OIG | OFFICE of the INSPECTOR GENERAL

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OIG No. 20–02 | Sentinel Case | June 11, 2020

# The Department Settled a Case Against an Officer Who Was Dishonest at a State Personnel Board Hearing Regarding Another Officer's Misconduct

The Office of the Inspector General (OIG) is responsible for, among other things, monitoring the California Department of Corrections and Rehabilitation's (the department) internal investigations and employee disciplinary process. Pursuant to California Penal Code section 6133, the OIG reports semiannually on its monitoring of these cases. However, in some cases, where there are compelling reasons, the OIG may issue a separate public report; we call these *Sentinel Cases*. The OIG may issue a Sentinel Case when it has determined that the department's handling of a case was unusually poor and involved serious errors, even after the department had a chance to repair the damage. This Sentinel Case, No. 20–02, involves the department entering into a settlement agreement permitting an officer to return to work for the department despite a preponderance of evidence suggesting that he lied at a State Personnel Board hearing to protect another officer.

On December 4, 2018, a department attorney called an officer to testify in a State Personnel Board hearing involving allegations that a second officer left her prison post before the end of her shift and lied about it. The department attorney responsible for litigating the case called the officer to testify as a witness concerning previous statements he had made multiple times that supported the department's position that the second officer had left her post early. However, the officer took the stand and, in our opinion, falsely testified that the second officer had spent an hour assisting him with his duties and that he had seen her "around" later in the shift.

The officer met with the department attorney twice before being called as a witness. An employee relations officer also attended these meetings and took contemporaneous notes of the statements the officer made. The department attorney advised the officer he needed to be truthful regarding the events in question. During those meetings, one of which took place only a few days before the State Personnel Board hearing, the officer stated he could not remember the specific details of his shift that day, but he could assuredly state that the second officer assisted him at work on a few occasions and that, on those few occasions, the second officer only assisted him for about 15 to 20 minutes. The officer also told the department attorney and the employee relations officer that the second officer assisted him with duties that day in connection with a shift change, the period when staff ending their shift leave the area and the next group of staff arrives to begin the next shift. The shift change process lasts about 15 to 20 minutes. The officer recounted that on the day in question when the second officer was done assisting him, she did not remain in the area because there was nothing more for her to do.

According to the department attorney, on the day of the hearing, the officer sat in a waiting area outside the hearing room and spoke with the second officer's father. The second officer's father is a lieutenant who works at the same prison. The officer also spoke with the attorney representing the second officer. During a break from the hearing, the department attorney informed the officer that she intended on calling him as a witness. Given her observations of the officer's conversations with the second officer's father and the second officer's attorney, the department attorney questioned the officer regarding his upcoming testimony. In a complete reversal, the officer told the department attorney that he had been mistaken in his prior statements, suddenly remembering that the second officer was with him at his post for an hour.

After speaking with the second officer's father and the second officer's attorney, the officer testified under oath that the second officer had been in his presence for one hour and that he had also seen the second officer later during his shift when she walked past his window in the corridor multiple times. The department attorney tenaciously questioned the officer regarding his prior inconsistent statements, which the officer admitted making. Nevertheless, on the stand and under oath, the officer continued to contradict his original statements and maintain his new recollection of events.

The State Personnel Board administrative law judge, unconvinced by the officer's blatantly false testimony, upheld the second officer's termination for being dishonest.

Subsequently, the department initiated an employee disciplinary case against the officer for lying under oath. On December 2, 2019,



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the warden reviewed the evidence in the case, determined the officer was dishonest, and decided to dismiss him. On January 13, 2020, the department served the officer with a disciplinary action for dismissal.

After being served with a disciplinary action for dismissal, the officer proposed a settlement of the matter through his attorney. The officer presented no new information or evidence, but offered to settle the case if the department reduced the dismissal penalty to a nondismissal penalty. Surprisingly, a senior department attorney recommended that the warden accept this offer. The senior department attorney advised the warden that he believed the department could not prevail in a disciplinary action because he could not prove the officer's *intent* to deceive the State Personnel Board. The warden, relying on the senior department attorney's recommendation to settle, indicated she was willing to settle the case for a 10 percent salary reduction for 12 months. The OIG disagreed and elevated the decision to the warden's supervisor. In the meantime, the officer offered to settle the case for a 10 percent salary reduction for 24 months, which is a *higher* penalty than the warden was willing to proffer.

The warden's supervisor, an associate director, agreed with the warden and opined that the officer was not being deceitful, but was just unsure of dates and times; she indicated that she was willing to settle the case against the officer for a 30-working-day suspension. This is an even lower penalty than that which the officer proffered.[1] The OIG disagreed and elevated the matter to the associate director's supervisor.

