BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

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| In the Matter of the Appeal by | ) | SPB Case No. 32774 |
| | ) | |
| **R[redacted] [redacted]. K[redacted]** | ) | **BOARD DECISION** |
| | ) | (Precedential) |
| | ) | |
| From dismissal from the position of Supervising Investigator II, Department of Consumer Affairs with the Medical Board of the Department of Consumer Affairs | ) | **NO. 94-11** |
| | ) | April 5-6, 1994 |

Appearances: Robert F. Tyler representing Appellant, R[redacted] [redacted]. K[redacted]; Daniel E. Lungren, Attorney General, by Vincent J. Scally, Deputy Attorney General for Respondent, Department of Consumer Affairs.

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

**DECISION**

Members Carpenter, Bos and Villalobos:

This case is before the State Personnel Board (Board) for consideration after the Board rejected the attached Proposed Decision of the Administrative Law Judge (ALJ), which sustained the dismissal of R[redacted] [redacted]. K[redacted] from his position as Supervising Investigator II with the Department of Consumer Affairs. (Department).

The Board originally rejected the attached Proposed Decision in order to review: 1) whether the adverse action was taken in the name of the appointing authority; 2) whether the ALJ was correct in refusing to compel the Department to provide appellant with the CHP Investigation Summary and information on disciplinary actions taken against other Department employees for similar offenses; 3) whether

appellant's Skelly rights were violated; and, 4) whether the penalty is appropriate under all the circumstances?

After a review of the entire record, including the transcripts and briefs submitted by the parties, and having listened to oral arguments, the Board adopts the attached Proposed Decision as its own Precedential Decision pursuant to Government Code section 19582.5 to the extent it is consistent with the discussion below.

**APPOINTING AUTHORITY**

The first issue is whether the adverse action was properly taken in the name of the appointing authority. On this question, the Board concurs with the discussion set out in the ALJ's decision.

**DISCOVERY**

The second issue concerns the ALJ's refusal to compel discovery of certain requested documents. The particular documents at issue are copies of adverse actions taken against other employees of the Medical Board of the Department of Consumer Affairs, a 248 page summary of the California Highway Patrol's entire investigation into improprieties at the Medical Board, and 15 to 17 binders of documents upon which the CHP summary was based.

The ALJ conducted two separate hearings on the issue of discovery after which he refused to compel production of the

documents listed above.[1] In his Proposed Decision, the ALJ discussed his reasons for denying discovery of the requested documents.

Once an ALJ has issued a decision on a petition to compel discovery, the proper means for litigating a claimed error in a discovery decision is set forth in Government Code § 19574.2, subdivision (b). Section 19574.2, subdivision (b) provides to aggrieved parties a right to appeal to superior court within 30 days of an ALJ's decision denying or granting discovery. In this case, since appellant did not avail himself of the statutory remedy available to him, the Board declines to make a determination at this point in the proceeding as to whether discovery was inappropriately denied.

**SKELLY RIGHTS**

In Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194, the California Supreme Court determined that minimal standards of due process required that, prior to imposition of discipline, a public employee must be afforded certain procedural safeguards including: (1) notice of the action proposed; (2) the grounds for discipline; (3) a copy of the charges and materials upon which the action is based; and, (4) the opportunity to respond in opposition to the proposed action. [Id. at 215; see also 2 Cal. Code of

[1]The record does not disclose the exact point when discovery was denied but there is no dispute that the ALJ denied discovery of these documents.

Regulations, §52.3].

Appellant argues that the Department violated his Skelly rights by failing to provide copies of the materials upon which the adverse action was based. [Id. at 215]. The particular documents at issue are a 248 page summary of the California Highway Patrol's entire investigation into improprieties at the Medical Board and 15 to 17 binders of documents upon which the summary was based. In addition, appellant argues that the Department should have forwarded to the Skelly officer letters written in support of his continued employment so that the Skelly officer could review them in mitigation of the harsh penalty of dismissal.

The Board does not adopt the ALJ's discussion of appellant's Skelly rights but, for the reasons that follow, agrees with the ALJ that appellant's Skelly rights were not violated.

