Appellant filed a writ petition, which was granted by the San Diego Superior Court. On May 22, 2000, the Fourth District Court of Appeal reversed the superior's court order granting the writ, and upheld the Board's decision.

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **J[redacted] G[redacted]** From dismissal from the position of Parole Agent I with the Department of the Youth Authority at San Diego	Case No. 97-2349 **BOARD DECISION** (Precedential) **NO. 98-03** May 5 -6, 1998

APPEARANCES: Elizabeth J. Schulman, Attorney, on behalf of appellant, J[redacted] G[redacted]; Karen J. Kilpatrick, Hearing Specialist, on behalf of respondent, Department of the Youth Authority.

BEFORE: Florence Bos, President; Richard Carpenter, Vice President; Ron Alvarado, Member.

DECISION

Appellant, J[redacted] G[redacted], was dismissed from his position as a Parole Agent I with the Department of the Youth Authority (the "Department") for admittedly having smoked marijuana in a motel room with two friends on one occasion. The Administrative Law Judge (the "ALJ") who presided at the hearing sustained the dismissal. The ALJ found, however, that the Department's failure, at the time it served the proposed adverse action, to provide to appellant a copy of an investigation report prepared by the San Bernardino Sheriff's Department that, among other things, documented appellant's admitted marijuana use, constituted a violation of appellant's pre-termination due process rights as described in Skelly v. State Personnel Board ("Skelly") (1975) 15 Cal. 3d 194.

In this decision, the State Personnel Board (the "Board") substantially adopts the ALJ's findings of fact and conclusions of law with respect to appellant's dismissal. The Board concludes, however, that the Department's failure to provide appellant with the investigation report prepared by the Sheriff's Department before taking adverse action does not constitute a violation of appellant's due process rights since appellant did not show that the Director of the Department relied upon that report when he made the decision to take adverse action.

Factual Summary

Appellant was appointed to the position of Parole Agent I on July 16, 1990. He has received no prior adverse actions.

In its adverse action against appellant, the Department alleged, among other things, that, on or about April 1 or 2, 1997, appellant: (1) "smoked marijuana on at least one occasion while at a motel in Wrightwood, California;" (2) told Detective Norman Neiman from the San Bernardino County Sheriff's Department that he smoked marijuana from time to time; (3) asked Detective Neiman not to report appellant's marijuana use to the Department; and (4) during an interview with Lieutenant Sandra Wright, an investigator for the Department, denied that he smoked marijuana from time to time and stated that Detective Neiman was a liar for so stating.[1] The Department contends that these acts constitute cause for discipline under Government Code § 19572, subdivisions (f) dishonesty, (m) discourteous treatment of the public or other

[1] The Department also alleged that for "an unknown period of time prior to April 1, 1997, on an unknown number of occasions, [appellant] smoked marijuana." The ALJ properly dismissed this allegation for failure to meet minimal standards of pleading in accordance with L[redacted] K[redacted] (1991) SPB Dec. No. 91-04.

employees, (o) willful disobedience and (t) other failure of good behavior during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority or the person's employment.

Appellant's Use of Marijuana on April 2, 1997

On April 1, 1997, appellant and two friends, Charles Itchko and Ken Tamakawa, went on a camping/hiking trip. On April 3, 1997, while on this trip, Mr. Tamakawa disappeared. Appellant and Mr. Itchko reported Mr. Tamakawa's disappearance to the San Bernardino County Sheriff's Department. Detective Neiman of the Sheriff's Department was one of the officers assigned to investigate Mr. Tamakawa's disappearance.

As part of his missing person investigation, Detective Neiman interviewed appellant. During this interview, appellant told Detective Neiman that he and his two friends had spent the night of April 2, 1997 in a motel. Appellant admitted to Detective Neiman that, while in the motel room, appellant smoked part of a marijuana cigarette and drank a small amount of alcohol before going to bed.

Detective Neiman also interviewed Mr. Itchko. During this interview, Mr. Itchko admitted that he had brought the marijuana to the motel room and shared it with appellant.

When he returned to work, appellant reported to his supervisor that he had been interviewed by the San Bernardino County Sheriff's Department with regard to its investigation of Mr. Tamakawa's disappearance. Upon hearing of the matter, Michael Gallegos, the Deputy Director of Parole Services for the Department, telephoned the Sheriff's Department and requested information as to its missing person's investigation

regarding Mr. Tamakawa. The Sheriff's Department provided to Mr. Gallegos a report prepared by Detective Neiman (the "Sheriff's Report") of the on-going investigation of Mr. Tamakawa's disappearance. In the Sheriff's Report, Detective Neiman, among other things, described appellant's admissions as to smoking marijuana on April 2, 1997.

