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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,

Plaintiff and Appellant,

v.

CALIFORNIA STATE PERSONNEL
BOARD,

Defendant and Respondent;

REGINA TUCKER,

Real Party in Interest and Respondent.

B247123

(Los Angeles County
Super. Ct. No. BS135379)

PETITION for writ of mandate. Robert H. O'Brien, Judge. Reversed with directions.

Stephen A. Jennings for Plaintiff and Appellant.

Alvin Gittisriboongul and Dorothy Bacskai Egel for Defendant and Respondent.

Daniel Luna for Real Party in Interest and Respondent.

The California Department of Corrections and Rehabilitation (the Department) dismissed real party in interest Regina Tucker from her position as an academic teacher at Wasco State Prison (Wasco) because she violated the Department's policy regarding contact with an inmate whom she initially disclosed as a "personal friend," but with whom she corresponded, and with whom she was romantically involved, before, during, and after his incarceration. Tucker contested her dismissal, and an administrative law judge (ALJ) issued a proposed decision sustaining Tucker's dismissal. The State Personnel Board (Board) adopted the ALJ's proposed decision.

The Department appeals from the trial court judgment granting Tucker's petition for writ of administrative mandamus seeking to overturn the Board's decision to sustain her dismissal.¹ Inexplicably, the trial court's order, upon which the judgment is based, refers to a different case involving a "thirty percent penalty given to petitioner," and ordering repayment of overpaid benefits.²

Upon our review of the administrative record and superior court proceedings, we conclude the judgment entered was in error, the Board's decision is supported by substantial evidence, and Tucker's dismissal was not an abuse of discretion. We therefore reverse the judgment with directions to deny the petition and to reinstate the Board's decision to dismiss Tucker.

FACTUAL AND PROCEDURAL BACKGROUND

Tucker was dismissed from her position as an academic teacher at Wasco after an investigation revealed she had knowingly, or with gross negligence, violated the Department's policy that prohibits giving inmates written messages or any kind of gifts,

¹ The Board filed a respondent's brief in this appeal, stating it will comply with the final disposition of this matter.

² The minute order states: "Petitioner waived objections to the late-filed opposition. Real party in interest is not involved in the petition which seeks only to set aside the thirty percent penalty given to petitioner. Petitioner is liable to repay benefits that were overpaid. [¶] The petition for writ of mandate is granted. There is sufficient evidence showing 'willful' (knowing) failure to report a material fact."

and that requires the employee to inform the warden in writing if an inmate contacts the employee. Tucker appealed her dismissal, and the appeal was heard by an ALJ.

1. *Administrative Hearing Testimony*

In June 2009, Tucker learned that inmate Scott DeSmyther would be confined to Wasco. DeSmyther is a family friend with whom Tucker also is romantically involved. Tucker told Matthew Koop, the principal and supervisor of correctional education programs at Wasco, that DeSmyther would be incarcerated at Wasco. She did not tell Koop that she was romantically involved with DeSmyther.

a. *Tucker's Notification of Committed Relative or Friend*

Tucker received annual training regarding the Department's inmate-staff relations policy. As required under the policy, Tucker presented Koop with a form dated June 5, 2009, entitled "Notification of Committed Relative or Friend" (hereafter, notification form), describing DeSmyther as a "personal friend." Koop signed the notification form and suggested that DeSmyther be transferred to another facility. On June 10, 2009, the warden instructed staff to transfer DeSmyther.

Tucker admits that Koop told her to have no contact with DeSmyther. She understood Koop's directive to mean "don't go out into the building and sit in the Day Room with him." Tucker believed that once she filled out the notification form she could correspond with DeSmyther.

Brian Kibler, the former public information officer and administrative assistant to the warden, testified that the purpose of the notification form is to ensure employees' safety and security. Completing the notification form does not give the employee permission to contact or correspond with the inmate.

Joseph Way Bolls works in the investigative services unit at Wasco. He provides training on the Department's inmate-staff relations policy. Tucker's training log showed that she attended Bolls's inmate-staff relations classes in March and September of 2008. During these training classes, Bolls discusses the purpose of the notification form. Bolls emphasized that the notification form does not permit an employee to contact or

correspond with an inmate. Employees are informed during training that they must obtain permission from the warden to contact or communicate with an inmate.

b. Tucker's Correspondence with DeSmyther

On June 2, 2009, Tucker wrote the first of several letters to DeSmyther. These letters revealed she sent him books, envelopes, and paper, along with attempting to put money on his phone card. Initially, Tucker used her friend's post office box to correspond with DeSmyther. Later, she obtained a post office box and used the name "G. DeSmyther." Tucker stated that she took these steps to protect her privacy.