CHP Summary and 15-17 Binders

Appellant argues that his Skelly rights were violated when the Department failed to provide copies of the 248 page CHP summary and the 15-17 binders of documents. Appellant argues that these documents should have been provided prior to the Skelly hearing because they were reviewed by the Department prior to taking the adverse action.

The Board rejects appellant's argument that every document reviewed by a decision-maker need be disclosed. Where, for

example, a decision-maker considers bringing three separate charges against an employee based on three separate incidents, but determines that two of the incidents do not warrant discipline, only the material pertaining to the one charged offense need be provided. Since the adverse action was not based on possible other charges, the documents pertaining to those charges are not subject to disclosure under Skelly.

Here, appellant sought a copy of the summary and the documents in the binders merely because appellant was mentioned in the various reports and interviews. Appellant was charged with falsifying his employment application. Only material concerning the charge of falsifying the application was pertinent to appellant's Skelly hearing. The Department did not violate appellant's Skelly rights in withholding documents that did not pertain to the falsification charge.

Letters of Support

Appellant argues that, prior to the Skelly hearing, the Department should have forwarded to him letters written in support of his continued employment so that appellant could have provided these to the Skelly officer in mitigation. The ALJ found that these letters had been "discounted" by the decision-maker and, therefore, could not be said to "constitute materials upon which the action was based." The ALJ's rationale contradicts the Board's decision in Karen Johnson (1992) SPB Dec. No. 92-02.

The document at issue in Johnson was an investigative report which had been presented to the Department decision-maker. The report failed to corroborate the Department's view of events upon which the adverse action was based. The Department argued that the investigative report merely summarized the allegations against Johnson and contained no conclusions regarding the alleged conduct of appellant nor recommendations regarding the propriety of adverse action.

We concluded that Johnson's Skelly rights had been violated when the Department withheld the investigative report. Our conclusion was based on a number of discrete facts. The adverse action taken against Johnson rested entirely on the testimony of one eyewitness. The Department had directed its Senior Special Investigator to investigate the allegations against Johnson. The investigative report failed to corroborate the statements of the only witness against Johnson. The investigator presented his report to the executive director who was the decision-maker in Johnson's adverse action. Based on these facts, we found that Johnson was entitled to the report, notwithstanding the fact that the decision-maker reviewed the report and apparently discounted its findings.

In the instant case, the fact that the decision-maker may have "discounted" the letters does not shield them from disclosure. The

letters are not subject to disclosure because disclosure would not further the purposes of a pretermination hearing.

The purpose of a pretermination hearing such as that afforded public employees under Skelly was addressed by the U.S. Supreme Court in Cleveland Bd. of Educ. v. Loudermill (1985) 470 U.S. 532:

> [T]he pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions--essentially, a determination of whether reasonable grounds to believe that the charges against the employee are true and support the proposed action. Id. at p. 545.

Thus, the purpose of the hearing and, necessarily, the disclosure prior to the hearing of "materials upon which the action was based" is to guard against a dismissal unsupported by facts.

Appellant was dismissed on the basis of one act on his part: he falsified his application for the position of Deputy Chief of the Enforcement Division of the Medical Board. The adverse action was based entirely on this one act of falsification.

A letter of support which simply argues that the penalty is too severe is not the kind of "material" that requires disclosure under Skelly. While an appellant may sensibly seek these kind of support documents outside the Skelly process, and may send or present them to the Skelly officer, the Department does not have an affirmative duty to produce them prior to a Skelly hearing.

Penalty

On the issue of what penalty is appropriate, a majority of the Board agreed with the ALJ's discussion and voted that dismissal was appropriate.

**ORDER**

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Government Code sections 19582 and 19584, it is hereby ORDERED that:

1. The adverse action of dismissal of R[redacted] [redacted]. K[redacted] from the position of Supervising Investigator II, Department of Consumer Affairs is hereby sustained;

2. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.