After reviewing the Sheriff's Report, Mr. Gallegos and Robert Ekstrom, Assistant Deputy Director of Parole Services for the Department, decided to initiate an internal investigation as to the information contained in the Sheriff's Report regarding appellant's admitted marijuana use.

Lieutenant Wright was assigned to conduct the internal investigation for the Department. She reviewed the Sheriff's Report and interviewed both appellant and Detective Neiman. During his interview with Lieutenant Wright, Detective Neiman stated that appellant admitted to smoking marijuana on the night of April 2, 1997 and to smoking "a small amount of marijuana from time to time." Detective Neiman also informed Lieutenant Wright that appellant "was concerned" about the Department being notified about the investigation.

Before the ALJ, Detective Neiman testified that appellant expressed "concern" about Detective Neiman's reporting his use of marijuana to the Department. However, contrary to the allegations set forth in the adverse action, Detective Neiman stated that appellant did not tell Detective Neiman not to report to the Department about the Sheriff's Department's investigation.

Lieutenant Wright also interviewed appellant. Near the beginning of the interview, she informed appellant that her questions covered the time period "30 days

before and 30 days" after April, 1997. During his interview with Lieutenant Wright, appellant admitted that he told Detective Neiman that he had smoked marijuana in the motel room on April 2, 1997. He stated, however, that he did not smoke marijuana on a regular basis. After his representative clarified that they were talking about the time period from March, 1997, appellant also stated that the April incident was the first time he had used marijuana.

Contrary to the allegations set forth in the Department's adverse action against appellant, the transcript of Lieutenant Wright's interview with appellant does not indicate that appellant called Detective Neiman a liar. In addition, that transcript does not support the Department's claim that appellant lied about whether he used marijuana from time to time, since Lieutenant Wright asked appellant only whether he used marijuana "on a regular basis," not whether he used marijuana from time to time. The interview transcript also does not support the Department's allegation that appellant lied about whether the April incident was his first use of marijuana. Both the transcript of Lieutenant Wright's interview with appellant and appellant's testimony during the hearing indicate that appellant understood Lieutenant Wright's question as to whether the April incident was his first use of marijuana to mean whether it was his first use in the preceding thirty days. The Department did not offer any evidence to refute appellant's statement that the April incident was appellant's the first use of marijuana in 30 days.

DISCUSSION

There was not sufficient evidence presented by the Department to support discipline against appellant under Government Code § 19572, subdivisions (f)

dishonesty, (m) discourteous treatment of the public or other employees, or (o) willful disobedience. Those causes of discipline are, therefore, dismissed.

Appellant admitted that he smoked part of a marijuana cigarette provided by Mr. Itchko in a motel room on April 2, 1997. The issue before the Board is whether a one-time use of marijuana in the privacy of a motel room by an off-duty peace officer is sufficient to support dismissal under Government Code § 19572, subdivision (t), other failure of good behavior outside of duty hours which is of such a nature that it causes discredit to the Department or appellant's employment. For the reasons set forth below, the Board decides that a one-time off-duty use of marijuana by a parole officer, such as appellant, who is expected to serve as a role model for the wards he oversees, is a sufficient failure of good behavior under Government Code § 19572(t) to warrant dismissal.

Nexus between Appellant's One-time Use of Marijuana and his Employment

In order justify discipline under Government Code § 19572(t), the Department must show a failure of good behavior on the part of the appellant which is of such a nature as to cause discredit to the Department or appellant's employment.[2] For discipline to be sustained under Government Code § 19572(t), it

> must be based on more than a failure of good behavior; it must be of such a nature as to reflect upon [appellant's] job… the misconduct must bear some rational relationship to [appellant's] employment and must be of such a character that it can easily result in the impairment or disruption of the public service. . . The legislative purpose behind subdivision (t) was to discipline conduct which can be detrimental to state service. . . . It is apparent the Legislature was concerned with punishing behavior which had potentially destructive consequences, rather than concentrating upon intentional conduct.[3]

[2] Warren v. State Personnel Board ("Warren") (1979) 94 Cal. App. 3d 95, 104.
[3] Stanton v. State Personnel Board (1980) 105 Cal. App. 3d 729, 739-40. (Emphasis in original.)