Tucker testified she told Koop that she intended to write to DeSmyther. Koop contradicted this testimony, stating they never discussed the issue.

Tucker told her coworker, Marjorie Lawrence, that she intended to use her friend's post office box to write to DeSmyther. Lawrence told Tucker that writing letters to DeSmyther would violate the Department's inmate-staff relation policy. Lawrence reported Tucker's conduct.

c. Tucker's Contact with DeSmyther

While Desmyther was at Wasco, Tucker had contact with him on two occasions. As part of her job duties, Tucker assessed inmates' reading levels by administering the test of adult basic education or "TABE" test. Tucker conducted DeSmyther's TABE test in June 2009. In August 2009, DeSmyther still had not been transferred, and Tucker changed a TABE test list from one housing unit to DeSmyther's housing unit. DeSmyther appeared on the TABE test list, even though he already had taken the test. DeSmyther did not take the test again, but a corrections officer was not available to take him back to his housing unit. Instead, Tucker took DeSmyther into an empty classroom to watch a movie until the other inmates completed the TABE test and joined them.

Koop testified it violated the Department's inmate-staff relations policy for Tucker to conduct DeSmyther's TABE test. Koop, however, never communicated this information to Tucker.

d. *DeSmyther is Transferred to Chino*

In November 2009, DeSmyther was transferred to Chino State Prison. Tucker visited DeSmyther after she completed a visitation request form. She did not obtain approval from the warden at Wasco to visit DeSmyther, as required under the Department's inmate-staff relations policy. Tucker testified she was not aware of that requirement.

In January 2010, before DeSmyther was released from Chino State Prison, Tucker sent a memo to the warden at Wasco, describing her relationship with DeSmyther. She informed the warden that DeSmyther would be staying with her "until other living arrangements can be made."

e. *Investigation, Dismissal*

Tucker was given notice that she would be dismissed from her position following an investigation into allegations that she engaged in an over familiar, romantic relationship with DeSmyther, provided false statements to her supervisor regarding the nature of her relationship with DeSmyther, and maintained a clandestine relationship with DeSmyther while he was an inmate at Wasco. Tucker invoked her right to appeal her dismissal to the Board.

2. *The ALJ's Findings of Fact and Conclusions of Law*

Following the administrative proceedings, the ALJ issued a proposed decision to sustain Tucker's dismissal. The ALJ concluded that Tucker's acts of corresponding with DeSmyther, sending him packages while he was at Wasco, and having personal contact with him on August 7, 2009, the date his name appeared for a second time on the TABE test list, constituted inexcusable neglect of duty. (Gov. Code, § 19572, subd. (d).) Additionally, the ALJ concluded that Tucker was dishonest in her statements, both verbal and written, surrounding her relationship with DeSmyther. (Gov. Code, § 19572, subd. (f).) Tucker's conduct also constituted other failure of good behavior on or off duty causing discredit to her employer. (Gov. Code, § 19572, subd. (t).)

In making factual findings, the ALJ recounted the conflicting evidence concerning Tucker's mistaken belief that she had obtained permission to correspond with

DeSmyther. The ALJ concluded Tucker's testimony that she received permission from Koop to correspond with DeSmyther lacked credibility because her co-worker, who received the same training on inmate-staff relations, knew that only the warden could authorize communication between staff and inmates. The ALJ also noted that Tucker's explanation for the use of post office boxes and different surnames was "disingenuous and her testimony that she believed she was permitted to correspond with DeSmyther [was] not credited."

The ALJ concluded Tucker's dismissal was just and proper.

3. *The Board's Decision*

The Board adopted the ALJ's factual findings and legal conclusions in their entirety, and the ALJ's proposed decision became the decision of the Board. Thereafter, the Board denied Tucker's petition for rehearing.

4. *The Petition for Writ of Mandate*

Tucker brought the instant petition for a writ of administrative mandamus. (Code Civ. Proc., § 1094.5.) After taking the matter under submission, the trial court's order granting the petition reflects a ruling on a different case. (See fn. 2, *ante*.) The Department filed a timely appeal from the judgment granting the petition and awarding costs to Tucker.

DISCUSSION

1. *The Law Governing Discipline and the Standard of Review*

The Board enforces civil service statutes and reviews disciplinary actions. (*California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 584 (*Youth Authority*); see Gov. Code, § 19578.) Because the Board is created by, and derives its adjudicatory powers from, the California Constitution (Cal. Const., art. VII, §§ 2, 3), it acts much as a trial court in reviewing disciplinary actions, making factual findings and exercising discretion on matters within its jurisdiction. (*Youth Authority*, at p. 584.)

