly summary of their time and activities. Although this practice was abandoned shortly thereafter by other staff, appellant continued to submit his weekly summaries to Griggs until early May 1994. He continued to keep weekly summaries for his own records during the remainder of 1994.

At the end of January, Griggs told appellant that funding was not available for another consultant, and he would continue to have responsibility for writing the PIERs. In a January 26, 1994, memo, Griggs specifically directed appellant to review and organize Podesta's work on the PIERs. Appellant spent approximately six weeks reviewing and organizing Podesta's files.

X

In late March 1994, Griggs asked appellant to finish the limited partnership PIER. In late May, Griggs told appellant to submit his finished work product on the limited partnership PIER by the end of June. At the end of June, appellant was absent due to an illness in his family. He did not submit the PIER when he returned. Griggs did not give appellant any further deadline(s) for submission of the PIER.

XI

On November 14, 1994, Griggs directed appellant to meet with her and her supervisor, Jerry Hill (Hill), Assistant Secretary of State, on November 16, 1994, and to bring copies of all completed work and work-in-progress on the PIERS to the meeting. At the meeting, appellant distributed a one-page work outline for the limited partnership PIER and brought his draft of that PIER⁸. Appellant could not adequately explain the work he had performed during the past six months. He asked to meet alone with Hill. Griggs left the room.

Appellant asked Hill for another assignment and told Hill that he could not work with Griggs. Hill told appellant that he would "work on it". Hill did not direct appellant to stop working on the PIERS.

Appellant contended that he was removed from the PIERS assignment at the November 16 meeting. This argument is rejected. Griggs did not change appellant's assignment at the

⁸ These documents were the sole work products appellant submitted to department superiors during 1994 and 1995 until his demotion.

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meeting, although they had no further discussions on appellant's work and/or progress on assignments after the meeting. Appellant asked Hill for work several times after the meeting, but was not given an assignment by Hill.

XII

Appellant's weekly time reports for the period of November 16 through December 31, 1994, indicate that he performed no work on the PIERS and had no other assignment. Appellant reported that he spent one hour on break, one hour in meetings, and six hours on "administrative" functions during each day worked in the period. Appellant did not keep weekly time reports in 1995. He testified that he had nothing to do prior to his demotion.

Griggs denied appellant a pay-for-performance increase in January 1995. Hill met with appellant on January 5, 1995, and told him that he had several options: retire, find another job, voluntarily demote, or receive disciplinary action.

XIII

Appellant claimed that the PIERS should not have been assigned to him because he had helped to design many of the systems. He cited language in Podesta's contract, "To insure the most objective and independent evaluation, it is vital that an independent contractor not have been involved in the design of the system being studied."

Riley testified that PIERS are typically prepared by a department's data processing section. If an independent contractor had designed the system, the contractor would be

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precluded from evaluating it. Riley, Griggs and Hill testified that appellant was the best person to complete the PIERs because of his experience as the ISS manager.

XIV

Appellant alleged that Podesta's work was corrupted by Griggs' father, which interfered with his ability to work on the PIERs. Griggs brought her father, an Alzheimer's victim, to work for several weeks during 1993. She permitted him to use Podesta's computer after Podesta's contract expired. Appellant discovered that Griggs' father had overwritten the first page on one of Podesta's draft PIERs when he reviewed Podesta's work in late January or early February 1994. It took appellant approximately one-half to one hour to determine that the rest of the document had not been corrupted.

XV

Appellant alleged that Griggs demoted him to create a position for herself. Griggs's career executive appointment (CEA) was in jeopardy after the November 1994 election. She had mandatory return rights to a DPM II position with DOF, and exercised these rights. She had returned to DOF at the time of the hearing.

XVI

Appellant asserted that the PIERs assignment was unnecessary. He claimed that in October 1994, he was informed by John Adams (Adams) at OIT that the PIERs would not be reviewed by OIT, because they were so late and the current

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systems bore little relationship to the initial ones. Appellant did not seek official confirmation of this conversation. He did not disclose this information to Hill or Griggs until their November 16, 1994, meeting.

Riley testified that sometime in 1994, Adams told her that the PIERS were still required. Griggs, Hill and Chief Deputy Robert Lapsley testified that the lack of PIERS has severely harmed the credibility of the department with DOF and OIT, and continues to interfere with the department's ability to obtain approval for its BCPs and other projects.

XVII

Appellant argued that he was given other assignments which interfered with the time available to draft the PIERS. This argument is accepted during 1993, but not in 1994.