The critical questions that must be addressed to sustain discipline under Government Code § 19572(t) are: (1) whether there is a rational relationship between appellant's failure of good behavior and his duties as a parole agent and (2) whether his failure of good behavior may result in the impairment or disruption of public service in the Department.[4]

Appellant was a community parole agent for the Department. As set forth in the Board's specification for his class,[5] appellant's job was to supervise, counsel and monitor the progress of paroled wards in making social and economic adjustments outside of confinement. As part of his duties, among other things, appellant was responsible for enforcing the conditions of his wards' parole, investigating parole violations, gathering information which could cause a change in parole status, and apprehending parole violators. As Mr. Ekstrom testified, if one of appellant's wards were discovered smoking marijuana, that ward's parole could be revoked. Mr. Ekstrom testified that the Department could not condone a parole agent engaging in the type of behavior that could cost one of his parolees his freedom. As the Second District Court of Appeal stated in Ramirez v. State Personnel Board, 204 Cal. App. 3d 288, 293,

> One of the purposes of the Youth Authority is to rehabilitate those youths in its charge, with punishment as a rehabilitative tool…. Rehabilitation has many facets, not the least of which is an attempt to teach that the law must be respected and obeyed. … A youth counselor who does the very thing he is

[4] See, Id. at p. 739.

[5] The Board takes administrative notice of its class specification for Parole Agent I, Youth Authority. On April 7, 1992, the Board designated Parole Agent I, Youth Authority as a "sensitive class" under Rule 213. Since that time, applicants for positions in this class are subject to a drug screening test. Rule 213 provides that a class may be designated for pre-employment drug testing only after the Board has concluded, after a public hearing, that the appointing power has adequately documented the sensitivity of the class and the consequences of drug-related behavior, and has shown that drug testing is job related.

supposed to counsel against (disobedience of the law) cannot be said to be acting in the best interests of the Youth Authority or its wards.

In addition, Mr. Ekstrom testified that the Department has a policy which prohibits parole agents' illicit drug use. Mr. Ekstrom stated that the Department is very concerned about drug use by parole agents since they are armed.

There is clearly a rational relationship between appellant's smoking of marijuana and his employment as a parole agent. Since parole agents are peace officers, they are held to a higher standard of behavior than non-peace officers.[6] Peace officers may be disciplined for violating laws they are employed to enforce.[7] Both the Board and the courts have found a nexus between unlawful conduct committed off-duty by peace officers employed by the Department and such peace officers' employment.[8] There was uncontroverted evidence in the record to establish a connection between appellant's misconduct and his official duties as a parole agent for the Department.

There was also sufficient evidence in the record to establish that appellant's failure of good behavior may result in the impairment or disruption of public service in the Department. Employees in appellant's position must maintain their credibility with parolees, some of whom may have been incarcerated for crimes relating to the sale or use of marijuana.[9] Appellant's admitted use of marijuana could have a significant adverse impact upon his credibility with his parolees and upon the community to which

[6] See, J[redacted] R[redacted] (1993) SPB Dec. No. 93-04.
[7] Hooks v. State Personnel Board (1980) 111 Cal. App. 3d 572, 577.
[8] See, e.g., M[redacted] M[redacted] (1993) SPB Dec. No. 93-11.
[9] See, Parker v. State Personnel Board (1981) 120 Cal. App. 3d 84, 87.

those parolees have returned. A peace officer who breaks the law he is sworn to uphold discredits himself and his employer.[10]

Appellant contends that he should not be punished because he committed no public wrongdoing: he smoked marijuana in the privacy of a motel room, he did not drive under the influence, he did not purchase the marijuana. The Board disagrees. Appellant engaged in illegal conduct with at least one other person in the motel room. Appellant's conduct, therefore, cannot be seen as purely private. As the court stated in Warren, supra, 94 Cal. App. 3d 95, 106,

> A law enforcement agency cannot permit its officers to engage in off–duty conduct which entangles the officer with lawbreakers and gives tacit approval to their activities. Such off-duty activity casts discredit upon the officer, the agency, and law enforcement in general.

The Department has established that: (1) there is a nexus between appellant's one-time off-duty use of marijuana in a motel room and his employment as a parole agent and (2) such behavior may result in the impairment or disruption of public service in the Department to justify discipline under Government Code § 19572(t).

Penalty

Appellant contends that even if his one-time use of marijuana may be deemed to be punishable conduct under Government Code § 19572(t), the penalty of dismissal is excessive.

The Sheriff's Department did not charge appellant with any criminal activity after he admitted that he had smoked marijuana. Appellant's contends that, even if the Sheriff's Department had charged him with a crime, at most, he could have been

[10] R[redacted] H[redacted] (1193) SPB Dec. 93-22.

convicted of an infraction under the Penal Code and ordered to pay a $100 fine.[11] Appellant argues that he should not be dismissed for such a small infraction.

