BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **J[redacted] [redacted]. A[redacted]** From dismissal from the position of State Traffic Officer at the Rancho Cucamonga Area Office, Department of California Highway Patrol at Rancho Cucamonga	)	SPB Case No. 35103 **BOARD DECISION** (Precedential) **NO. 95-17** December 5-6, 1995

Appearances: Anthony M. Santana, Attorney, on behalf of appellant, J[redacted] [redacted]. A[redacted]; Daniel E. Lungren, Attorney General, by Mary T, Horst, on behalf of California Highway Patrol at Rancho Cucamonga.

Before: Lorrie Ward, President; Ron Alvarado, Richard Carpenter, and Alice Stoner, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) which modified the dismissal of J[redacted] [redacted]. A[redacted] (appellant), State Traffic Officer with the California Department of Highway Patrol (Department or CHP), to a one year suspension. The ALJ modified appellant's dismissal on the grounds that a fellow officer who committed much of the same misconduct as appellant settled his dismissal action with the Department for a sixty days' suspension. The Board rejected the decision to address whether or not modifying an employee's penalty on the basis of a coworker's settlement was proper.

After a review of the record in this matter, including the transcript, exhibits, and the oral and written arguments of the

parties, the Board concludes that the fellow employee's settlement agreement should not have been a factor in determining whether appellant should have been dismissed and that, under all of the circumstances, appellant's dismissal should be sustained.

FACTUAL SUMMARY

Appellant's Background

Appellant began work as a State Traffic Officer in 1982. She and fellow State Traffic Officer R[redacted] M[redacted] (M[redacted]) were stationed at the Rancho Cucamonga office and were, at the same time, cohabitants for many years.

Through the years, appellant received a number of commendations for her work and also worked in the capacity of a union representative for the highway patrol officer's union. Although appellant had no formal adverse actions of record, she did receive a number of informal disciplinary actions during 1993.

On April 15, 1993, appellant was counselled about her poor interpersonal skills, verbal disrespect toward supervision, and disruptive and rude verbal outbursts during shift briefings. She was advised that if she continued to exhibit such behavior, she would be placed on interim reporting.

On May 4, 1993, appellant received a Censurable Incident Report for making an inappropriate remark to an Inland Communications Center Dispatcher after her radio transmission was not immediately acknowledged. She was advised that future acts of a similar nature would be dealt with more severely.

On September 11, 1993, appellant received a Censurable Incident Report for failing to properly investigate a traffic collision and demonstrating an insubordinate attitude toward Area supervisors when instructed to make appropriate corrections. She was advised that future occurrences would not be tolerated and would be dealt with in a more serious manner.

On September 13, 1993, appellant was placed on interim reporting for her disrespectful and insubordinate behavior. On several occasions she displayed a rude and disrespectful attitude toward her fellow workers and supervisors despite counseling to improve her behavior. She was advised to improve her demeanor to avoid receiving a more severe disciplinary action.

The informal disciplinary incidents placed appellant on notice that she was to adopt a more respectful, positive attitude toward her work and her fellow employees.

Allegations Re Susan Schaffer

On or about December 13, 1993, Susan Schaffer, an admitted prostitute, filed a citizen's complaint against Officer M[redacted], appellant's boyfriend. Ms. Schaffer alleged that Officer M[redacted] was repeatedly harassing her and refused to provide her assistance when she requested it. The Department investigated Ms. Schaffer's complaint and ultimately issued Officer M[redacted] an order to stay away from the location where Ms. Schaffer frequented, specifically, the Beacon Truck Stop Area.

Appellant was aware of Ms. Schaffer's complaint as she was Officer M[redacted]'s union representative at an administrative

interrogation on December 29, 1993. She was annoyed about Ms. Schaffer's complaint and frustrated with the fact that Officer M[redacted] was being instructed to stay away from a woman who she believed was a known prostitute and drug user.

On January 2, 1994, appellant drove with Officer M[redacted] to an area near the Beacon Truck Stop to see if Ms. Schaffer was there. At approximately 11:00 p.m. that night, appellant spotted Ms. Schaffer and, later on that same evening, she called the Ontario City Police Department from her cellular phone. Appellant stated that her name was "Linda Johnson" and that she wanted to report that she was at the Beacon Truck Stop and that a woman in a white or tan car was banging on truck doors and had solicited her husband for prostitution. Appellant also said that an hour earlier someone had approached her [the caller's] car to sell drugs.

The content of the phone call to the police was false. Appellant never saw or heard any solicitation for prostitution nor did she see anyone attempting to sell drugs. The motivation for appellant's telephone call appeared to be to seek revenge against Ms. Schaffer for complaining against Officer M[redacted] and causing him trouble at work.