Appellant cited a February 4, 1994, memo to control agencies which designated him as the Information Security Officer under the department's annual risk management certification. On his weekly time summaries, appellant identified three special projects on which he worked in 1994: "Security and Risk Management: Disaster Recovery Planning"; "Agency Information Mgmt Strategy (AIMS)"; and "Consultant RFP for PIERS" for summaries through January 30, 1994, and "PIERS" for summaries thereafter. The weekly summaries reflect that appellant spent 36 hours during 1994 on the security and risk management project in which he was designated as the department's Information Security Officer. He recorded 18.5

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hours on the AIMS special project⁹. He devoted 982 hours to the PIERS project prior to November 16, 1994.

Appellant identified eight other time reporting categories: "miscellaneous", "administration", "meetings", "training", "breaks", "sick leave", "personal time off", and "state holiday (includes SHC/PH)." He worked 18 hours during 1994 on miscellaneous assignments, and reported 456 hours to the "sick leave", "personal time off" and "state holiday" categories.

After May 9, 1994, when he stopped submitting weekly summaries to Griggs, through November 6, 1994, appellant consistently reported five hours of work each day devoted to the PIERS project, one hour on break, one hour in meetings¹⁰, and one hour on administrative functions¹¹.

Appellant's weekly summaries, however, did not specify the particular task(s) performed on the PIERS. The only specific entry, on August 10, 1994, noted that appellant informed Griggs that he had completed phase I of his work plan for the limited partnership PIER and was working on phase II. Griggs asked when he would meet with the limited partnership

⁹ Appellant's estimate was corroborated by Susan Huiga, Chief of Policy Planning and Budget. She testified that the Operational Recovery Plan was a special project of hers and that a consultant drafted the strategic plan. Appellant was asked to attend approximately five or six meetings on AIMS, each of which lasted one to two hours.

¹⁰ Appellant did not attend ISS staff meetings and never met with the limited partnership staff.

¹¹ Administrative functions involved responding to his mail and reading trade journals.

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staff, and he told her he would meet with them within the next month.

Appellant never met with the limited partnership staff, however. The weekly summaries show 90 hours of work on that PIER in September 1994, 95 hours in October 1994, and 39 hours in November 1994, until the meeting on November 16, 1994. There is no work product to substantiate the use of this time by appellant.

Both Podesta's and appellant's drafts of the limited partnership PIER were received into evidence. A line-by-line comparison of the two documents reveals that appellant did no original work on the text of that PIER. The format of the document was changed, such as fonts and line spacing, and tables were placed on separate pages. No substantive changes were made to Podesta's text in appellant's draft. The few grammatical errors made by Podesta were not corrected by appellant. Appellant made very few non-substantive changes¹². There are over six dozen entries in Podesta's draft which indicate areas in which appellant was required to provide additional explanation. No text was added by appellant to these areas in his draft.

* * * * *

¹² The biggest change that appellant made to Podesta's draft was his reorganization of the "performance criteria" (appellant's draft at pages 20 through 22; Podesta's draft at pages 24 and 25). Appellant did not change the actual text, however.

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

Appellant is a very experienced manager and is expected to perform his work and complete projects with a minimum of supervision and direction. He may not have understood what his role was to be in drafting the PIERs, in large part because of the lack of communication among Griggs, Podesta and himself during 1993. Nevertheless, as a high level department manager, appellant must bear some responsibility for this lack of communication.

Appellant was given several other special assignments in 1993. His health problems resulted in poor attendance and interfered with his ability to work on, much less complete, any assignments in 1993.

During 1994, however, appellant did not have health problems. There was no other consultant working on the PIERs project. He was rarely given any other projects or duties, as reflected by his documentary evidence. He was given specific assignments on the PIERs, first to review and organize Podesta's work in January, and then, in March, to finish the limited partnership PIER, for which Podesta had already prepared a draft.

Despite devoting 982 hours to the PIERs project in 1994, appellant produced virtually no original work product and did not further complete or revise Podesta's draft, other than to clean up the format of the document, largely a clerical task.

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Appellant identified activities which needed to be performed to complete the PIER, but he did not undertake any of the tasks he himself designated as critical, such as interviewing staff, and had no credible explanation for his failure to do so.

The Board defines incompetence as ". . .generally found when an employee fails to perform his or her duties adequately within an acceptable range of performance." (*Fortunato Jose* (1993) SPB Dec. No. 93-34.) Appellant's failure to produce any original work product on the limited partnership PIER after months of work in 1994 constituted incompetence in violation of Government Code section 19572, subdivision (b).

