

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by ) SPB Case No. 38499  
J ■ ■ . A ■ ■ )  
 ) **BOARD DECISION**  
 ) (Precedential)  
 )  
From dismissal from the position )  
of Correctional Officer at the ) **NO. 96-17**  
Richard J. Donovan Correctional )  
Facility, Department of )  
Corrections at San Diego )  
 )  
In the Matter of the Appeal by ) SPB Case No. 38518  
M ■ ■ . I ■ ■ )  
 ) **BOARD DECISION**  
 ) (Precedential)  
From dismissal from the position )  
of Correctional Officer at the )  
Richard J. Donovan Correctional )  
Facility, Department of )  
Corrections at San Diego )  
 ) December 3-4 , 1996

Appearances: David M. Goldstein, Attorney, on behalf of appellant, J ■ ■ . A ■ ■ ; Everett L. Bobbitt, Attorney, on behalf of appellant, M ■ ■ . I ■ ■ ; Lieutenant John R. Sandlin, Employee Relations Officer, Richard J. Donovan Correctional Facility, on behalf of respondent, Department of Corrections.

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

**DECISION**

This case comes before the State Personnel Board after the Board granted a Petition For Rehearing filed by the California Department of Corrections after a decision was reached In the Matter of the Appeals filed by M ■ ■ . I ■ ■ and J ■ ■ . A ■ ■ (collectively "appellants"). The appellants had been dismissed from their positions as Correctional Officers at the Richard C. Donovan Correctional Facility based on their alleged failure to

(A [REDACTED] continued - Page 2)

prevent an inmate from escaping from the prison. The Board had previously adopted the decision of the Administrative Law Judge modifying each dismissal to a sixty-days' suspension. The Board granted the Department's Petition for Rehearing to review the record and determine the appropriate penalty.

After reviewing the record of the hearing and considering the oral and written arguments of the parties, the Board concludes that appellants' acts of misconduct warrant their each receiving a six-months' suspension.

#### **FACTUAL SUMMARY**

I [REDACTED] was appointed to the position of Correctional Officer in December 1983. A [REDACTED] was appointed to the position of Correctional Officer in January 1987. Both officers have good work records and neither has any history of disciplinary action. At the time of the inmate's escape from the prison, I [REDACTED] had been assigned to work in the sallyport for approximately three months; A [REDACTED] for approximately two years.

The sallyport is a gated area where vehicles park to be searched prior to leaving the prison. After the correctional officers working the sallyport determine that a vehicle has been thoroughly searched and is clear, they give a signal to the officer at the perimeter gate to open the gate so the vehicle can leave the prison.

(A [REDACTED] continued - Page 3)

Prior to this incident, appellants had received approximately one hour of formal instruction which covered, in general, the duties of a sallyport officer. In addition, both officers received on-the-job training related to their duties as sallyport officers.

Appellants acknowledge that, as sallyport officers, they were required to thoroughly inspect all departing vehicles to assure that no inmates escaped. Appellants generally worked together as a team in conducting their searches.

On the morning of April 3, 1995, appellants were working in the sallyport when a Nalco chemical delivery truck drove up for its pre-departure inspection. The truck was extremely large, with several compartments lining its sides. Appellants had both searched this particular delivery truck a number of times before.

At the time the truck drove up, I [REDACTED] was nearby, inside the restroom. While I [REDACTED] was in the restroom, A [REDACTED] said hello to the driver of the truck and began his search. He started on the driver's side, opening and closing the compartments. He then climbed on top of the truck to search that area, and then climbed down to check under the front hood. He then walked around to the passenger's side and opened and closed all of the compartments on that side.

In the meantime, I [REDACTED] left the restroom and walked out to where the truck was parked, standing on the passenger's side. When I [REDACTED] arrived at the passenger's side of the truck, A [REDACTED] was on

(A [REDACTED] continued - Page 4)

the other side of the truck opening and closing compartments. At that point, I [REDACTED] assumed that A [REDACTED] was in the process of searching the truck.

While A [REDACTED] was busy searching the vehicle, I [REDACTED] grabbed an inspection mirror and began to search the underside of the truck, starting with the front of the passenger's side and slowly walking his way to the back of the truck. The inspection mirror is a large round mirror on a long handle, similar to a large dentist's mirror. It is designed so that a person, while standing, can place the mirror underneath a vehicle and see the underside. At no time during I [REDACTED]'s search of the undercarriage of the truck did I [REDACTED] bend down or attempt to get underneath the truck, nor did he walk around to the driver's side to search the undercarriage of that side with the mirror.

After I [REDACTED] searched the undercarriage of the truck, working his way from the front to the back of the passenger's side, he met up with A [REDACTED] who was standing by the back of the truck on the driver's side. I [REDACTED] asked A [REDACTED] if A [REDACTED] had searched the compartments on the passenger's side, and A [REDACTED] responded that he had. At that point, A [REDACTED] gave a quick sign to the officer at the gate, acknowledging that the truck had been searched and was free to proceed through the gate.