A week later, on January 9, 1994, appellant again drove by the Beacon Truck Stop area with Officer M[redacted]. Appellant asked Officer M[redacted] to stop at a pay phone near the truck stop, telling him that her pager went off. Again, appellant called the Ontario Police Department, told them that her name was "Schrader" and reported that a lady was going from truck to truck attempting to

sell drugs and that a second lady appeared to be a prostitute and was trying to solicit customers in the trucks. Appellant described the prostitute to the police and told them that she was driving a white or tan Ford escort type of vehicle. Again, these statements were not true and appeared to be aimed at getting Ms. Schaffer in trouble with the Ontario Police Department. The Ontario police responded to these phone calls, but found no criminal activity.

At her administrative interview regarding these incidents, appellant denied making either of these phone calls. It was only after hearing one entire side of a cassette tape of the telephone calls played back to her did appellant finally break down and admit that she had indeed placed these phone calls under assumed names. She then admitted that the contents of these phone calls were false. She also stated that Officer M[redacted] was not involved in making these telephone calls, and in fact, had told her to "stay out of it."

Allegations Re John Szakal

Officer M[redacted] was also the subject of a citizen's complaint from a Mr. John Szakal. Mr. Szakal was cited for numerous commercial violations by Officer M[redacted] who pulled him over for a routine vehicle inspection. Appellant was called to assist with the enforcement stop and was present when Mr. Szakal was cited by Officer M[redacted]. The next day, Mr. Szakal phoned the headquarter's dispatch, made a citizen complaint against Officer M[redacted], and also threatened to kill Officer M[redacted]. Appellant overheard Sergeant Elzig relay this information to Officer M[redacted] and was

aware that Officer M[redacted] was instructed to avoid all contact with Mr. Szakal.

A few days after this incident, when appellant was having dinner at a local restaurant with fellow State Traffic Officer Wilson, appellant spotted Mr. Szakal. Appellant radioed Officer M[redacted] to tell him that Mr. Szakal was in the restaurant. Officer M[redacted] had previously planned to meet appellant at the restaurant but despite his instruction not to have contact with Mr. Szakal, Officer M[redacted] arrived at the restaurant almost immediately after appellant radioed him.

Later that evening, appellant told Sergeant Elzig that Mr. Szakal followed her and Officer Wilson out of the restaurant from a distance of 10 to 15 feet in an apparent effort to intimidate the two of them. Officer Wilson denied that Mr. Szakal did such a thing. Moreover, despite the fact that appellant knew that Officer M[redacted] was instructed to avoid contact with Mr. Szakal, appellant failed to mention during her conversation with Sergeant Elzig that she had radioed appellant about seeing Mr. Szakal at the restaurant and that Officer M[redacted] arrived almost immediately after this radio transmission. She also failed to mention that Officer M[redacted] was in the restaurant at the same time as Mr. Szakal.

Based upon these incidents, the Department served appellant with an adverse action, dismissing her as a State Traffic Officer, effective May 9, 1994. The adverse action alleged, among other things, that appellant conspired to violate a Departmental directive to stay away from Ms. Schaffer, that she made false

reports to the Ontario Police alleging criminal activity, that she made a false statement about a citizen at a restaurant, and that she was dishonest during her administrative interview with Department officials. Based upon these actions, the Department dismissed appellant, citing causes for discipline under Government Code section 19572, subdivisions (d) inexcusable neglect of duty, (e) insubordination, (f) dishonesty, (m) discourteous treatment of the public or other employees, (t) failure of good behavior, and (x) unlawful retaliation against a member of the public for reporting suspected criminal activity.

Officer M[redacted]'s Adverse Action

On or about April 13, 1994, Officer M[redacted] was also served with an adverse action of dismissal. That adverse action was based upon the following incidents: harassing Ms. Schaffer; failing to provide assistance as needed by Ms. Schaffer; twice driving by Ms. Schaffer's location at the Beacon Truck Stop after being told not to be there and conspiring with appellant to make false reports to the Ontario Police; failing to report appellant's false reports to the Ontario Police Department; harassing Mr. Szakal for his attitude in an enforcement stop by citing him unnecessarily; and finally, for purposefully going to the restaurant where Mr. Szakal was known to be after Sergeant Elzig had directed him to avoid all further contact with Mr. Szakal. Besides alleging all of these incidents which also involved appellant, the Department also alleged in the adverse action against Officer M[redacted] that he made a threat to passengers during an enforcement stop when drugs were

found and later submitted a falsified report as to where the drugs were found.