The associate director's supervisor, a deputy director, relied upon the senior department attorney's weak analysis that he could not prove it was more likely than not the officer provided false testimony at the hearing. The deputy director, without offering any evidence in support thereof, also opined that the officer was probably just "confused" when he testified under oath at the State Personnel Board hearing. Based on these excuses, the deputy director removed the dishonesty allegation from the disciplinary action, added a neglect of duty allegation instead, and reduced the officer's penalty from a dismissal to a 30-working-day suspension.

The OIG disagrees with the settlement in this case. To meet its burden of proof in an employee disciplinary case against the officer, the department need only prove it was more likely than not that the officer was dishonest. There is certainly enough evidence to prove it was more likely than not that the officer was dishonest. The officer made his original statements on two occasions to a department attorney and to an employee relations officer, who contemporaneously documented the officer's statements. Immediately before testifying at the hearing, the officer spoke with the second officer's attorney and also with the second officer's father, a lieutenant and higher-ranking officer at the same prison. Immediately following these interactions, the officer suddenly and radically changed his testimony to the benefit of the second officer. The officer suddenly recalled and testified under oath that the second officer spent an hour with him at his post. The officer suddenly recalled and testified under oath that the second officer walked by him several times after the second officer left the officer's post. Shortly after speaking to the second officer's father and to her attorney, the officer made these statements in support of the second officer's defense, in complete contradiction of his prior recorded statements.

This case reflects a lack of understanding regarding the importance of peace officers providing truthful testimony under oath. The department's unwillingness to dismiss a dishonest peace officer from its ranks is troubling, especially as it pertains to an officer who attempted to subvert a righteous employee disciplinary case pursued by one of its own department attorneys and involving another dishonest peace officer. The courts have provided ample guidance regarding the importance of peace officers being truthful, noting that peace officers are held to a higher standard and that dishonesty by law enforcement personnel is to be treated seriously (*Ackerman* v. *State Personnel Board* (1983) 145 Cal.App.3d; *Pauline* v. *Civil Service Commission* (1985) 175 Cal. App.3d 962). In this case, the department did not pursue the appropriate disciplinary action. Instead, it entered into a settlement agreement for a penalty less than that to which the officer was willing to settle and which also permits the officer to keep his job at the prison. OIG

1. There are typically 21 or 22 working days in a month. A one-working-day suspension amounts to losing 1/21 or 1/22 of an employee's monthly salary, which is approximately a 5 percent salary reduction. A two-working-day suspension is the equivalent of a 5 percent salary reduction for two months, or a 10 percent salary reduction for one month. Therefore, a 10 percent salary reduction for 24 months would be about equivalent to a 48-working-day suspension. It is a significantly higher monetary penalty than a 30-working-day suspension. This analysis solely covers the approximate monetary equivalents and does not address collateral issues, such as potential loss of benefits, seniority, or breaks in State service.



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STATE OF CALIFORNIA — DEPARTMENT OF CORRECTIONS AND REHABILITATION | GAVIN NEWSOM, GOVERNOR

**OFFICE OF THE SECRETARY**
P.O. Box 942883
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May 12, 2020

Mr. Roy Wesley
Office of the Inspector General
10111 Old Placerville Road, Suite 110
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Dear Mr. Wesley:

The California Department of Corrections and Rehabilitation (the Department) submits this letter in response to Sentinel Case Report 20-02. Thank you for the opportunity to review and comment on the draft report.

The Department has reviewed the draft Sentinel Report prepared by the Office of the Inspector General. Contrary to the suggestion that the Department and its employees do not understand the importance of honesty among its employees, and especially its peace officers, the Department absolutely appreciates that it is critical for all Departmental employees, including its peace officers, to be honest. In fact, the Department regularly disciplines (including terminating) employees who are dishonest. The case at issue in the Sentinel Report does not evince any lack of understanding by the Department and its employees. Instead, the case at issue involved circumstances in which there was not likely a preponderance of evidence that the employee had intentionally misrepresented known facts and a belief that the employee understood his errors when he made inconsistent statements, and based on those considerations, the Department elected to resolve the employee's discipline prior to appeal. 1

The Department does not believe that the Sentinel Report fully and accurately captures the facts underlying the discipline of the Department's Correctional Officer, nor does it accurately reflect the legal standards that apply to dishonesty cases. Finally, the Department disputes that the legal representation it received was poor; counsel for the Department properly advised their client of the factual and legal weaknesses in the case and the risks of proceeding with courses of action. 4 5, 6, 9, 12

Procedural Overview

Discipline

The Department alleged that Correctional Officer [redacted] was dishonest in his testimony before the State Personnel Board in another employee's appeal of her discipline, the details of which are discussed below. Following an investigation, Department attorneys recommended against sustaining the allegation of dishonesty, as they did not believe that the facts were