When performing its constitutional responsibility to review disciplinary actions[12], the Board is charged with rendering a decision that is "just and proper".[13] 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[14] 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 omitted.] Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence.[15]

Harm or potential harm to the public service is almost certain to exist where, as here, the employee's off-duty misconduct is of such a nature that it causes discredit to the employer or the employment within the scope of Government Code § 19572(t). As noted above, courts have consistently recognized that peace officers bring discredit to their employment under Government Code § 19572(t) by violating the laws they are employed to enforce.[16]

Even though appellant's limited use of marijuana may only be an infraction under the Penal Code, it is nonetheless a crime of particular significance given appellant's job responsibilities. Appellant's position involves counseling young offenders, some of

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[11] Penal Code § 19.8.
[12] Cal. Const. Art. VII, section 3(a).
[13] Government Code § 19582
[14] (1975) 15 Cal.3d 194
[15] Id. at 217-218.
[16] G[redacted] C[redacted] (1992) SPB Dec. 92-11.

whom may have abused drugs themselves. Appellant's duties include ensuring parolees follow all rules and laws; he is called upon to set an example for the parolees under his care.[17] Given the sensitivity of appellant's position, appellant's illegal conduct cannot be countenanced.

Appellant argues that dismissal is inappropriate in this case because the Board has upheld disciplinary actions far short of dismissal for adverse actions involving alcohol abuse. The Board does not agree that drug use must be treated in the same fashion as alcohol abuse. Alcohol use or abuse, however disruptive it may be to the workplace, is not illegal; marijuana use is.[18]

Appellant also argues that the Board has imposed lesser discipline than dismissal for drug use by non-peace officers.[19] Cases involving non-peace officers are distinguishable. The Board has consistently held peace officers to higher standards than non-peace officers.[20] As a parole agent, appellant must act in a manner that is above reproach. His lawbreaking activity is inconsistent with his duties as a parole agent.

Appellant asks that the rehabilitation efforts he undertook after his dismissal be taken into consideration in mitigation of his discipline. The Board commends appellant for his rehabilitation efforts. However, while the Board has discretion to consider rehabilitation when assessing penalty, the harm to the public service remains the Board's overriding concern.[21] In this case, the Board finds that appellant's participation in post-disciplinary rehabilitation is not sufficient to outweigh the actual and potential

[17] M[redacted] M[redacted] (1993) SPB Dec. 93-11.
[18] G[redacted] J. O[redacted] (1992) SPB Dec. 92-11.
[19] See, e.g., E[redacted] A[redacted] (1995) SPB Dec. No. 95-03.
[20] See, e.g. R[redacted] H[redacted] (1993) SPB Dec. No. 93-22.
[21] G[redacted] O[redacted] (1992) SPB Dec. No. 92-11. See also, E[redacted] H[redacted] (1996) SPB Dec. No. 96-11.

harm that appellant's failure of good behavior has had and may have upon the public service.

Appellant argues that dismissal is too severe a punishment for a one-time off-duty sharing of a marijuana cigarette given appellant's very good employment history and otherwise unblemished record. Appellant's criminal behavior is irreconcilable with his job as a parole agent for the Department.[22] The punishment of dismissal is not unreasonable under the circumstances of this case.

Skelly Issues

Appellant contends that the Department violated his Skelly rights by failing to provide him with a copy of the Sheriff's Report when it took adverse action against him. Appellant argues that the appropriate remedy for such a violation is an award of backpay, exclusion of all evidence which resulted from Detective Neiman's investigation of the disappearance of Mr. Tamakawa, and dismissal of the adverse action.

Mr. Ekstrom testified that both he and Mr. Gallegos reviewed the Sheriff's Report. From the information they gleaned from that Sheriff's Report, they decided to initiate an internal investigation into appellant's marijuana usage. Lieutenant Wright reviewed the Sheriff's Report during the course of her internal investigation. Because the Sheriff's Report was part of an ongoing investigation into the disappearance of Mr. Tamakawa, Detective Neiman requested that the Department keep it confidential and not share it with appellant. In compliance with this request, the Department did not give a copy of the Sheriff's Report to appellant as part of the materials appellant received with written notice of the proposed adverse action.

[22] Ramirez v. State Personnel Board, supra, 204 Cal App. 3d at p. 294.

During the hearing before the ALJ, Detective Neiman refused to give the Sheriff's Report to appellant or his counsel because the missing person investigation was still continuing. Detective Neiman did, however, allow the ALJ to read into the record those paragraphs of the Sheriff's Report which specifically referred to appellant's admitted marijuana use.