THE STATE PERSONNEL BOARD*

Richard Carpenter, President
Floss Bos, Member
Alfred R. Villalobos, Member

*Members Stoner and Ward concurred in part and dissented in part:

We agree with the above discussion concerning the resolution of the issues raised herein and agree that strong discipline is required. However, we do not believe that dismissal is warranted under all the circumstances, especially given that appellant is a long term employee with an exemplary work record.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on April 5-6, 1994.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

| | |
|---|---|
| In the Matter of the Appeal by<br>RONALD L. K[redacted]<br>From dismissal from the position of Supervising Investigator II, Department of Consumer Affairs with the Medical Board of California, Department of Consumer Affairs at Sacramento | Case No.32774 |

PROPOSED DECISION

This matter came on regularly for hearing before Thomas M. Sobel, Administrative Law Judge, State Personnel Board, on April 2, 9, 15 and 16, 1993 at Sacramento, California. Final briefs were due April 23, 1993.[2]

The appellant, R[redacted] [redacted]. K[redacted], was present and was represented by Robert F. Tyler, his attorney.

The respondent was represented by Daniel E. Lungren, Attorney General, by Vincent J. Scally, Deputy Attorney General.

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

[2]The Attorney General asked for the right to file a responsive brief, which I granted. After receipt of his brief, counsel for the appellant purported to file a responsive brief on the grounds that the Attorney General briefed the evidence in the case and that I had only ordered that legal issues be addressed. It was not my intention to order that only the legal issues be addressed. Had appellant's counsel chosen to brief the factual issues in addition to the legal issues, I would have considered his brief. Since the Attorney General did not violate my order by briefing more than I asked for, appellant's counsel had no warrant to submit a responsive brief. Appellant's responsive brief is stricken.

and Proposed Decision:

I

The above dismissal effective February 16, 1993, and appellant's appeal therefrom, comply with the procedural requirements of the State Civil Service Act.

II

Appellant has been a State employee since 1968; employed first as a State Traffic officer and, after 1977, as an investigator with the Medical Board (Board.) He has no prior adverse actions. The present action arises from appellant's falsely stating 1) that he had an Advanced Certificate from the Commission on (P)eace (O)fficer (S)tandards and (T)raining (POST) when he did not, and 2) that he had an AA degree from Consumnes River College when he did not, on an application for a Deputy Chief examination which he submitted towards the end of 1989. There is no dispute that the position for which appellant was applying required an Advanced POST certificate.

III

At the time his falsehood was discovered, appellant had voluntarily demoted to the position of Supervising Investigator II, the position from which he was dismissed. Appellant's duties as a Supervising Investigator required him to supervise investigations related to alleged violations committed by licensees of the Department of Consumer Affairs (Department), as well as criminal unlicensed activity. Before relating what happened, I will take up the "jurisdictional" question posed by appellant, namely, the question of the power

of the Director of the Department to take disciplinary action against him.

IV

At the commencement of the hearing, appellant contended that the action was void because taken in the name of the Director of the Department and not in the name of his appointing power, the Medical Board. Appellant renews this argument in his Post-Hearing Brief. Resolution of this issue requires understanding the relationship between the Medical Board and the Department of Consumer Affairs.

Business and Professions Code Section 2001 creates a Medical Board of California within the Department of Consumer Affairs. In order to perform its functions, the legislature has granted the Board authority to "employ" investigators such as appellant, Business and Professions Code Section 2020. It is Section 2020 upon which appellant relies in arguing that only the Board may dismiss him.

It is important to note that section 2020 does not denominate the Board as appellant's "appointing authority." These words do appear in the legislation which creates the Board's parent agency, the Department. Business and Professions Code Section 23.6 provides that "'appointing power', unless otherwise defined, refers to the Director of Consumer Affairs." The Business and Professions Code also provides that "any and all matters relating to employment, tenure, discipline of employees of any board [including the

Medical Board] . . . shall be initiated by said board . . . but all such actions shall, before reference to the State Personnel Board, receive the approval of the appointing power." (Section 154, Emphasis added.) This section explicitly distinguishes between the authority of boards inside the Department and which must initiate discipline, and the authority of the "appointing power", which must "approve" discipline.

Since Section 154 does not further define what the "approval" of the Director signifies, reading it in isolation one could argue that the procedure contemplated by Section 154 requires the Board to have initiated this action, sent it along to the Director of the Department for "approval" in the sense of "signing off", after which it would have been returned to the Board for whatever would follow.