*The OIG's comments begin on page 10.*

sufficient to establish by a preponderance of evidence that intentionally made false statements of known facts during his testimony. Warden decided to sustain the allegations, and was served with a Notice of Adverse Action for termination.[1]

After being served with his Notice of Adverse Action, Correctional Officer made a settlement offer to resolve any appeals of his termination. Warden , after speaking with , believed that understood his errors and his career could be salvaged, thus, she wanted to make a counter-offer of a 30-day suspension.[2] The Department's attorneys agreed with Warden proposal, as they had recommended against sustaining the allegations in the first instance. 2

OIG's Executive Review

OIG disagreed with Warden proposal to settle the matter, and initiated the Executive Review process, holding Executive Reviews before Associate Director and Deputy Director . Associate Director agreed with making the settlement offer, and noted that had she been the hiring authority she would not have sustained the allegations at the outset, as she did not believe there was sufficient evidence that had been dishonest. Deputy Director agreed that she did not believe there was sufficient evidence of dishonesty, and with making the settlement offer. Throughout the Executive Review process, the Department's attorneys maintained that settling the case to resolve the discipline was reasonable, which was consistent with its initial recommendation.

After the Executive Review before Deputy Director or about March 12, 2020, OIG declined to seek review before Director : "Although the OIG disagrees with your decision to settle this case for a 30 day suspension, the OIG will not seek a higher level of review." EAPT was instructed by OIG to work with the assigned SAIG to finalize a settlement agreement. On or about April 2, 2020, OIG approved the draft settlement agreement for Mr. signature. Mr. thereafter signed the settlement agreement. On or about April 10, 2020, OIG advised EAPT that it was going to seek a higher level of review, in effect, withdrawing its earlier representation that it would not seek a higher level of review. Because the settlement agreement was already signed, the Department ultimately declined to agree to OIG's attempt to withdraw its prior determination to not seek further review and invoke Executive Review beyond the 3-day period provided for under the Department's policies. 3 3

[1] The Department's attorneys did not invoke Executive Review of the Warden's decision, as they did not believe that there were grounds under the Department's policies to seek review.
[2] In addition to the Department's policies, the Department must consider the *Skelly* factors which include, among other things, the likelihood of recurrence and the totality of the circumstances surrounding the misconduct.



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It is incongruous that the OIG claims that it is concerned about the Department's conduct, when it did not properly and timely seek further review before the Director or Undersecretary, and, instead, affirmatively represented that it would not seek review and approved the settlement agreement without further comment. 3

Grounds For Discipline

discipline arises out of testimony he gave in the appeal filed by another employee before the State Personnel Board, , and its apparent contradictions to statements made to Department attorneys during witness preparation. Specifically, the Department held that was dishonest when he testified that on December 24, 2017, assisted him in the control booth for one hour, and that he saw "around" after she left the control booth. However, in prior discussions with Department's attorneys, stated that assisted him in the control booth on a few occasions during shift change and that interaction lasted approximately 15-20 minutes, that he did not recall seeing during the rest of his shift, and that he could not remember whether she helped him on December 24, 25, or 26.[3] The Department's attorneys informed that they would not call him as a witness. He was ultimately subpoenaed by counsel. 5

At Internal Affairs interview, when questioned about the purported discrepancies regarding how long was in the control booth, he explained that all times he was providing approximations, and that the dates were approximations. He further explained that at the SPB hearing he was simply trying his best to recall the time frame from one year prior. He explained that he was nervous and had never been in a situation like the SPB hearing. He reinforced that he was trying to the best of his knowledge to remember the day (December 24, 2017) and that he was always unsure as to the dates and times. explained that it was never his intent to give false statements and he simply tried to state what he could remember. Further, denied that anyone attempted to persuade him to change any of his answers.[4] 6

[3] was not interviewed during the investigation into conduct, and the hearing on her appeal took place on or about December 4, 2018, almost a year after the date of conduct. Further, was not interviewed by the Department's attorneys until on or about October 1, 2018 (for approximately 15 minutes) and December 2, 2018 (for approximately 10 minutes).

[4] There was no evidence as to the content of any alleged discussion between and father (who is also a Department employee) on the day of the hearing. Neither of the Department attorneys identified hearing any conversation that would lead them to conclude that father and discussed his testimony. Further, father was not interviewed regarding the nature of his conversation with . As such, any speculation as to the discussion is just that.

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EAPT's Evaluation

There were and are potential issues relating to the ability of the Department to prove the required elements of dishonesty as to statements at hearing. EAPT's recommendation was at all times that the Department should not sustain the allegations.

