

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 30278
)
HELEN FAN) BOARD DECISION
) (Precedential)
)
From a 5% reduction in salary) NO. 93-12
for 6 months as a Motor Vehicle)
Field Representative with the)
Department of Motor Vehicles) June 1, 1993

Appearances: Michael D. Hersh, California State Employees Association, representing appellant, Helen Fan; Frank Britt, Staff Counsel, Department of Motor Vehicles, representing respondent, Department of Motor Vehicles.

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

DECISION

This case is before the State Personnel Board (SPB or Board) after the Board granted the Petition for Rehearing filed by the appellant Helen Fan (appellant or Fan). The Administrative Law Judge (ALJ) had sustained the 5% reduction in salary for six months taken against Fan in her position of Motor Field Representative with the Department of Motor Vehicles (DMV) for alleged work performance deficiencies, and the Board had originally adopted the Proposed Decision of the ALJ.

Pursuant to its granting of the Petition for Rehearing, the Board accepted written briefs filed by the parties.¹ After review of the entire record, including the transcript and briefs submitted

¹The parties did not request oral argument.

(Fan continued - Page 2)

by the parties, the Board modifies the penalty of a 5% reduction in salary for six months to an official reprimand, for the reasons set forth below.

FACTUAL SUMMARY

The appellant has worked as a Motor Vehicle Field Representative, a Program Technician I and a Program Technician Trainee since her appointment on September 2, 1982. She has no prior adverse actions. The record reflects she is a hard-working employee, with a high production rate, who deals effectively with the public, notwithstanding the cashiering errors that are the subject of this adverse action.

The parties stipulated that appellant made the following errors in the performance of her cashiering duties:

1. On or about March 25, 1991, appellant incorrectly issued 1992 sticker #R4916553 to a customer who should have received 1991 sticker #K2083251.

2. On or about April 24, 1991, appellant improperly accepted a check in the amount of three hundred eighty-seven dollars (\$387.00) for a three hundred eighty-four dollar (\$384.00) transaction.

3. On or about April 29, 1991, appellant improperly accepted a check in the amount of one hundred forty-nine dollars (\$149.00) for a one hundred forty-dollar (\$140.00) transaction.

4. On or about April 30, 1991, appellant incorrectly issued

(Fan continued - Page 3)

two (2) temporary disabled plates, numbers M249658 and M249659, to the same customer.

The parties also stipulated to the following discrepancies in appellant's cashiering record:

	<u>DATE</u>	<u>SHORTAGE</u>	<u>OVERAGE</u>
1.	04/03/90		\$ 1.00
2.	04/12/90	\$ 10.00	
3.	04/25/90		\$ 1.00
4.	04/26/90	\$500.00 ²	
5.	02/14/91	112.00	
6.	04/03/91	10.00	
7.	04/29/91		9.00
8.	05/01/91	9.00	
9.	06/03/91	80.00	
10.	06/07/91	4.00	
11.	06/11/91		5.00
12.	06/20/91		1.00
13.	06/21/91	5.00	
14.	07/10/91	200.00 ³	

² This discrepancy was reversed by the Department.

³ The ALJ found that this discrepancy should have been reversed by DMV because the check in question was stolen and thus there was no actual shortage that could be recovered or attributable to employee error. We need not determine the validity of this ruling as we do not find the \$200.00 discrepancy to be determinative of the validity of this adverse action.

(Fan continued - Page 4)

<u>DATE</u>	<u>SHORTAGE</u>	<u>OVERAGE</u>
15. 07/26/91	68.00 ⁴	

DMV's published guidelines for corrective action for discrepancies provide as follows:

<u>TIME PERIOD</u>	<u>NUMBER OF DISCREPANCIES</u>	<u>CRITICAL DISCREPANCIES</u>	<u>ACTION</u>
3 Months	7	/or 1	Informal, documented consultation. Retraining, if
needed			
5 Months	11	/or 2	Warning letter stating dissatisfaction & intent to proceed with formal measures.
6 Months	14	/or 3	Official Reprimand
8 Months	16	/or 4	Suspension
9 Months	17	/or 5	Dismissal

DMV's guidelines define "extreme recurrence" of discrepancies, which must be reported to the Regional Manager, as follows:

Twelve discrepancies within a six-month period shall be considered an extreme recurrence. Discrepancies which have been offset or reversed shall not be included in this consideration.