In Skelly, the California Supreme Court set forth certain notice requirements that a public employer must fulfill to satisfy an employee's pre-removal procedural due process rights:

> As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.[23]

Pursuant to Skelly, the Board enacted Rule 52.3, which provides, in pertinent part:

> (a) Prior to any adverse action . . . the appointing power . . . shall give the employee written notice of the proposed action. This notice shall be given to the employee at least five working days prior to the effective date of the proposed action. . . . The notice shall include:
>
> (1) the reasons for such action,
> (2) a copy of the charges for adverse action,
> (3) a copy of all materials upon which the action is based,
> (4) notice of the employee's right to be represented in proceedings under this section, and
> (5) notice of the employee's right to respond….

In this case, the ALJ found that a Skelly violation occurred prior to the effective date of appellant's dismissal due to the Department's failure to provide appellant with a copy of the Sheriff's Report. The ALJ rejected the Department's assertion that, since appellant failed to show that the Director of the Department relied upon the Sheriff's Report when he

[23] 15 Cal.3d at 215.

made the decision to take adverse action against appellant, appellant failed to prove that a Skelly violation occurred. The ALJ reasoned that, because persons in the Director's position must necessarily rely upon summaries of relevant material when making their adverse action decisions, the Department could not assert that the Director did not personally review the Sheriff's Report when he decided to take adverse action against appellant if his subordinates had read that Report prior to recommending dismissal.

The Board has clarified that the "material upon which the action is based" referred to in Skelly and Board Rule 53.2 is not all the material in the possession of the Department at the time the adverse action is taken. It is, rather, all the material relied upon by the individual who makes the ultimate decision to take adverse action against an employee.[24] In contrast, an appellant's right to discovery is broader. It includes "the right to inspect any documents in the possession of, or under the control of, the appointing power which are relevant to the adverse action." [25] To hold otherwise would be to blur the distinction between what is minimally required to satisfy appellant's pre-termination due process rights, as delineated in Skelly, and the broader category of materials that may be discoverable prior to the post-termination hearing.

The Board has consistently held that appellant has the burden of proving a Skelly violation.[26] At the hearing before the ALJ, Mr. Ekstrom testified that he used the Sheriff's Report only to initiate the internal investigation and that he based his recommendation that appellant be terminated solely upon the results of the internal investigation. Although

[24] J[redacted] K[redacted] (1997) SPB Dec. No. 97-06; L[redacted] G[redacted] (1997) SPB Dec. No. 97-04; S[redacted]-J[redacted] (1995) SPB Dec. No. 95-14.
[25] Government Code § 19574.1
[26] J[redacted] K[redacted] (1997) SPB Dec. No. 97-06.

Lieutenant Wright, who conducted the internal investigation, testified that she had read the Sheriff's Report, she did not refer to the Sheriff's Report in her investigation report. Instead, in her investigation report, Lieutenant Wright based her conclusion that appellant should be disciplined solely upon the information she had obtained during her interviews with Detective Neiman and appellant.

Without any factual support, in his Final Brief, appellant speculates that the Sheriff's Report must have contained "rumors and innuendoes concerning appellant which were likely to have colored the [Department's] determination." However, there was no testimony or evidence presented during the hearing before the ALJ which showed that, when making the decision to terminate appellant, the Department Director was told or relied upon any information contained in the Sheriff's Report that was not included in Lieutenant Wright's investigation report.

There was no evidence presented in the record as to whether appellant ever sought to assert his discovery rights by seeking a copy of the Sheriff's Report pursuant to the procedures set forth in Government Code § 19574.2. We are not called upon to determine whether appellant would have been entitled to a copy of the Sheriff's Report in discovery.

Appellant has not shown that the Department Director who made the decision to terminate appellant relied upon any material other than that which was provided to appellant with the proposed adverse action. Appellant has, therefore, failed to carry his burden of proving a Skelly violation. The Board finds that the Department did not violate appellant's due process rights by not providing him with a copy of the Sheriff's Report with its proposed adverse action.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is hereby ORDERED that:

1. The adverse action of dismissal of J[redacted] G[redacted] from his position of Parole Agent I with the Department of the Youth Authority at San Diego is sustained.

2. This decision is certified for publication as a Precedential Decision.

(Government Code § 19582.5).

STATE PERSONNEL BOARD[27]

Florence Bos, President
Richard Carpenter, Vice President
Ron Alvarado, Member

* * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on May 5 - 6,1998.

_____

Walter Vaughn
Executive Officer
State Personnel Board

[G[redacted].F]

[27] Members Ward and Strock did not participate in this decision.