Dishonesty under Government Code section 19572, subdivision (f), requires a showing of intentional misrepresentation of known facts, or a willful omission of pertinent facts, or a disposition to lie, cheat, or defraud. *(Nhut Minh Nguyen* (1999) SPB Dec. No. 99-01, p. 8; *Eliette Sandoval* (1995) SPB Dec. No. 95-15, pp. 4-5.) "'Dishonesty' connotes a ***disposition to deceive***...It denotes an absence of integrity; a disposition to cheat, deceive, or defraud." (*Gee v. California State Pers. Bd.* (1970) 5 Cal.App.3d 713, 718-19 (emphasis added).) Whether or not an employee is intending to deceive parties, or makes false statements because of other factors, raises conflicts in the evidence and presents a factual determination for a trier of fact. (See, e.g., *Cvrcek v. State Personnel Board* (1967) 247 Cal.Ap.2d 827, 832 (recognizing a distinction between an employee who lied in order to deceive or who "lied only because they are nervous and under extreme tension.").)

EAPT identified several issues with the allegation of dishonesty, based on the purportedly dishonest statements:

1. That helped for an hour on the date in question.
    a. did not unequivocally testify that was there for an entire hour. Instead, his testimony was that helped him with shift change (which took approximately 15-20 minutes) and then provided him with a debrief. 5
    testified that he viewed these two events as separate. estimated that these activities lasted "maybe an hour," but occurred "within the first hour of shift change" and "no longer than that." Finally, testified that he was not paying attention to the time, as he was a new Correctional Officer and the assignment was hectic.
    b. While Department attorney stated at the SPB hearing that never told her about the "debrief" time in addition to assisting with the shift change, maintained that he did. Further, Employee Relations Officer , who 7
    was present during discussion with , included in her notes that stated that "[ would] give me a brief on what to do."[5]
        i. It should be noted that and memoranda state that testified that was with him for about one and one-half hours. memorandum states that testified

[5] was retired at the time of the investigation into testimony and was not interviewed as part of the Internal Affairs investigation. Department attorney was similarly not interviewed.

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that was with him for over an hour. None of these accounts is consistent with the testimony and could open the Department's employees up to significant impeachment regarding the accuracy of their recollection of the exact statements that were made and are at issue in this case. 8

2. That helped on December 24, 2017.
   a. initially testified that assisted him on December 24, 2017, and repeated that testimony multiple times. After being questioned by , conceded that he did not recall the specific date, and that it could have been December 24, 25 or 26. 5, 6, 9
   b. At the hearing, explained that he was providing estimates. During his Internal Affairs interview, maintained that it was always his intention to provide estimations and that he was trying to remember to the best of his ability.
   c. The Department does not have direct evidence of intention to make a false statement of fact regarding the date that helped him. Instead, the Department has repeated representations that at all times he was providing estimates, and on the day of the hearing he was attempting to do his best, and was nervous. 12
   d. However, repeated affirmative statements that helped him on December 24, and his clarification that was an estimate only when confronted with his prior statements could support an inference that was intentionally making a false statement early in his testimony. 10
3. That saw "around" after she left the control booth on December 24, 2017.
   a. testified that at some point he saw in the corridor, but did not identify when/how soon after she left the control booth he saw her.
   b. In response to being questioned regarding the apparent inconsistency with his prior statements to , testified that he could not remember when helped him, but that it had to be on either December 24, 25 or 26, and that had gone back to work after she helped him. However, was not questioned further regarding his knowledge of return to work, nor was he asked to clarify whether he recalled seeing her after shift change on any date other than December 24. 5, 6, 9
   c. The Department does not have direct evidence of intention to make a false statement of fact regarding whether he saw her after shift change on December 24. Instead, the Department has repeated 12

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representations that at all times he was providing estimates, that he could not recall which date(s) helped him, and on the day of the hearing he was attempting to do his best, and was nervous.

d. However, statement that he saw on December 24, and his clarification that he actually does not recall what date he saw only when confronted with his prior statements could support an inference that was intentionally making a false statement early in his testimony. 10

is certainly not an excellent historian. In light of apparent confusion over the dates, repeated statements that he was providing estimates and doing his best, and consistent statements that was present for shift change and a debrief (which was corroborated by notes), EAPT did not believe the Department had sufficient evidence to establish that was intentionally misrepresenting known facts to the State Personnel Board. These issues were identified to and discussed with the Department's hiring authorities in the Department's attorney's Executive Review memorandum and throughout the Executive Review process. 7 6

The Department disputes that the analysis or evaluation by its attorneys was weak. Rather, the Department's attorneys evaluated the claims based on all facts known to them, and the legal standard for dishonesty, which requires more than mere inconsistency in statements.