Officer M[redacted]'s appeal of his dismissal did not, unlike appellant's appeal, result in a hearing. Instead, Officer M[redacted] and the Department settled the adverse action in a stipulated settlement agreement approved by the Board. As part of the stipulated agreement, Officer Miranda's dismissal action was modified to a sixty days' suspension.

In her Proposed Decision, the ALJ reduced appellant's dismissal to a sixty days' suspension based upon his opinion that Officer M[redacted]'s conduct was at least as bad, if not worse, than appellant's and given that Officer M[redacted] ultimately received only a sixty days' suspension from the Department, appellant should not receive a more severe penalty.

ISSUES

1. Whether appellant's actions warrant cause for discipline under the charged subdivisions?

2. Whether in assessing an employee's penalty, the Board may take into consideration a settlement agreement reached by a coworker arising out of the same incident(s) for which the employee is being punished?

3. What is the appropriate penalty in this case under all of the circumstances?

DISCUSSION

Causes For Discipline

We agree with the ALJ's findings that appellant committed the actions with which she was charged. Specifically, we find a preponderance of evidence that appellant made phone calls to the Ontario Police Department using a fake name and giving false information in order to harass Susan Schaffer and initially lied to Department investigators about her actions. We further find that appellant called Officer M[redacted] to come to the restaurant knowing Mr. Szakal was present, despite knowing that Officer M[redacted] was not to go near Mr. Szakal, and that she lied to Department investigators when she claimed that Mr. Szakal tried to intimidate her and Officer Wilson at the restaurant. We find appellant's misconduct under these circumstances constitutes cause for discipline under Government Code section 19572, subdivisions (d) inexcusable neglect of duty, (e) insubordination, (f) dishonesty, (m) discourteous treatment of the public or other employees, (t) failure of good behavior, and (x) unlawful retaliation against a member of the public for reporting an actual or suspected violation of law.

Relevancy Of A Coworker's Settlement Agreement

In Determining Appellant's Penalty

We find the ALJ's consideration of one appellant's settlement agreement as evidence in another appellant's adverse action was improper. The settlement agreement reached by Officer M[redacted] has no relevancy to the issue of whether Officer A[redacted] actually committed an act of misconduct. Neither is it relevant to the

issue of the appropriate penalty for the misconduct charged against the appellant. For the reasons below, we do not consider Officer M[redacted]'s settlement in our assessment of the adverse action taken against appellant.

First, the factors which may influence one appellant and department to reach a settlement in a case arising out of a particular incident may have no relevancy as to whether or not another employee connected with the same incident committed wrongdoing or the seriousness of that particular wrongdoing. Factors such as the factual weaknesses of a particular case, the skills of the particular attorneys involved in the settlement negotiations, the availability and dependability of witnesses, the timing of the settlement negotiations, and the costs of pursuing the appeal, may play a role in determining whether a particular case settles, but have no relevancy to the question of whether a co-participant in the incident underlying the settlement deserves the discipline meted out to him or her by a department. To parlay one appellant's settlement agreement into a piece of evidence deemed relevant for consideration at another appellant's hearing would be to misconstrue the nature of settlement agreements.

Second, the modification of penalty agreed to in the settlement agreement in Officer M[redacted]'s case has no bearing on the issue of whether the penalty imposed in this case was just and proper under all of the circumstances. Just because the Department and Officer M[redacted] agreed to modify his adverse action to a sixty days' suspension as part of a settlement is not evidence that

Officer M[redacted]'s misconduct was deserving of a sixty days' suspension. All the settlement agreement means is, that for a variety of reasons which the Board shall never know, the parties agreed to the compromise of a sixty days' suspension.

On the contrary, the Board's job is to make a "just and proper" decision on each appeal that comes before it. Government Code section 19582. When considering the "just and proper" penalty for an employee, the Board must assess each case on its own merits. Factors such as an employee's entire work history, their degree of participation or involvement in the incident, and their subsequent actions, all have bearing upon the just and proper penalty for that employee. Even if we had considered Officer M[redacted]'s settlement in this case, we believe that the two Officers' cases are very different. M[redacted] was not the person who made the fraudulent calls to the Police Department, and did not encourage appellant to do so. Additionally, there was no evidence that Officer M[redacted] was placed on notice as to prior poor conduct through informal disciplinary measures as was appellant.

Finally, we believe that consideration of one appellant's settlement as evidence in another appellant's hearing would interfere with the Board's strong policy of encouraging settlements. Departments might hesitate to enter into a settlement agreement if faced with the possibility that the agreement would be used by another appellant as relevant evidence in another adverse action hearing.