On appeal, we give no deference to the trial court's judgment.³ (*Davis v. Civil Service Com.* (1997) 55 Cal.App.4th 677, 686.) Our scope of review is identical to that of the trial court (*Youth Authority, supra*, 104 Cal.App.4th at p. 584) and is governed by Code of Civil Procedure section 1094.5, subdivision (c). "Decisions of the State Personnel Board, an agency of constitutional authority [citation], are reviewed only to determine whether substantial evidence supports the determination, even when vested rights are involved." (*Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1125-1126.)

" 'Substantial evidence' is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." (*Youth Authority, supra*, 104 Cal.App.4th at pp. 584-585.) The Board's findings " 'come before us "with a strong presumption as to their correctness and regularity." ' " (*Id.* at p. 584.) We do not reweigh the evidence, nor do we substitute our judgment if the Board's decision is a reasonable one. (*Ibid.*) In Board proceedings, when determining whether substantial evidence exists, we consider all the evidence presented, including that which fairly detracts from the evidence supporting the Board's decision. (*Id.* at pp. 585-586.)

We do not interfere with the penalty imposed by the Board to fix appropriate disciplinary action unless it has abused its discretion. (*County of Siskiyou v. State Personnel Bd.* (2010) 188 Cal.App.4th 1606, 1615.)

It is under the foregoing principles that we must consider Tucker's claims that: (1) the Board's decision is not supported by substantial evidence because she did not have notice that her conduct was prohibited, and thus she was not dishonest or neglectful of any duties when she initially described her relationship, wrote to DeSmyther, or visited

³ Tucker's defense of the judgment is indefensible. Tucker's brief states: "Ms. Tucker asserted in her Petition with the Superior Court that the SPB prejudicially abused their discretion in the hearing process by failing to properly evaluate the evidence presented, by failing to proceed in the manner required by law and rendering a decision that was arbitrary, capricious and procedurally unfair. [¶] The Superior Court apparently agreed and granted Ms. Tucker's writ of mandate after a hearing on December 5, 2012." The order granting the petition cannot be read to adopt Tucker's claims of error.

him while he was incarcerated at Chino State Prison; and (2) the Board's decision to dismiss her is an abuse of discretion because the Board ignored its precedential decisions in which it reduced the penalty or applied progressive discipline.

2. The Board's Decision is Supported by Substantial Evidence

Tucker contends the Board's decision lacks substantial evidence that she had notice she could not correspond with DeSmyther. In support of her argument, Tucker cites to her testimony that Koop told her not to contact DeSmyther, but he did not specifically prohibit her from writing letters to DeSmyther. She also points out that neither the warden nor the warden's agents told her she had to obtain permission to write letters to DeSmyther.

Taking into account Tucker's cited evidence, the record contains substantial evidence that Tucker had notice the Department's policy on inmate-staff relations prohibited *any contact* with inmates.⁴ Tucker received annual training, which included prohibitions against contacting inmates without permission. Lawrence, Tucker's co-worker and friend, received the same training and knew Tucker could not write letters to DeSmyther without the warden's permission. The record does not reveal that Lawrence had any incentive to fabricate damaging testimony. (See *Flowers v. State Personnel Bd.* (1985) 174 Cal.App.3d 753, 759 [“ ‘The trier of fact's determination will be interfered with on appeal only when it appears that the witness' testimony is inherently so improbable as to be unworthy of belief’ ”].) Tucker's belief that once she filled out the notification form she could correspond with DeSmyther was not a reasonable one given

⁴ In support of this argument, Tucker cites to Board precedential decisions, stating if an employee is to be held accountable for particular conduct, he or she must have clear notice of such conduct. In *In re Dunningham* (1993) State Personnel Bd. Precedential Dec. No. 93-32, for example, the issue was whether the Department of California Highway Patrol (CHP) had a policy prohibiting a common practice of its officers to check the vacation box on traffic citations in order to position themselves for overtime compensation. (*Id.* at p. 9.) The CHP did not establish it had a policy, the officers had notice of the policy, or the CHP intended to enforce the policy. *Dunningham* is inapposite. The Department had a policy, and Tucker received annual training on the policy that prohibited contact with inmates.

her inmate-staff relations training, and Koop's instruction not to have any contact with DeSmyther. The notification form does not grant employees any rights to contact or correspond with inmates, and the notification form clearly states the personal information provided "shall only be utilized for the purpose of notifying all pertinent officials of any committed relatives and/or friends." Based upon the entire record, Tucker had notice not to correspond with DeSmyther.⁵ Therefore, substantial evidence supports the ALJ's findings and, by extension, the Board's decision.