Further Corrections to Factual and Legal Assertions in the Sentinel Report

1) OIG states in several places that testified that was in the control booth for longer than an hour. As discussed, above, did not testify that was in the control booth for longer than an hour. 5

2) did not testify that did not leave the institution prior to the end of her shift. 5

3) As discussed, above, was consistent that gave him a "brief" or "debrief" on what his job duties were after helping him with shift change. 7

4) SPB's decision in the case is not as represented. For example:

   a. OIG states that the ALJ rejected testimony. However, name and testimony were not mentioned anywhere in that decision. The mere fact that testimony was not relied on is not the same as being rejected by a trier of fact. Further, as noted below, admitted to leaving the institution early on the day in question, thus, the ALJ did not need to consider testimony. 11

b. SPB did not conclude lied about leaving the institution early. In fact, at hearing she admitted she left the institution early. SPB found her credible on when she left the institution. The SPB determined that was dishonest for failing to accurately reflect when she left the institution on her time sheet and for failing to be truthful about how she sought and received permission to leave early in a memorandum submitted the next day. 11

5) OIG's statement of the legal standard is incomplete. The Department has to show by a preponderance that the employee was dishonest. However, OIG's summary does not identify the necessary elements of dishonesty, and most critically here, the requirement that the Department show an intentional misrepresentation of a known fact, not merely that story was inconsistent. 12

6) The Hiring Authorities made their own evaluations of the evidence and reached their own conclusions. It should be noted that at the outset, the Hiring Authority did not follow the recommendation of EAPT. Further, the Hiring Authorities, in particular Associate Director and Deputy Director listened to testimony and reviewed the investigation records prior to reaching their own decision on the matter.

7) Associate Director did not propose a 30-day suspension. Warden proposed the 30-day suspension as a counter-offer to offer to settle his discipline. OIG invoked the Executive Review process from Warden desire to make this counter-offer. 2

The Department understands the importance of honesty among its employees, particularly its peace officers, and takes these matters seriously. If you have further questions, please contact me at (916) 323-6001.

Sincerely,

RALPH M. DIAZ
Secretary

# COMMENTS

## OFFICE OF THE INSPECTOR GENERAL'S COMMENTS ON THE RESPONSE FROM THE DEPARTMENT OF CORRECTIONS AND REHABILITATION

To provide clarity and perspective, we are commenting on the California Department of Corrections and Rehabilitation's (hereinafter referred to as the department) response to our Sentinel Case 20–02. The department contends the Sentinel Case does not fully capture the facts underlying the discipline of the officer in this case. We submit the facts contained in the Sentinel Case are comprehensive and have been verified for accuracy. Any factual revisions in the Sentinel Case have been noted in this response. Furthermore, the department alleges that we are inaccurate in our representation of the legal standard in this case, but that is not correct. "The California Supreme Court has stated that the standard of proof to be used in state employment cases is a preponderance of the evidence" (*Skelly* v. *State Personnel Board*, supra, 15 Cal.3d at p. 204, fn. 19, 124 Cal.Rptr. 14, 539 P.2d 774). This is the standard which we have used in our analysis. The numbers below correspond with the numbers we have placed in the margin of the department's response (pages 3–9).

1. The department alleges that this case involved circumstances in which there was "not likely" a preponderance of evidence that the officer had intentionally misrepresented known facts and a belief that the officer understood his errors when he made "inconsistent statements." Nevertheless, at the investigative and disciplinary findings conference, ***the warden***, who was the hiring authority designated by the department to make decisions in the case, reviewed the evidence and ***determined there was, in fact, a preponderance of the evidence*** that the officer had misrepresented known facts when the officer testified at a State Personnel Board hearing. Based on the warden's finding that there was a preponderance of evidence that the officer was dishonest, the warden dismissed the officer.

   At the time of the investigative and disciplinary findings conference, the senior department attorney assigned to the case disagreed with the hiring authority's finding and set forth the reasons for his disagreement. The warden did not find the senior department attorney's arguments convincing, however, and still decided to find that the officer had been dishonest and that the officer should be dismissed. The warden sustained a finding that the officer intentionally provided false information when he testified at a State Personnel Board Hearing. When the OIG or department attorneys do not concur with the decisions of a warden or any other hiring authority, department attorneys may choose to elevate decisions to the hiring authority's supervisor. This process is called *executive review*. Here, even though the senior department attorney did not agree with the warden's findings, the senior department attorney ***never*** elevated the matter to the warden's supervisor.

Furthermore, if it is true that the department is now asserting that the officer's actions should not have warranted a sustained finding of dishonesty and a dismissal penalty, then it follows that the senior department attorney wrote and the department served a disciplinary action dismissing an officer based on a case the department believed it could not prove.

