

## GOVERNMENT CODE SECTION 19572

### (a) Fraud in Securing Appointment

To prove cause for discipline for fraud in securing appointment Respondent must prove, by a preponderance of the evidence, that Appellant made an intentional misrepresentation of known facts on the application for employment. (*Richard C. Toby* (2001) SPB Dec. No. 01-04.)

### (b) Incompetency

Incompetency is generally found when an employee fails to perform his or her duties adequately within an acceptable range of performance. (*Fortunato Jose* (1993) SPB Dec. No. 93-34 at p. 3.)

The technical term “incompetency” is a relative one generally used in a variety of factual contexts to indicate an absence of qualification, ability or fitness to perform a prescribed duty or function. (*Dennie L. Melton* (1995) SPB Dec. No. 95-10 at p. 2 citing *Pollak v. Kinder* (1978) 85 Cal. App. 3d 833, 837.) It is commonly defined to mean a general lack of present ability to perform a given duty as distinguished from inability to perform such duty as a result of mere neglect or omission. (*Pollack, supra*, 85 Cal.App.3d at p. 837.) The terms negligence and incompetency are not synonymous; an individual may be competent or capable of performing a given duty but negligent in performing that duty. (*Id.* at p. 838.)\_

**(c) Inefficiency**

The Board defines inefficiency under Government Code section 19572, subdivision (c) as either a continuous failure by an employee to meet a level of productivity set by other employees in the same or a similar position, or a failure to produce an intended result with a minimum of waste, expense, or unnecessary effort. (*Gayle McCormick* (2003) SPB Dec. 03-06 at p. 8; *Robert Boobar* (1993) SPB Dec. No. 93-21 at p. 4; see also *Bodenschatz v. State Personnel Board* (1971) 15 Cal.App.3d 775 [sustaining dismissal of state traffic officer for inefficiency because officer's law enforcement activity was below that of others in same line of work]; *Sweeney v. State Personnel Board* (1966) 245 Cal.App.2d 246 [affirming dismissal of attorney for inefficiency based on evidence that others doing same work accomplished more than appellant and appellant's output should have been substantially greater].)

**(d) Inexcusable Neglect of Duty**

A violation of Government Code section 19572, subdivision (d), for inexcusable neglect of duty requires that the conduct be either intentional or a grossly negligent failure to exercise due diligence in the performance of a known official duty. (*Gayle McCormick* (2003) SPB Dec. 03-06; *Robert Herndon* (1994) SPB Dec. No. 94-07.)

**(e) Insubordination**

To support a charge of insubordination, an employer must show mutinous, disrespectful, or contumacious conduct by an employee, under circumstances

where the employee has intentionally and willfully refused to obey an order a supervisor is entitled to give and entitled to have obeyed. A single act may be sufficient to constitute insubordination if it meets the above test. An employee has no right to put conditions on his/her obedience. (*Bill A. Balvanz* (1996) SPB Dec. No. 96-16; *Richard Stanton* (1995) SPB Dec. No. 95-02.)

**(f) Dishonesty**

Dishonesty generally requires a showing of an intentional misrepresentation of known facts, or a willful omission of pertinent facts, or a disposition to lie, cheat, or defraud; untrustworthiness, lack of integrity. (*Nhut Minh Nguyen* (1999) SPB Dec. No. 99-01; *Eliette Sandoval* (1995) SPB Dec. No. 95-15.)

**(g) Drunkeness on Duty**

In *Blake v. State Personnel Board* (1972) 25 Cal.App.3d 541, although intemperance was not the specific issue involved, the court of appeal explained that intemperance referred to on-duty or off-duty drinking “which impaired the employee's ability to discharge his duties,” while drunkenness on duty [Government Code § 19572, subdivision (g) ] referred to being actually drunk while on-duty. (*Id.* at pp. 551–552).

Expert testimony is not required for the finder of fact to conclude that a person is under the influence of alcohol: lay persons may testify competently as to observing a person in such a condition. (*Jerome G. Wendt* (1995) SPB Dec. No. 95-16 at p. 6 citing *People v. Ravey* (1954) 122 Cal.App.2d 699.)

In *Skelly v. State Personnel Board* the California Supreme Court held the Board's finding that the appellant's absences were due to drinking rather than illness was supported by substantial evidence, including the testimony of two credible witnesses who stated that they personally observed petitioner at a bar drinking on the dates in question, and the testimony of petitioner himself that, on the latter date, he did consume two martinis at lunch despite his claimed illness. (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 275.)