However, the section cannot be read in isolation; rather it must be read in light of Government Code Section 19574, which only permits "appointing powers" or their delegates to take adverse actions.[3] Since Section 154 is obviously not a complete delegation of the Director's authority, the question becomes whether or not the Director's taking this action in his own name is a reasonable assertion of the authority

[3]Appellant notes that Title 16 Code of California Regulations Section 1356 provides that the Director of the Department has delegated his authority "in connection with investigative and administrative proceedings under the jurisdiction of the Division" to the Board. However, this regulation appears to refer, and appellant characterizes it as referring, to "the handling and disposition" of actions taken against licensees under the Medical Practices Act. As such, it looks outward, rather than inward.

granted to him to "approve" actions. I find that it is.

Among the meanings of "approve" is that of giving official sanction to or ratifying, See, e.g., Random House Dictionary of the English Language, 2nd Edition; the example given in the Dictionary is that of "the Senate promptly approved the bill". Since this usage implies formal action of the kind taken by the Director in this case, I conclude that the action is not void because taken in the name of the Director.

There is no contradiction between the Director's having authority over discipline and the fact that the Board is elsewhere treated as the "employer" of employees of the Board since the latter only means that the Board has been given the "right of control" over Board employees in the performance of their duties.[4]

V

A. FALSIFYING HIS APPLICATION

Appellant became an investigator with the Department of Consumer Affairs in 1973. In 1977, when the Medical Board was created, appellant became a Senior Medical Investigator. In 1979, he became Supervising Investigator I, assigned to the Santa Ana office. When he assumed his duties in Santa Ana, his family resided in Fresno; he served in Santa Ana until summer

[4]On this reading, it is a separate question whether or not the department followed the statutory procedure in dismissing appellant and I find, on the basis of Cheryl Maudsley's testimony, that it has: the action against appellant was initiated by the Board and finally taken in the name of the appointing authority.

1980 when he voluntarily demoted in order to return to Fresno to be with his family.[5]

He stayed in Fresno until February 1991 when he was promoted to Supervising Investigator I and transferred to the Sacramento Regional Office. His duties required him to supervise all the investigations conducted by the Sacramento Regional Office. In 1983, appellant became Supervising Investigator II. While in that position, appellant oversaw the entire enforcement operation of the Board and gradually took on more and more responsibilities until he was effectively acting as an assistant to the Chief of Enforcement. In this capacity, he had the working title of Assistant to then Chief of Enforcement Vern Leeper. However, there was no formal civil service class for the duties he was performing.

B.

Leeper and appellant testified that, as the enforcement function of the Board grew, it became clear that a number of positions in the Board had greater responsibilities than higher level positions in the Department of Consumer Affairs which carried higher salaries. Among these positions were Leeper's and appellant's. Besides this, salary increases had resulted in "compaction" so that subordinate staff salaries had grown ever closer to those of appellant and Leeper. It was decided to upgrade the positions of the two men.

[5]I go into this history because, among appellant's defenses, is his contention that the penalty is too severe given his long tenure with the department and the personal sacrifices which he has endured in the public service.

Sometime in spring 1988, Leeper started the formal process of upgrading appellant's position with the help of Cheryl Maudsley, the personnel analyst from the Department of Consumer Affairs who was assigned to the Board. According to her, the department could have started a new class or "tagged" an existing class, but it was easier to use the existing class of Deputy Chief, Department of Consumer Affairs. There is no question that this new classification was being created for appellant and there was never any intention that it be filled by anyone else, although there were other applicants for the position. Indeed, as Leeper testified, had appellant told him that he did not possess the requisite qualifications for the position, Leeper would have sought to change the qualifications, and, failing that, he would have scrapped the attempt.