2. The department is not providing a complete history of the settlement discussions and the negotiations between the department and the officer. The warden originally indicated she was willing to offer a salary reduction of 10 percent for 12 months to resolve the officer's case. The employee relations officer sent the following email message to the senior department attorney and to the OIG:

**From:**
**Sent:** Monday, January 13, 2020 2:29 PM
**To:**
**Subject:**

Officer was walked off today. He has since contacted us to negotiate a deal in lieu of dismissal. The warden agrees to 10% for 12 months. We remove the dishonesty charge and he waives all rights to appeal.

What do you two think?

This offer was never communicated to the officer. The officer conveyed to the department that, in lieu of a dismissal, he was willing to enter into a settlement agreement with the department for a 10 percent salary reduction for 24 months, which is the monetary equivalent of 48 days. The employee relations officer sent the following email message to the senior department attorney and to the OIG:

**From:**
**Subject:**
**Date:** January 13, 2020 at 2:53:39 PM PST
**To:**

His counsel offered 10% for 24 months. They do not know the warden's offer of 10% for 12 months.

The OIG did not agree with the department's decision to settle the case and invoked executive review. From the time the warden decided to sustain the dishonesty allegation and dismiss the officer to the time the department offered to settle case, there was not a change of circumstances, meaning the evidence in the case remained the same.[1] Yet, even though there was not a change in circumstances and evidence, the department was willing to settle the case. After the OIG invoked executive review, the department proposed

1. To the present day, the evidence has remained the same. In other words, the evidence the warden originally analyzed to decide to sustain the allegation and dismiss the officer is still the same even though the department has now settled the case for a 30-working-day suspension.


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settling the case for a 30-working-day suspension, which is a more favorable penalty for the officer than the 48-working-day suspension.

3. The OIG does not instruct the department to do anything. The OIG monitors the department's internal investigations and employee disciplinary process and makes recommendations, which the department can choose to accept or reject. Moreover, while the OIG may review written settlement agreements to verify that the form of an agreement complies with policy and that it accurately reflects the decision made by the department, the OIG does not approve settlement agreements and is not a signatory to the agreements. When the department presented the settlement agreement to the OIG, the OIG reviewed it and agreed with the *form* of the settlement agreement, not the *substance*. The OIG has never agreed with the substance of the settlement agreement in this matter.

   It is important to point out that, at the time the department forwarded the settlement agreement to the officer, the OIG had already expressed its disagreement concerning the settlement to the warden, invoked executive review of her decision, and engaged in the executive review process with two other departmental executives: an associate director and a deputy director. Furthermore, by this time, an OIG executive had already elevated the matter to an undersecretary at the department. The undersecretary indicated he was reviewing the case and that the department would be taking no further action on the case until he concluded his review. On April 10, 2020, after discussions with the undersecretary, the OIG informed the department that it was invoking further executive review. However, by that juncture, the department attorneys had already sent the written settlement agreement to the officer, and it had been executed by all parties.

4. We strongly disagree with the department's contentions that our report does not fully and accurately capture the facts underlying the discipline of the officer and that it does not accurately reflect the legal standards that apply to dishonesty cases. We provide further clarifications in sections 5, 6, 9, and 12 below.

5. In the prior discussions with the department attorney and the employee relations officer, the officer consistently stated that the second officer assisted him for approximately ***10-20*** minutes. In an October 1, 2018, discussion, the officer told the department attorney and the employee relations officer that he did not remember any details of the shift he worked on December 24, 2017, the date in question concerning his interaction with the second officer. The officer said the second officer ***helped him briefly in the past during shift change***, but the officer did not remember the specific day and had ***no memory*** regarding whether he had seen the second officer during the rest of the shift after the second officer had helped him.

   In another discussion on December 2, 2018, two department attorneys and the employee relations officer met with the officer in person and again discussed the officer's recollection of December 24, 2017, events. Again, the officer indicated he could not remember any details of his shift except for the fact

that he remembered working in the control booth and that the second officer ***helped him during shift change on one of three days*** (December 24, 25, and 26, 2017). The officer stated that the second officer only helped during shift change for approximately ***15-20*** minutes. The officer said the second officer would have no reason to remain in the control booth after the control booth was no longer busy. The officer specifically stated he ***did not*** remember if he had seen the second officer after she left the control booth. The department attorney did not subpoena the officer to the hearing. It is reasonable to infer the department attorney did not subpoena the officer because of the officer's poor memory regarding the events in question.