Inefficiency has been defined as ". . .an employee's failure to produce an intended result with a minimum of waste, expense or unnecessary effort. . . ." (*F. E.* (1993) SPB Dec. No. 93-21.) During much of 1994, appellant reported that he spent an average of one hour each day on break, double the normal time. He reported that he spent an average of one hour each work day in meetings, when he had none. His poor use of working time in 1994, as further evidenced by his failure to complete the limited partnership PIER, constituted inefficiency in violation of Government Code section 19572, subdivision (c).

Inexcusable neglect of duty is defined as an ". . .intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty." (*Gubser v. Department of Employment* (1969))

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271 Cal.App.2d 240.) Appellant did not complete virtually the only assignment given to him during 1994 and provided no credible explanation for his failure to do so. His failure to complete the limited partnership PIER during 1994 constituted inexcusable neglect of duty in violation of Government Code section 19572, subdivision (d).

Penalty

The remaining issue is the appropriateness of the penalty. Under *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, the factors for the Board to consider in assessing the propriety of the imposed discipline 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.

Appellant's failure to complete the limited partnership PIER during 1994 harmed the public service. The PIERS remain delinquent, which seriously erodes the department's ability to obtain additional positions and funding.

Appellant accepted no responsibility for his failure to complete the limited partnership PIER. None of the reasons he advanced adequately explain his lack of progress on this assignment. Appellant was the appropriate person to assign to the task. It took him less than an hour to identify and correct the "corruption" of Podesta's draft by Griggs' father. Even assuming for the sake of argument that Griggs had designs on appellant's job, his demotion was based on his lack of

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work. If delinquent PIERS were no longer required by OIT, appellant should have sought official confirmation of that fact and immediately informed his superiors. Although appellant did not understand his role in the development of the PIERS assignment in 1993, he also did not seek to clarify it. Throughout 1994, however, there should have been no ambiguity as to what was appellant's assignment. He was also given no other assignments in 1994 which would have interfered with his ability to finish the limited partnership PIER.

Although appellant asked to be relieved of the PIERS assignment at his private meeting with Hill on November 16, 1994, meeting, clearly he was not then removed from that responsibility.

Appellant made a unilateral decision not to perform work on the PIERS after this meeting. He thus worked on no assignments from November 16, 1994, until his demotion over three months later.

As a high-ranking manager, appellant must be expected to work with minimal supervision and to demonstrate initiative in the tasks assigned to him. Appellant spent an average of only five hours each work day for over six months on a single assignment. His poor use of work time, failure to produce a work product, and denial of responsibility indicate that appellant must be assigned to a position in which his work product and accountability will be more closely supervised.

There is some likelihood that without discipline, appellant will continue to fail to perform at the expected performance level of a DPM II. A demotion is appropriate in

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that he will be more closely supervised.

Appellant, however, has served as a state employee for over thirty-six years with no prior adverse actions. Given appellant's numerous but excused absences during 1993, mitigating circumstances exist for his failure to produce a work product during 1993.

Respondent also failed to provide sufficient progressive discipline to appellant to sustain a permanent demotion. When appellant did not submit a completed limited partnership PIER by the end of June 1994, Griggs did not counsel him or set another deadline. She did not ask for the draft again until November 1994. Griggs' denial of appellant's pay-for-performance increase and Hill's discussion with him occurred in January 1995, the month before he was demoted. Hill's meeting cannot be construed as a counseling session for the purpose of progressive discipline. Hill had made up his mind prior to the meeting to discipline appellant if appellant did not elect one of the other options presented to him.

The lack of progressive discipline distinguishes this case from *Mercedes C. Manayao* (1993) SPB Dec. No. 93-14. That appellant, a 19 year state employee with a clean record, was demoted from her position as a supervisor without any prior formal discipline. The Board found the demotion warranted because the appellant had received numerous counseling sessions and informal warnings, which provided her with an opportunity to improve her on-the-job performance. The repeated informal corrective measures were found to constitute

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prior notice and progressive discipline.

Here, appellant was not given adequate notice of his deficient performance through progressive discipline to warrant a permanent demotion. It should also be remembered that appellant apparently successfully managed a work unit for 13 years. His deficient performance here was on a special assignment. Although a manager should not have to be closely supervised, he is nonetheless entitled to progressive discipline before receiving a permanent two classification demotion.

* * * * *

WHEREFORE IT IS DETERMINED that the adverse action of demotion of appellant Paul M. Virga, effective February 24, 1995, is modified to a demotion for a period of one year, through February 23, 1996.

Said matter is hereby referred to the Chief 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, if any, due appellant under the provisions of Government Code Section 19584.

* * * * *

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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 13, 1995

KYMBERLY M. PIPKIN
Kymberly M. Pipkin,
Administrative Law Judge,
State Personnel Board.