⁴ This discrepancy was reversed by the Department.

(Fan continued - Page 5)

The parties stipulated that a "critical" discrepancy for purposes of the type of cashiering work performed by appellant is a fifty dollar (\$50.00) shortage/overage.

During the entire seventeen (17) month period covered by the adverse action, from April 3, 1990 through July 26, 1991, appellant had fifteen (15) cashiering discrepancies, five (5) of which were deemed critical by the Department. Notably, two (2) of the five (5) critical discrepancies were reversed by the DMV, and the ALJ found that an additional discrepancy should have been reversed. (see chart above).

Prior to imposing the 5% pay reduction upon appellant based on the cashiering errors noted above, DMV issued a series of counselling memorandums, one in February 1991, three in June 1991, and one in July 1991. The successive counselling memorandums, however, show the accumulation of discrepancies over different periods of time, repeating discrepancies that have already appeared in earlier counselling memorandums. The following chart reflects which discrepancies are reflected in which counselling memoranda:

COUNSELLING MEMO

DISCREPANCIES BY NUMBER

(See chart at p.3)

February 19, 1991 (4 discrepancies over 10 months, 1 of which was critical. Discrepancy #4, which was for \$500.00 but was reversed, is not reflected in the counselling memoranda)	1, 2, 3, 5
--	------------

June 5, 1991 (5 discrepancies in 9 months, one of which (#9) is critical)	5, 6, 7, 8, 9
--	---------------

(Fan continued - Page 6)

COUNSELLING MEMO

DISCREPANCIES BY NUMBER

(See chart at p.3)

June 20, 1991 12
(This document is actually entitled "Documentation of Incident Report", and notes that the 6/20/91 \$1.00 discrepancy "is the seventh discrepancy in 3 months." It does not reflect the other six)

June 24, 1991 6, 7, 8, 9, 10, 11, 12, 13
(This document reflects 8 discrepancies in 3 months, one of which (#9) is critical)

July 12, 1991 5, 6, 7, 8, 9, 10, 11, 12, 13, 14
(This document reflects 10 discrepancies in 5 months, 3 of which are critical (#5, #9 and #14). The ALJ, however, found that #14 should have been reversed; thus we actually have 9 discrepancies, 2 of which were critical during 5 months)

On or about August 19, 1991, DMV imposed upon appellant a 5% pay reduction for a period of six months, for incompetency, inefficiency, inexcusable neglect of duty, and violation of board rule 172, under Government Code 19572, subdivisions (b), (c), (d), and (q).⁵

ISSUE

The issue raised by this case is whether, applying the concept of progressive discipline, the penalty imposed on appellant based on the errors she made is appropriate under all the circumstances.

⁵The charge of violation of Board Rule 172 is dismissed pursuant to the rationale set forth in D. [REDACTED] M. [REDACTED] (1993) SPB Dec. No. 93-06.

DISCUSSION

The Board noted its commitment to the principles of progressive discipline in its precedential decision F. [REDACTED] . N. [REDACTED] (1992) SPB Dec. No. 92-07 as follows:

Historically, the SPB has followed the principles of progressive discipline in exercising its constitutional authority to review disciplinary actions under the State Civil Service Act. The principles of progressive discipline require that the employer, seeking to discipline an employee for poor work performance, follow a sequence of warnings or lesser disciplinary actions before imposing the ultimate penalty of dismissal. The obvious purpose of progressive discipline is to provide the employee with an opportunity to learn from prior mistakes and to take steps to improve his or her performance on the job.... (F. [REDACTED] . N. [REDACTED] at p. 6).

In reviewing the DMV's own guidelines for corrective action based on the number of cashiering discrepancies by an employee over certain time periods (see p. 4; supra), one cannot ascertain whether DMV is committing to apply progressive discipline to successive instances of poor work performance or is simply specifying a set level of punishment for each delineated error rate. In any event, the guidelines are disseminated to the employees, and in this case appellant was given the chart portion of the guidelines, as set forth above, in each counselling memorandum that she received.

Applying the DMV's own guidelines, we find that at the time of issuance of the February 19, 1991 and June 5, 1991 counselling memoranda, the number of appellant's discrepancies did not warrant any documented corrective action. Notably, there was a ten month

(Fan continued - Page 8)

period between the first three discrepancies noted in April 1990 and the February 14, 1991 discrepancy, during which appellant made no documented errors.