The State Personnel Board held a hearing concerning the second officer's disciplinary action on December 4, 2018. Prior to the hearing, in the lobby, the officer interacted with the second officer, the second officer's father, and the second officer's attorney. Subsequent to his interaction with those individuals, the officer testified under oath at the hearing. Interestingly, the officer suddenly had a moment of clarity and clearly remembered the specific date that the second officer assisted him in the control booth and testified regarding the duration of the time that the second officer allegedly assisted him on the date in question. Under oath, the second officer testified that the second officer assisted him for a duration which was at least ***triple*** the time frame he had previously provided to the department attorney and the employee relations officer on the two prior occasions. Furthermore, the officer testified under oath that the officer definitively saw the second officer after the second officer left the control booth. Concerning the bottom paragraph of page six of the department's response (numbered 1 and 2), the OIG reviewed the audio recording of the State Personnel Board hearing again and notes that the officer testified that the second officer was in the control booth for an hour or "within the hour" of his first shift, and the OIG acknowledges that the officer did not testify that the second officer left the institution before the end of the second officer's shift.

Earlier in the December 4, 2018, hearing, the department attorney impeached the second officer's testimony based on the department attorney's two prior conversations with the officer, meaning she confronted the second officer with the information provided by the officer in the two prior conversations. The officer subsequently testified. The officer's testimony not only contradicted his earlier statements to the department attorney and to the employee relations officer, the officer's testimony also negated the department's prior impeachment of the second officer. The officer's testimony also corroborated the length of time the second officer was claiming to have stayed in the control booth and the second officer's story that she had, in fact, returned to the vicinity of the control booth later in the afternoon in question.

6. The officer's testimony at the December 4, 2018, State Personnel Board hearing was not only a vast departure from the information he had previously repeatedly provided to the department attorney and to the employee relations officer, but suddenly his recollection of the events in question became specific concerning events which occurred almost a year earlier in December 2017. In a

matter of days, the officer's memory went from failing—on October 1, 2018, and again on December 2, 2018, just 48 hours before the hearing, his recollection concerning the events was very unclear—to suddenly becoming undecayed and clear at the December 4, 2018, State Personnel Board hearing. This is not a case of nerves. This is a case in which the officer completely changed his testimony on the heels of being surrounded in the lobby of the location of the State Personnel Board hearing by the second officer and the second officer's father—a lieutenant and higher-ranking official of the department. Incidentally, the second officer's father was a character witness who was present and remained in the lobby during the hearing and interacted with subpoenaed witnesses. Although there is no direct evidence of the content of the discussions which took place in the lobby before the hearing, after his interaction with the other individuals in the lobby, the officer suddenly had an otherwise unexplainable and significant change in his version of events and testified with newfound clarity concerning events which took place almost a year before. The officer's interactions with the second officer, the second officer's father, and the second officer's attorney immediately before testifying coupled with the officer's inexplicably radical change in his recollection while testifying is circumstantial evidence of the officer's intent to be dishonest.

7. The department identified as an issue that the department attorney's statement and the officer's contention regarding the contents of their previous discussions of the incident in question contradict each other. It is disheartening to note that the department views conflicting statements between its own department attorneys versus those of an officer as problematic without assessing the quality and reliability of the statements. While the officer changed his story multiple times, the department attorney has been consistent with her recitation of the facts and her recollection of events.

   Furthermore, the department attempts to corroborate the officer's testimony during the State Personnel Board hearing with the fact that the employee relations officer mentions in her memorandum that the officer previously stated the second officer would "brief" him on what to do. On the day of the hearing, the officer testified that the second officer "debriefed" him for the remainder of the hour after shift change in an attempt to account for the extra time the second officer remained in the control booth. However, the officer never mentioned anything about a debrief in his previous conversations with the department attorney and the employee relations officer. The department incorrectly uses the words "brief" and "debrief" interchangeably. However, there is a difference between the verb and the noun forms of *brief* and *debrief*. To *brief* means *to summarize* or *to give instructions*. On the other hand, to *debrief* means *to question or get information from someone*.[2] A *briefing* primarily occurs before and sometimes during an event. A *debriefing* usually occurs after the event. Therefore, even if the second officer gave the officer a *brief*, it still would not account for any of the time the officer is now claiming the second officer allegedly stayed in the control booth ***after*** shift change.

2. *A Brief on "Brief" and "Debrief."* Retrieved from **https://www.merriam-webster.com**.