In allowing the truck to leave through the gate, A [REDACTED] assumed that I [REDACTED] had checked the entire undercarriage of the

(A [REDACTED] continued - Page 5)

vehicle with the mirror and that the search was complete. Similarly, I [REDACTED] assumed that A [REDACTED] had checked the undercarriage of the driver's side.

Unbeknownst to either officer, an inmate wearing blue coveralls had earlier snuck into the undercarriage of the truck and braced himself under some crossbeams. When the truck driver eventually stopped many miles away, the inmate crawled out from under the truck and attempted to run away. Fortunately, a person watching nearby caught the attention of the driver and the inmate was captured by authorities just a short time later.

The Department dismissed I [REDACTED] and A [REDACTED] from their positions as correctional officers as a result of the inmate's escape, citing cause for discipline under Government Code section 19572, subdivisions (d) inexcusable neglect of duty and (i) inefficiency.

The Department contends that dismissal is warranted, as protecting the public from inmate escapes is the foremost task of correctional officers: if they cannot do that, the Department argues, they should not be correctional officers.

While the appellants conceded that they did not properly perform their duty to complete a thorough examination of the truck, they argue that dismissal is not an appropriate penalty.

First, appellants contend that they did not have the proper equipment available that day to complete a thorough search of the truck. The only equipment available to assist them in their search

(A [REDACTED] continued - Page 6)

on that day was their flashlights (which neither officer used) and the inspection mirror. Appellants point out that the "creeper" (a board that officers lie on to look underneath vehicles), as well as a large rectangular mirror on wheels, were out being repaired at the time of the incident and were not available to assist them that day.

Second, appellants contend that they were never given proper training on how to conduct a vehicle inspection. They contend that they were never instructed on how to best perform a search of a vehicle as their hour-long training session did not cover inspections in such detail. Moreover, A [REDACTED] testified, without contradiction, that he was instructed by his superior officer never to crawl underneath vehicles to conduct an inspection.

Third, appellants argue that dismissal is not appropriate as the incident was a one-time work performance issue, not volitional misconduct, and therefore does not warrant the ultimate penalty of dismissal, particularly in light of their excellent work records.

#### **ISSUES**

The following issues are before the Board for determination:

1. What causes for discipline, if any, did the Department prove by a preponderance of the evidence?
2. Assuming cause for discipline is established, what is the appropriate penalty?

## DISCUSSION

### Causes For Discipline Established

The courts and this Board have defined inexcusable neglect of duty, a cause for discipline under Government Code section 19572, subdivision (d), to mean "an intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty." J [REDACTED] T [REDACTED] (1996) SPB Dec. No. 96-04, page 11, citing Gubser v. Dept. of Employment (1969) 271 Cal.App.2d 240, 242.

The evidence in the record is insufficient to allow this Board to determine whether the inmate could have been seen on the particular day in question had I [REDACTED] or A [REDACTED] crawled underneath the truck or placed the mirror underneath the driver's side of the truck. We do not believe, however, that we need to answer those questions in order to determine whether I [REDACTED] and A [REDACTED] were neglectful of their duties. Both men admitted that they had a duty to conduct a complete search of the delivery truck and further admitted that they did not conduct a complete search of the vehicle because of assumptions each made about the other officer's search efforts. In light of these admissions, the Board rejects appellants' argument that the Department failed to provide adequate equipment to perform a search or failed to give them sufficient training in performing searches. While certainly clear post orders, adequate training and the best equipment can reduce the

(A [REDACTED] continued - Page 8)

likelihood of escapes, we do not find that the escape in this case was caused by any deficiencies in these areas.

As noted above, to find appellants' admitted failure constitutes legal cause for discipline as "inexcusable neglect of duty," we must conclude that that failure was either intentional misconduct or gross negligence. In R [REDACTED] H [REDACTED] (1994) SPB Dec. No. 94-07, this Board found that a traffic officer's one-time failure to secure his radio extender to his belt was only simple negligence, not subject to discipline as inexcusable neglect of duty. In contrast, in T [REDACTED] C [REDACTED] (1992) SPB Dec. No. 92-16, this Board found that an employee's one-time failure to follow proper medication procedures, which resulted in a wrong dosage being administered, did constitute inexcusable neglect of duty.

In assessing whether negligent conduct is "simple negligence" or "gross negligence," we consider the degree of seriousness of the harm to the public that could result from the employee's negligence. The potential harm from the misconduct at issue in H [REDACTED] was only minor - a broken or lost radio extender. In comparison, the potential harm from the misconduct at issue in C [REDACTED], a medication error, was serious illness or even death.

The instant case is closer to C [REDACTED] than to H [REDACTED]. While the appellants in this case did not intentionally neglect their duty or make a conscious decision not to abide by any explicit procedures, the potential for harm to the public arising out of

(A [REDACTED] continued - Page 9)

errors such as the one made by appellants is serious, constituting gross negligence. Having concluded that appellants were grossly negligent in performing their duties, we find cause to discipline appellants for inexcusable neglect of duty.