Tucker next contends the evidence does not support a finding that she was dishonest when she initially described DeSmyther as a "personal friend" in her notification form. In her June 2, 2009 letter to DeSmyther, written before Tucker filled out the notification form, she closes with, "I love you!" Tucker also used her friend's post office box, and later obtained a post office box using DeSmyther's surname to correspond with him. The ALJ did not believe Tucker's explanation as to why she failed to disclose the true nature of her relationship with DeSmyther, or her explanation as to why she did not use her surname in her correspondence. The ALJ's credibility determination and finding is supported by substantial evidence.

3. Dismissal from Employment Was Not an Abuse of Discretion

Tucker contends her dismissal was too harsh a penalty, and the Board should have followed its precedent to reduce the penalty or apply progressive discipline.

The propriety of a penalty imposed by an administrative agency is a matter resting in the sound discretion of the agency, and its decision will not be disturbed unless there has been an abuse of discretion. (*Blake v. State Personnel Board* (1972) 25 Cal.App.3d 541, 553; see also *Davis v. Civil Service Com.*, *supra*, 55 Cal.App.4th at pp. 687-688.)

⁵ Koop admitted that he never explicitly prohibited Tucker from administering DeSmyther's TABE test, but he told her not to have any contact with DeSmyther. Given that "contact" would include both personal and professional interactions, this is sufficient notice that Tucker should not have conducted DeSmyther's TABE test or interacted with him in August 2009 when he was on the list to take the TABE test again. The record is not fully developed on what, if any, training Tucker had concerning visiting a state prisoner at another facility.

“In determining whether the misconduct warranted dismissal, consideration should be given to the circumstances surrounding the misbehavior, the degree to which it affected the public service and the likelihood of its recurrence.” (*Blake v. State Personnel Board, supra*, at pp. 553-554.) “The fact that reasonable minds may differ as to the propriety of the penalty imposed will fortify the conclusion that the administrative body acted within the area of its discretion. [Citation.]” (*Id.* at p. 553.)

The Board concluded dismissal was appropriate for Tucker’s conduct in failing to disclose the true nature of her relationship with DeSmyther, corresponding with him after being told not to have any contact with him while he was at Wasco, using a friend’s post office box, using a different surname to correspond with him, and deliberately deceiving her supervisor. The Board was concerned that Tucker not only violated the Department’s inmate-staff relations policy, but she also put herself and other employees at risk by maintaining a romantic relationship with an inmate. The Board thus properly focused on the potential harm to the public service posed by Tucker’s misconduct.

While Tucker contends that others received less severe penalties for similar misconduct, or alternatively received progressive discipline, this contention does not show an abuse of discretion in the selected penalty in her case. In the penalty-reduction cases Tucker cites, the employees’ conduct was not comparable to Tucker’s misconduct in which she put herself and other employees at risk by maintaining a romantic relationship with an inmate. (See, e.g., *In re Rey* (1999) State Personnel Bd. Precedential Dec. No. 99-10, pp. 14-18 [single incident of off-duty misconduct]; *In re Fan* (1993) State Personnel Bd. Precedential Dec. No. 93-12, pp. 7-11 [cashiering errors].)

Tucker also relies on *In re Nelson* (1992) State Personnel Bd. Precedential Dec. No. 92-07, which she argues is similar to her case. Not so. In *Nelson*, the Board did not agree that dismissal of a San Quentin gunrail officer was the appropriate penalty. The gunrail officer failed to stay alert on the job, and the Board found that the harm to the public service was serious, as other officers and inmates rely on the gunrail officer for their personal safety and essential security. (*Id.* at p. 6) The Board, however, reduced the penalty and applied progressive discipline to provide the employee with an opportunity to

improve her work performance. The Board acknowledged progressive discipline is “well-suited to treating problems of poor work performance, [but] it should be noted that serious willful misconduct on the part of an employee may well warrant dismissal in the first instance.” (*Id.* at p. 6, fn. 3.) Here, Tucker’s misconduct did not constitute poor work performance for which progressive discipline would have been appropriate. The Board did not abuse its discretion in sustaining Tucker’s dismissal.

DISPOSITION

The judgment granting the petition is reversed with directions to enter judgment denying the petition and reinstating the State Personnel Board's decision to dismiss Tucker. Appellant shall recover costs on appeal.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.