In light of this, I find appellant's testimony (as well as the statement in his answer) that "money was not [his] motivation for this act [falsifying his qualifications]" incredible. He knew, as everyone else did, that the position was being created solely for him, and that if he couldn't have it, no one would; it follows, then, that if he did not qualify, he would have remained working out-of-class. Accordingly, the only stakes in the reclassification had to be prestige and perquisites, including the several hundred dollar a month raise. This conclusion is reinforced by Maudsley's

testimony that appellant often "prodded"[6] her to effectuate the change by saying she was taking food from his family and by appellant's statements to the effect that since he had been doing the job, he might as well be paid for it.

C.

Appellant testified credibly that, during his discussions with Maudsley about the position, he did not know that among the requirements for it was an Advanced POST certificate. According to appellant, the first time he learned that an advanced certificate was needed was when he saw the application. He admitted that when his then-wife observed that he had listed an Advanced POST Certificate on his application, he told her "Don't worry about it."

D.

Appellant served as Deputy Chief from October 1991 until March 2, 1992 when he voluntarily demoted to Supervising Investigator II. Appellant provided a number of different reasons for taking this action -- at a number of different times. At the time he resigned, he told his associates that he was resigning because of stress; he repeated this explanation during his investigative interview. However, in both his answer to the adverse action, and in his testimony during the hearing, he insisted that chief among his reasons for demoting was remorse or contrition over having obtained the position by

[6]Maudsley admitted that appellant made such remarks "jokingly", but the humor is clearly pointed and, despite its tone, conveys a serious message.

falsifying his application.

According to him, he never mentioned this reason prior to the adverse action being taken because he was too embarrassed to admit what he had done. The department contends that appellant's "remorse" testimony is not only false, but also, by its falsity, demonstrates appellant's continuing propensity to attempt to say what he needs to say for his own purposes. I agree.

In light of the fact that appellant did not demonstrate any self-consciousness when his wife noticed the falsehood, the idea that it weighed so much on his mind that he abandoned the position, is impossible for me to accept. Far more likely is that he simply burned-out on the job both because of the amount of work it entailed, as well as his increasing conflicts with the Executive Staff. I find that he demoted for personal reasons, just as he practiced his deception for personal reasons.

VI

PROCEDURAL CONTENTIONS

The findings related above would ordinarily end the matter except that appellant has raised a variety of defenses arising from 1) the Department's investigation of this matter, 2) its decision to take this action, and 3) my own rulings in this case. Accordingly, I will discuss these matters before turning to the question of the appropriate penalty.

A.

THE CHP INVESTIGATION

1.POBAR Issues

Sgt. William Newton of the California Highway Patrol testified that during the summer of 1982, he was asked to conduct an investigation into a number of allegations of impropriety in the Board. Among the allegations were allegations 1) that members of the enforcement division, including appellant among others, had inappropriately disposed of meritorious cases; 2) that there were irregularities in promotional and job opportunities at the Board; 3) that there was misuse of state time; 4) that attendance documents had been falsified; 5) that state vehicles and equipment had been misused; 6) that there had been personal use of frequent flyer credits obtained from official travel; and 7) that undercover licenses had been misused in renting cars. During the course of the CHP investigation into these allegations, Newton was specifically advised by another employee of the Board, John Martinez, that appellant had falsified his application for the Deputy Chief exam.[7]

Appellant was interviewed by Newton on October 14, 1992. At the commencement of his interview, Sgt. Newton advised

[7]Appellant contends that because Martinez knew of appellant's falsification of his application in 1991, that the instant action is barred by laches. I reject the argument. Even if I were to find that Martinez's knowledge were attributable to the Department (which I decline to do) appellant has not shown that he was prejudiced by any delay in taking this action against him. "Delay is not a bar unless it works [a] disadvantage or prejudice." Witkin, Equity, Section 14, p. 692.

appellant that:

> This is an administrative inquiry concerning the Department of Consumer Affairs and involving the 7 primary allegations[8] of which Mr. K[redacted] has been apprised prior to this transcription in addition to his work history. RX 1, p.1

Appellant contends that the Peace Officer Bill of Rights required that he be given specific notice that he was being investigated for falsifying his application and that Newton's failure to do so, requires suppression of the interview. Government Code Section 3303 requires (a) that "when any public safety officer is under investigation by his commanding officer, or any other member of the employing public safety department, which could lead to punitive action," (b) "[t]he public safety officer shall be informed of the nature of the investigation prior to any interrogation."