8. The department seems to be applying a double standard here to the information and testimony provided by the officer and the information and statements provided by the department attorney and the employee relations officer. It gives the officer every deference and benefit of the doubt as to the interpretation of his statements, yet it does not do so with the statements provided by the department attorney and the employee relations officer. The department has now determined that all instances in which the officer gave dates and times were "approximations," that it should now overlook the fact that, under oath, the officer dramatically changed his recollection of events and omitted crucial information he provided in prior conversations with the department attorney and the employee relations officer, and, therefore, gave the officer leniency and settled the case. In the two prior conversations between the department attorney and the officer, the officer appeared to be candid when he indicated that he had an extremely poor recollection of the incident in question. However, on the day of the hearing, the officer had no reasonable explanation as to why his version of the events in question changed and never articulated a reason as to how or why his memory suddenly improved.

   In contrast, the department now criticizes the statements of the department attorney and the employee relations officer, who are credible and reliable departmental staff, and their recollections of the December 4, 2018, hearing despite the fact the department's position was undermined by the contradictory testimony of the officer. The department now concludes that statements of the department attorney and the employee relations officer "could open the department employees up to significant impeachment." However, a memorandum is a summary of their recollections and, unlike the actions of the officer, not sworn testimony. The department now gives every benefit of the doubt to the officer, but not to the department attorney and the employee relations officer. Clearly, the department has no confidence in the ability of its own employees to articulate their recollection of the events or clarify their memorandums. Ultimately, the department's point is moot because the State Personnel Board recorded the hearing and the recording of the hearing is, itself, the best evidence.

9. The officer changed his testimony multiple times on the stand. Under oath, the officer repeatedly testified concerning facts that he had never previously shared with the department attorney, despite his previous conversations with the department attorney on October 1, 2018, and December 2, 2018, and in which the department attorney repeatedly questioned the officer concerning his recollection of the incident in question. The first time the officer revealed the new information was immediately before he was called to testify under oath. Under oath, the officer repeatedly testified that the second officer helped him on December 24, 2017; that the second officer was in the control booth for the duration of the first hour of his shift; and, finally, the officer testified that he, in fact, saw the second officer later in the shift after the second officer left the control booth. The officer's testimony was clear enough that, after the hearing, the employee relations officer, who was present at the hearing and saw the officer testify, felt compelled to write a complaint to the hiring authority concerning the officer's sworn testimony being so different from his prior

statements to the department attorney and to the employee relations officer. In addition, the officer's testimony was clear enough that two department attorneys wrote memorandums detailing the substantive inconsistencies of the officer's testimony compared with the officer's previous statements to departmental staff concerning the incident.

10. The department even admits that the officer's affirmative responses under oath concerning specific facts, such as the officer helping the second officer on December 24, 2017, and seeing the second officer again after she left the control booth, support the allegation that the officer falsely testified at the State Personnel Board hearing.[3]

11. The department is correct when it notes that the State Personnel Board did not conclude that the second officer lied about leaving the institution early, but that the second officer was dishonest for not accurately reflecting on her time sheet when she left the institution and for lying in a memorandum concerning the incident. The department contends the State Personnel Board did not reject the officer's testimony because the officer's name and testimony are not mentioned in the State Personnel Board's decision concerning the second officer's case. However, the fact that the State Personnel Board administrative law judge did not mention the officer's name and testimony in the written decision indicates the officer's testimony was rejected or dismissed by the administrative law judge.

12. The OIG is clear concerning the legal standard needed to prove a dishonesty allegation. Allegations are proven by evidence. The department contends that it does not have direct evidence of the officer's intent to make false statements while testifying at a State Personnel Board hearing. However, the department's contention completely ignores the fact that there are two types of evidence—direct and indirect. Direct evidence is that which speaks for itself. For example, if a witness testifies she saw a jet plane fly across the sky before she testified at the State Personnel Board hearing, that testimony is direct evidence a jet plane flew across the sky. Indirect evidence suggests a fact by implication or inference. For example, if a witness testifies she saw the white trail which jet planes often leave, that testimony is indirect evidence because it supports the conclusion a jet plane flew across the sky.[4] It appears, however, the department is positing that, in order to prove intent, the department needs a confession from the officer regarding his false testimony, which would be direct evidence that the officer intentionally misrepresented known facts. The reality is that direct evidence of intent rarely exists. Intent can be proven by circumstantial evidence.[5] The law makes no distinction between the weight given to direct or circumstantial evidence. It is well settled that circumstantial evidence is just as reliable as direct evidence (*NLRB* v. *Wal-Mart Stores, Inc.* 488 F.2d 114, 116 (CA8 1973); *McGraw-Edison Co.* v. *NLRB*, 419 F.2d 67, 75-76 (CA8 1969)). As mentioned above, circumstantial evidence exists in this case (see No. 6).

3. Department's Response, page 5, 2 (d); page 6, 3 (d).

4. Example taken from Judicial Council of California Civil Jury Instructions, 202 Direct and Indirect Evidence.

5. CALCRIM 223 Direct and Circumstantial Evidence: Defined.