There is no case which defines "drunk on duty" but look to the following cases for examples:

*Edward Alcorn* (1995) SPB Dec. No. 95-01 (Found)

[odor of alcohol on breath; unsteady "almost staggering" gait; bloodshot eyes; positive drug test results indicating alcohol level above permissible limit]

*Jerome G. Wendt* (1995) SPB Dec. No. 95-16 (Found)

[slurring words; emitting the smell of alcohol; speaking incoherently; drooling; walking unsteadily; unable to produce medical evidence of a health condition causing such conduct/symptoms]

*Ralph Rey* (1999) SPB Case No. 99-10 (Not Found)

[Arrest for drunk driving on the way to work causing Appellant to be absent from work not deemed "drunk at work" for purposes of Government Code section 19572, subdivision (g).]

#### **(h) Intemperance**

Intemperance refers to the use of intoxicating liquor which causes a person to be unable to properly attend to his or her job duties or excessive conduct arising out of the use of intoxicating liquor. (*Gary Sharp and Frankie J. Johnson* (1995) SPB Dec. No. 95-14 at p. 2.) Standing alone, a single act of drunk driving, while off duty, is not sufficient evidence of excessive behavior to

establish a cause for discipline for intemperance under Government Code section 19572, subsection (h). (*Ralph Rey* (1999) SPB Dec. No. 99-10.)

**(i) Addiction to the Use of Controlled Substances**

No SPB precedential decision has defined this cause for adverse action. The cases below, however, discuss appropriate penalty, evidence of post-termination rehabilitation, as well as application of the Americans with Disabilities Act. In each case, the appellant admitted to being addicted to drugs and the focus of the Board's decision was on the appropriate penalty in light of the appellants' post-discipline rehabilitative efforts:

*Karen Nadine Sauls* (1992) SPB Dec. No. 92-13

*Leslie Wolford* (1993) SPB Dec. No. 93-17

*Ethel D. Hunter* (1996) SPB Dec. No. 96-11

The dictionary definition of the terms 'addict', 'to addict', 'addicted' and 'addiction' are as follows: An addict is 'one who is addicted to a habit, esp. the habit of taking some drug'; 'to addict' means 'to apply habitually; to give one's self up and over to as a constant practice; to devote; habituate'; 'addicted', when used in a bad sense, 'refers to one who is given up or strongly disposed to some taste, practice or pursuit'; and 'addiction' means 'state of being addicted; also, habituation, esp. to drugs.' (*Webster's New International Dictionary*, Second Edition, Unabridged.) The medical dictionary defines 'addict' as '1. To form a habit for the use of a drug. 2. One habituated to the use of a drug'; and defines 'addiction' as 'Enslavement to some habit, esp. the drug habit. A condition in which cessation of narcotic or other drug produces definite 'symptoms of

abstinence'.' (*Taber's Cyclopedic Medical Dictionary*, Revised Sixth Edition.)  
(*McMurtry v. Bd. of Med. Examiners* (1960) 180 Cal.App.2d 760, 769.)

**(j) Inexcusable Absence Without Leave**

Inexcusable absence without leave occurs when the employee's absence from work is without prior authorization and is not excused because of illness or other legitimate reason. (*Gerome G. Wendt* (1995) SPB Dec. No. 95-16 at p. 7; *Richard Vasquez Ramirez* (1994) SPB Dec. No. 94-05 at p. 4)

While an employer cannot force an employee to see a doctor, the Department can deny authorization for leave when a request for proof of illness is warranted and an employee refuses to provide proof that the absence is justified. (*Bethi J. Carver* (1996) SPB Dec. No. 96-18 at p. 2; *Timothy Welch* (1992) SPB Dec. No. 92-03 at p. 6.)

**(k) Conviction of a Felony or Misdemeanor Involving Moral Turpitude**

Government Code section 19572, subdivision (k) allows an employee to be disciplined for conviction of either a felony or misdemeanor involving moral turpitude. This code section also provides that "a conviction following a plea of nolo contendere to a charge of a felony or any offense involving moral turpitude is deemed to be a conviction within the meaning of the section." (*Randolph Luna* (1998) SPB Dec. No. 98-08.)