Offers of compromise and settlement agreements entered into between parties in civil lawsuits are, for the same public policy reasons, inadmissible as evidence. Evidence Code section 1152.[1] (See Brown v. Pacific Electric Ry. Co (1947) 79 Cal.App.2d. 613.)

For the above-stated reasons, we find that Officer M[redacted]'s settlement agreement was irrelevant to the issue of whether appellant deserved to be dismissed from her position as a Highway Patrol Officer, and should not have been admitted as evidence in this case.

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, in its judgment, is "just and proper." (Government Code section 19582). One aspect of rendering a "just and proper" decision involves assuring that the discipline imposed is "just and proper." 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, 843) The Board's discretion, however, is not unlimited. In the seminal case

[1] Evidence Code section 1152 provides, in pertinent part:

> Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.

of 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.)

The harm to the public service resulting from appellant's continuing dishonesty, and the potential harm to the public service should such misconduct be repeated, is obvious and serious. Appellant made two false telephone calls to a law enforcement agency in an attempt to "set up" Ms. Schaffer as revenge for what she perceived as harassment against Officer M[redacted]. Not only was appellant dishonest in her actions with the Ontario Police Department, causing embarrassment to the Department, but continued her dishonesty with the Department by denying her participation in these calls until after she was faced with her own voice on a tape recording.

As stated in the Board's Precedential Decision Jesus Reyes (1993) SPB Dec. No. 93-04, courts have consistently held peace officers to a higher standard of conduct than other employees. In particular, dishonesty by law enforcement personnel has been treated with due harshness by the courts and by this Board as well. J[redacted] R[redacted] (1993) SPB Dec. No. 93-04; G[redacted] J[redacted] (1992) SPB Dec. No. 92-01; (See also, Paulino v. Civil Service Com. (1985) 175 Cal.App.3d 962 where a CHP officer was dismissed for lying about his absences from work and Warren v. State Personnel Bd. (1979) 94 Cal.App.3d 95 where a peace officer was dismissed, in part, for lying about his participation in unlawful activity outside of duty hours.)

In the case of Ackerman v. State Personnel Board (1983) 145 Cal.App.3d 395, the Court of Appeal, quoting prior cases, stressed the seriousness with which dishonesty in law enforcement is viewed:

> 'The CHP as a law enforcement agency charged with the public safety and welfare must be above reproach.' [Citation]....
>
> ...CHP officers are held to the highest standard of behavior: the credibility and honesty of an officer are the essence of the function; his duties include frequent testifying in court proceedings....
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> ...The position of a CHP officer by its nature is such that very little direct supervision over the performance can be maintained. The CHP necessarily must totally rely on the accuracy and honesty of the oral and written reports of its officers as to their use of state time and
> equipment. 'Any breach of trust must therefore be looked upon with deep concern. Dishonesty in such matters of public trust is intolerable.' (emphasis in original) [Citation]...

In this case, appellant, a CHP Officer, was dishonest on at least four separate occasions, causing potential harm to Ms.

Schaffer and Mr. Szakal, as well as embarrassment to the Department. Although appellant has no record of prior formal discipline, she had received a number of informal warnings that her insubordinate and disrespectful attitude would not be tolerated. Despite warnings, appellant continued on her mutinous course of behavior and then increased the seriousness of her misdeeds by lying about them. Dismissal is warranted.

CONCLUSION

Appellant twice gave false information to a law enforcement agency in an attempt to get revenge against a member of the public who lodged complaints against Officer M[redacted] and then lied to Department officials about her actions. She also wrongfully alerted Officer M[redacted] to come to a restaurant where she knew Mr. Szakal was, even though she knew that Officer M[redacted] was prohibited from being near Mr. Szakal and then told lies to her superiors regarding Mr. Szakal's conduct at the restaurant. Appellant's actions in this case constituted cause for discipline under Government Code section 19572, subdivisions (d) inexcusable neglect of duty, (e) insubordination, (f) dishonesty, (m) discourteous treatment of the public or other employees, (t) failure of good behavior, and (x) unlawful retaliation.

Appellant's misconduct is highly egregious and proves that she is not deserving of being a law enforcement officer. The fact that her cohabitant, Officer M[redacted], was able to settle his adverse action with the Department for a sixty days' suspension has no impact on the outcome of appellant's case. After considering just the circumstances of appellant's case, we find that dismissal is a just and proper penalty.

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, it is hereby ORDERED that:

1. The adverse action of dismissal taken against J[redacted]. A[redacted] is hereby sustained.

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

STATE PERSONNEL BOARD*

Lorrie Ward, President
Ron Alvarado, Member
Richard Carpenter, Member
Alice Stoner, Member

*Floss Bos was not present when this case was heard 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 December 5-6, 1995.

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