In addition to citing inexcusable neglect of duty, as legal cause for discipline, the Department cited inefficiency under Government Code section 19572, subdivision (i). The Board has previously determined that inefficiency "...generally connotes a continuous failure by an employee to meet a level of productivity set by other employees in the same or similar position" and, in some instances, can also mean "...failure to produce an intended result with a minimum of waste, expense or unnecessary effort." R [REDACTED] B [REDACTED] (1993) SPB Dec. 93-21, pages 10-11. The charged misconduct in this case does not constitute "inefficiency," as defined; we therefore dismiss this charge.

#### Penalty

Having concluded that appellants failed to conduct an adequate search of the vehicle and thus should be disciplined for inexcusable neglect of duty, we turn to the issue of what penalty is appropriate. The California Supreme Court in Skelly v. State Personnel Board (1975) 15 Cal.3d 194 instructed the Board that in determining the appropriate penalty for a particular offense, the Board should consider a number of factors including the extent to which the offense resulted in, or if repeated is likely to result

(A [REDACTED] continued - Page 10)

in, harm to the public service, the circumstances surrounding the misconduct and the likelihood of its recurrence. Id. at 218.

Turning to the issue of harm to the public service, we agree with the Department that the public service suffers serious harm when correctional officers fail to act in a diligent manner to prevent the escape of inmates. One of the most important duties of correctional officers, if not the most important, is to keep prisoners behind bars until their scheduled release dates. The failure to keep prisoners behind bars endangers the lives of citizens and wreaks havoc upon the prison's relationship with the community. In this instance, the inmate who escaped had been imprisoned for second-degree murder. Although he was quickly captured without incident and returned to prison, the potential for harm caused by the escape is serious. Appellants' mistakes must be addressed with a severe penalty.

Although appellants' misconduct did cause harm to the public service, and although harm to the public service is of primary concern in the assessment of penalty, we feel in this case that the other factors deemed relevant in Skelly v. State Personnel Board, supra, counsel against dismissal. Thus, we consider the circumstances surrounding the conduct, as well as the likelihood of its recurrence, in deciding the appropriate penalty.

As to the circumstances surrounding the conduct, neither I [REDACTED] nor A [REDACTED] were engaged in any unprofessional conduct at the time

(A [REDACTED] continued - Page 11)

the truck rolled in for inspection. Their failure to fully inspect the truck, rather, stemmed from what appears to be a miscommunication between them and wrongful assumptions made about the other's search efforts. The incident was not a result of volitional wrongdoing, but rather was a work performance error, albeit a serious one, comparable to that of a correctional officer falling asleep on duty. [See R [REDACTED] N [REDACTED] (1992) SPB Dec. No. 92-07 where the Board modified Nelson's dismissal to a six-months' suspension, finding that in cases of poor work performance, a Department should follow a sequence of warnings or lesser disciplinary actions before imposing the ultimate penalty of dismissal.]

In addition, we find the penalty of dismissal too harsh given there is little likelihood of recurrence. Both officers have otherwise excellent work records and presented evidence at the hearing that their superiors and co-workers still trust them, despite the incident. Given the officers' otherwise good credentials and the fact that the conduct was a one-time work performance error, we feel comfortable accepting the officers' assertions that the mistakes made in this case will not happen again. Accordingly, we find a six-months' suspension to be an appropriate penalty.

**CONCLUSION**

Appellants' sloppy inspection of the delivery truck could have had serious consequences for the public's safety. Fortunately, the actual harm caused was limited. Although we do not believe that dismissal is warranted under the facts of this case, we do believe that a severe penalty is an appropriate means of sending a strong message that such mistakes will be dealt with harshly. We believe that the six-months' suspensions will serve such purpose. Any future lapses of a similar nature might well justify dismissal.

**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 dismissals taken against J [REDACTED] [REDACTED]. A [REDACTED] and M [REDACTED] [REDACTED]. I [REDACTED], Correctional Officers with R.J. Donovan Correctional Facility, Department of Corrections, are modified to six-months' suspensions.

2. The Department of Corrections shall pay J [REDACTED] [REDACTED]. A [REDACTED] and M [REDACTED] [REDACTED]. I [REDACTED] all backpay and benefits it may owe them as a result of the Board's decision to modify their dismissals to six-months' suspensions.

3. This case shall be assigned to the Chief Administrative Law Judge for hearing should the parties not be able to agree upon the amount of backpay and benefits owing to J [REDACTED] [REDACTED]. A [REDACTED] and M [REDACTED] [REDACTED]. I [REDACTED].

(A [REDACTED] continued - Page 13)

THE STATE PERSONNEL BOARD\*

Lorrie Ward, President

Floss Bos, Vice President

Ron Alvarado, Member

Richard Carpenter, Member

Alice Stoner, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on December 3-4, 1996.

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