As is clear from the quoted portion of Sgt. Newton's statement at the start of the interview, appellant was advised that the CHP was investigating "7 primary areas", including his own work history. Given that among the "primary areas" of inquiry were improprieties in promotions, and, further, that Newton specifically referred to appellant's "work history" at the beginning of the inquiry, I find that appellant was sufficiently apprised of the nature of the inquiry to satisfy

[8]In his testimony, appellant contends that at the time of his interview, he was only aware of allegations of case-dumping and misuse of state vehicles. I decline to credit appellant. Newton plainly refers to "7 primary allegations" in his introduction to the interview and appellant, who has shown a keen instinct to protect himself throughout these proceedings, does not demur to Newton's description.

his POBAR rights: the statute does not speak of a peace officer's being advised of the exact allegations against him, but only of the "nature" of the investigation. I conclude that a generic description of the areas of administrative inquiry satisfies the statutory requirements.[9]

Appellant also argues that he should have been apprised of his constitutional rights under Section 3303 (g) which provides that "if prior to or during the interrogation of a public safety officer it is deemed that he may be charged with a criminal offense, he shall be immediately informed of his constitutional rights." The only evidence adduced to support the argument that anyone considered criminal charges is the testimony of Jerry Sanders that, in December 1992, the Director of the Department of Consumer Affairs, stated that he would take criminal action against anyone involved in "case-dumping."

As respondent points out, appellant was interviewed in October 1992. There is simply no evidence to establish what Conran's intentions were at the time appellant was interrogated and Newton himself testified that he was never told that criminal charges were contemplated.

2. The results of the investigation

Besides interviewing appellant, the CHP conducted

[9]Although it is not entirely clear whether or not appellant continues to argue that his Miranda rights were violated, at hearing, he also contended that any use of the transcripts violated his rights under Miranda v Arizona (1966) 384 US 436. Miranda applies only to custodial interrogations; Newton's was an administrative inquiry.

numerous interviews of other Board staff concerning the variety of allegations under investigation. At the end of the investigation, it issued a 240 page report which, according to Newton, is little more than a chronological summary of the results of the interviews about the 7 areas of investigation, summarizing "who said what to whom and when." In addition, the CHP presented a report to Sandra Smoley, Secretary of the State Consumer Affairs Agency which summarized its findings regarding each of the areas of its investigation. It is undisputed that a copy of this report with names "blacked out" was utilized during a press conference by the Secretary of the Department.

At the outset of the hearing, appellant contended that he was entitled to receive any interviews which refer to him, the CHP Summary, and the unedited CHP report to Secretary Smoley. Appellant's argument for such materials was made on two separate grounds: first, that Skelly required these materials to be turned over to him prior to the effective date of the action; and, second, that he was entitled to these materials under the discovery procedures of Government Code
Section 19574.1. I will consider each argument in turn.

a. Skelly Issues

The department contends that appellant was provided with all the materials upon which the adverse action was based: thus, it provided him with the portions of interviews which referred to his falsifying his application, but not with any of the other materials he sought to obtain. Appellant contends

that 1) since the department had access to all these materials, 2) the Director must have read them before initiating this action, and 3) they therefore represent materials upon which the action was based. Even if the premises of appellant's argument be accepted, the conclusion does not follow from them.

In Skelly v. State Personnel Board (1975) 15 Cal 3d 194, the Supreme Court held that a disciplined employee was entitled to notice of the grounds upon which he was disciplined. The court described the scope of the required notice in terms of a narrow, fact-based standard, namely, only those materials upon which the disciplinary action was based. Appellant appears to be arguing that because the department may have had numerous potential causes of discipline against him, he was entitled under Skelly to disclosure of anything which related to these other, potential causes. There is nothing in Skelly which supports this argument: the Court only required disclosure of the evidence upon which the action was based, which I take to mean the grounds upon which the department has purported to act. To read Skelly, as appellant does, to require the department to turn over materials outside the scope of the actual action, would be to turn the rights afforded by Skelly into discovery-type rights, a result which I believe the Court was at pains to avoid.