The June 20, 1991 incident report combined with the June 24, 1991 counselling memorandum, could be considered informal consultation under DMV's guidelines; such consultation not inappropriate based on the number of discrepancies. Appellant was given little opportunity after receipt of that memorandum, however, to show any improvement in her error rate over a period of time. Twenty days later, the very next error she made, which is the error the ALJ determined should have been reversed (#14), precipitated another corrective interview documented in the July 12, 1991 memorandum.

The Department's guidelines on their face appear to justify the counselling documented in the July 12, 1991 memorandum and might have even warranted a "warning letter" under those guidelines, based solely on the accumulated number of discrepancies. Yet, since the period of time under scrutiny overlapped with the period of time covered in the earlier counselling sessions, appellant was in effect counselled/disciplined for the same errors over and over again with no opportunity to demonstrate improvement. Each subsequent individual error brought additional counselling and ultimately an increased level of penalty. Only two weeks later, another

(Fan continued - Page 9)

discrepancy (#15), which was reversed by the Department, precipitated the formal adverse action of a five percent (5%) pay reduction for six months.

Appellant should have been allowed the opportunity to improve her performance before adverse action was taken based primarily on the accumulated number of discrepancies. Having appropriately warned appellant in June that her error rate was higher than it should have been, the Department should have tracked appellant's error rate over the next three month period, or over a longer period of time as specified in the guidelines, to ascertain whether there was any improvement in her error rate. If appellant did not improve her error rate in accordance with the expectations set forth in the guidelines, further corrective action would then have been warranted.⁶

Neither does consideration of the other errors alleged in the adverse action, and stipulated to by appellant, warrant a pay reduction. While appellant may have been negligent in misreading the amounts on the checks, it is easy to see why a check in the amount of \$387.00 could be misread as a check for \$384.00, as "7" and "4" are numbers that are easily misread if not printed clearly;

⁶Under the Department's own guidelines, a letter of official reprimand would probably be most appropriate. We do not imply that progressive discipline mandates that a Department must utilize every possible successive level of discipline. In this case, however, the Department did disseminate its guidelines to employees and the employees should be able to expect the Department will abide its own guidelines, absent mitigating or aggravating factors.

(Fan continued - Page 10)

likewise a check for \$149.00 might be read as a check for \$140.00 if the "9" is not written clearly and is mistaken for a "0". We find the remaining alleged errors, the incorrect issuance of a 1992 registration sticker instead of a 1991 sticker on one occasion, and the issuance of two disabled plates to the same customer on another occasion, while they may reflect some negligence, to be relatively minor.

In summary, we find that over a seventeen month period, appellant had twelve (non-reversed) cashiering discrepancies, two of which were critical. She also made four other relatively minor errors in her cashiering duties. While appellant may have been somewhat negligent in the performance of her duties in a few isolated instances, the errors cited in the adverse action do not justify the level of punishment imposed, especially in light of appellant's nine years of state service with no prior adverse actions. Observations of appellant's cashiering procedures revealed nothing that would indicate that appellant's errors were attributable to anything much more than the fact that people performing a large number of transactions will make some mistakes.

The record reflects that appellant had a high productivity and low error rate on keying errors.

Notwithstanding the above, it is apparent that DMV is concerned with what it perceives to be appellant's negligence or carelessness in a number of instances. We find appellant's errors

(Fan continued - Page 11)

and cashiering discrepancies to constitute minor inefficiency. The charges of incompetency and inexcusable neglect of duty are dismissed. The penalty is modified to an official reprimand.

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 above-referenced adverse action of a five percent (5%) pay reduction for six (6) months is modified to an official reprimand;

2. The Department of Motor Vehicles and its representatives shall pay to appellant Helen Fan all back pay and benefits that would have accrued to her had she not been given the pay reduction, pursuant to Government Code section 19584;

3. This matter is referred to the Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due appellant;

4. This opinion is certified for publication as a Precedential Decision (Government Code section 19582.5).

*STATE PERSONNEL BOARD

Richard Carpenter, President
Alice Stoner, Vice President
Lorrie Ward, Member
Florence Bos, Member

*Alfred R. Villalobos was not a member of the Board when this case was originally considered.

(Fan continued - Page 13)

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on June 1, 1993.

Officer

GLORIA HARMON
Gloria Harmon, Executive

State Personnel Board