In his Post-Hearing Brief, appellant also argues that his Skelly rights were violated when the department failed to

provide him with letters sent to the Director of the Department of Consumer Affairs in support of him. Again, I cannot conclude that such materials constitute "materials upon which the action was based": even if the Director weighed the opinions of appellant's colleagues in determining the appropriate penalty, he obviously discounted them; thus, they cannot be said to constitute material upon which the action was based anymore than evidence contrary to a jury's verdict can be considered evidence upon which its verdict was based.

b. Discovery Issues

Appellant is entitled to discovery under Government Code Section 19574.1 and he timely requested discovery not only of the items referred to above, but also of other disciplinary actions taken by the department against other employees for similar allegations of dishonesty. The department resisted the requests for discovery of the CHP Summary and the unedited report on the basis of the official information privilege, Evidence Code Section 1040, and resisted the request for discovery of other personnel actions on the grounds of Penal Code Section 832.7, which creates a privilege for the personnel records of peace officers, including disciplinary records, Penal Code Section 832.8.

Although dubious about the relevance of the materials sought, I offered to inspect the materials in camera; when it became clear that the Attorney General was treating my offer as an order, I advised both parties that under the Evidence Code I had no power to order an in camera inspection in

connection with Section 1040 issues, (see, Evidence Code Section 915(b), and especially the comment of the Law Revision Commission, distinguishing between the powers of courts and administrative officers.) In view of appellant's continued arguments concerning the denial of discovery, I will address the matters here.

Since appellant is only entitled under the Government Code to the discovery of "relevant" evidence in these proceedings, if there is no showing that the evidence sought is relevant, he has not been harmed by the denial of discovery.

a.

So far as any other disciplinary actions taken against peace officers is concerned, this Board has held that "an agency is not required to impose the exact same penalty in every single case involving similar factual circumstances." T[redacted] J. G[redacted] (1992) SPB 92-18. Accordingly, in seeking discovery of other adverse actions, appellant has not met the standard for discovery set out by Government Code
Section 19574.1 with respect to other disciplinary actions.

b.

So far as discovery of the CHP Report and the unedited summary are concerned, if I understand appellant correctly, he is contending that he has a right to obtain evidence which would demonstrate that he would not have been dismissed but for the Director's consideration of the other allegations of misconduct. In the first place, no matter what the report and

summary actually say, by themselves they can never prove that the Director took them into account. Thus, in the absence of any evidence that the Director was motivated by anything other than what the adverse action states, which appellant has not offered to prove, the report itself is irrelevant.

Secondly, although the State Personnel Board does apply a "but-for" inquiry in so-called "dual motive" cases when an employee contends that his appointing power had a "prohibited motive" when it took adverse action, appellant has cited no authority, and I can find none, for the use of a "dual motive" inquiry in a case in which an appellant seeks to parse other legitimate motives the department may have had in taking adverse action.

To the extent appellant contends that he was entitled to discovery of such matters because it would show he was the victim of a "political" vendetta, his offers of proof concerning the nature of any such vendetta are insufficient to establish the relevance of such material. At the hearing, appellant identified, as one of the "political" motives, that the Department had considered taking over the budget of the Board. This is not the kind of "political" motive which calls for application of the dual motive test because it does not implicate the appellant's status or the assertion of his rights.

To the extent the appellant contends that he needs the report and summary to prove that the Department took the present action against him to satisfy its "public relations"

desire to show that it was cleaning up the problems at the Medical Board, the proffered use is also irrelevant. There is no dispute that appellant falsely stated his credentials on his application. The only remaining question is the level of discipline to be imposed. As to this, the State Personnel Board exercises its own discretion without deferring to the discretion of the department. Thus, even if the appellant did prove that the Department wanted to clean up its image, the Personnel Board would not take that motive into account, but would have to decide based upon its own standards (which do not include public relations) whether or not the penalty was appropriate in light of the specific offense charged.

c. Copies of interviews

Finally, in a variant of the same arguments, appellant contends that he was entitled to copies of the investigative interviews in which his name came up in connection with any of the other allegations under investigation by the CHP. For the reasons stated previously, these matters are irrelevant to the issue before me.

VII

MITIGATION

A number of appellant's witnesses testified about both appellant's value to the department and his reputation for honesty and veracity. I will summarize their testimony.

Jerry Sanders testified that appellant was not only a vigorous law enforcement officer, but the heart and soul of the enforcement program of the Board, someone always ready to

take on new responsibilities and always available to work. Sanders offered that appellant frequently reminded him that, peace officers must conduct themselves so as to avoid all appearance of impropriety.

When asked whether or not appellant was a man of integrity, Sanders opined that he regarded appellant as "absolutely" a man of integrity. Sanders admitted that an act of dishonesty would warrant dismissal only if it harmed another and asserted that appellant's failure to "immediately" admit to Newton that he had falsified his application was not dishonesty because, upon being presented with the application, appellant did not continue to insist upon its accuracy.

Vern Leeper testified that appellant was his right-hand man who did a little bit of everything and all of it well. He was tireless in his efforts on behalf of the department, arriving early in the morning and leaving late at night. Leeper opined that the act of dishonesty was totally out of character.

Dick Thornton, another Supervising Investigator for the Board, also testified that appellant's falsification of his application was an anomaly. According to Thornton, appellant's apparent evasiveness in the interview with Newton, does not demonstrate dishonesty because people caught off guard appear evasive: such evasiveness as appellant demonstrated would reflect on his character only if appellant had persisted in his falsehood after being confronted with it "in black and white."

Lynn Thornton testified she has never known appellant to deviate from ethical standards. When asked if she saw a transcript which indicated that appellant had lied during his interview her opinion would change, she said no.

Janet Tuton, an Assistant Attorney General who represents the Board on enforcement matters, testified she knew appellant to be keen on enforcement and that she regarded his falsehood as an aberration.

Richard Ikeda, Chief Medical Consultant to the Board, testified that appellant exemplified the lawman. According to Ikeda, too, appellant has "absolute" honesty and integrity.

It is difficult for me to take some of this testimony seriously. Appellant simply cannot be characterized as "absolutely" honest in the face of an admission that he has falsified his application. Moreover, I have specifically discredited him during these proceedings. Thornton's and Sanders' attempts to explain appellant's evasions during his interview as something other than dishonesty were ludicrous. Indeed, the extremes to which these witnesses went in testifying for the appellant persuaded me less of his rectitude and vigor than of their loyalty and affection. These are commendable attributes in friends, but discreditable for witnesses.

* * * * *

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

There is no dispute that appellant made false statements on his application for a civil service examination. The question remains whether or not dismissal is an appropriate punishment.

Dishonesty in a peace officer has been repeatedly characterized as a grave offense which can justify dismissal on the grounds that it "is not an isolated or transient behavioral act; it is more of a continuing trait of character." Gee v State Personnel Board (1970) 5 Cal. App. 3d 713, 719 Indeed, in speaking of the high moral standards to be expected from a peace officer, this Board has sustained a dismissal from service for two acts of dishonesty in a peace officer on the grounds that they demonstrated a "propensity to be dishonest." Gregory Johnson, SPB No. 92-01, p. 9

In this case, I have found that appellant has continued to demonstrate a propensity towards dishonesty during trial of this case. While I am not unmindful of appellant's long State service, it must not be forgotten that appellant was not only a peace officer, but one who enforced licensing statutes. Among his duties was the pursuit of unlicensed doctors -- doctors who lacked a piece of paper, no matter how many patients they cured. Rather than arguing in mitigation, appellant's many years of service should have taught him that "credentials" do count in the eyes of the law.

Moreover, appellant's own witnesses testified that he was formerly vigorous in pursuing lawbreakers. Though he contends the public was not harmed by his deception because he was an effective law enforcement official, if he were again to be charged with his previous responsibilities, he would be in the position of enforcing standards from which he had exempted himself. It is difficult to see how consciousness of his own frailty could not have an effect on either his attitude or his judgment. The dismissal is sustained.

* * * * *

WHEREFORE IT IS DETERMINED that the dismissal taken by respondent against R[redacted]. K[redacted] effective February 16, 1993 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 8, 1993.

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