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Whether a crime involves moral turpitude is a question of law. (*Otash v. Bureau of Private Investigators* (1964), 230 Cal.App.2d 568, 571.) The conviction of a crime may be a conviction involving moral turpitude even though

the crime is *malum prohibitum* rather than *malum in se*. (*In re Clark* (1959) 52 Cal.2d 322, 324.) Moral turpitude, broadly defined, is any conduct which is contrary to justice, honesty, and good morals. (*Arden v. State Bar* (1959) 52 Cal.2d 310, 321.) Moral turpitude includes fraud; a crime in which an intent to defraud is an element is a crime involving moral turpitude. (*Wilson v. State Pers. Bd.* (1974) 39 Cal. App. 3d 218, 221.)

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Section 19572, subdivision (k) permits the Board to look beyond the elements of the criminal offense to determine whether, by the manner of its commission, it involved moral turpitude. (*Padilla v. State Pers. Bd.* (1992) 8 Cal. App. 4th 1136, 1141.)

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A crime in which an intent to defraud is an essential element is a crime involving moral turpitude, as are offenses involving intentional dishonesty for purposes of personal gain. (*Wilson v. State Personnel Board* (1974) 39 Cal.App.3d 218, 221; *In re Hallinan* (1954) 43 Cal.2d 243, 247-248; *Douglas Durham* (1995) SPB Dec. No. 95-18.)

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No separate showing of "nexus" is required to impose discipline under subdivision (k). (*Wilson v. State Personnel Board*, (1974) 39 Cal.App.3d 218, 221; *Douglas Durham* (1995) SPB Dec. No. 95-18.)

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Moral turpitude reflects a trait of character that may continue, and affect an employee's performance of duties not related to the circumstances in which it was manifested. (*Wilson v. State Personnel Board*, (1974) 39 Cal.App.3d 218; *Douglas Durham* (1995) SPB Dec. No. 95-18.)

**(l) Immorality**

There are no SPB precedential decisions interpreting immorality under Government Code section 19572, subdivision (l). Accordingly, it is appropriate to use the plain meaning of the term as expressed in recognized dictionaries.

However, In *Brewer v. Department of Motor Vehicles* (1970) 93 Cal.App.3d 358, the First District Court of Appeal addressed moral turpitude and good moral character standards under regulatory licensing schemes. Citing *Morrison*, the court of appeal reasoned:

[T]he purpose of the moral turpitude and good moral character standards in license regulatory statutes is not to punish [the appellant]. Presumably the penal law has adequately attended to that task. The paramount purpose of the standards is to protect members of the public when they deal with [the appellant] in his occupation.

(*Brewer, supra*, at pp. 365-66.) This suggests there should be some rational connection between the immoral conduct and the appellant's employment in order to impose discipline under Section 19752, subdivision (l). (See e.g., *Brewer, supra*, at p. 365 [finding one-time sexual offender with abnormal sexual interest in children was not unfit to sell vehicles to the public].)

**(m) Discourteous Treatment of the Public or other Employees**

Discourteous treatment of the public or other employees generally involves conduct where a person displays hostility towards others, speaks in an

abrasive tone of voice, and has a brusque demeanor. (*Walker v. State Personnel Board* (1971) 16 Cal.App.3d 550, 552; *Gayle McCormick* (2003) SPB Dec. No. 03-06 at p. 9.)

Discourteous treatment” is more than “unprofessional” or “immoral” conduct. (*Blake v. State Personnel Board* (1972) 25 Cal.App.3d 541, 550.) It is outside the normal dictates of civilized behavior. (*Jose L. Flores Jr.* (1994) SPB Dec. 94-24 at p. 4.) To establish a violation of Government Code section 19572, subdivision (m), the respondent must prove: (1) the appellant was discourteous to a member of the public or another employee; (2) the discourtesy bears some rational relationship to the appellant’s employment; and, (3) the discourtesy “is of a character that can reasonably result in the impairment or disruption of public service ....” (*Gray v. State Personnel Board* (1985) 166 Cal.App.3d 1229, 1232 citing *Blake v. State Personnel Board* (1972) 25 Cal.App.3d 541, 550.) In other words, there must be a nexus between the discourtesy and the appellant’s employment, such that it brings discredit to the agency and the appellant’s classification. (*Blake, supra, at p. 551.*)

The nature of the discourteous conduct and its effect on the public service rather than the time or place of its occurrence should be the determinative factors. If the misconduct bears some rational relationship to the employment and is of a character that can reasonably result in the impairment or disruption of public service, it should be no less a cause for discipline under subdivision (m) simply because it occurred outside of duty hours. In determining whether an employee should be disciplined, whatever the cause, the overriding consideration

is whether the conduct harms the public service. (*Blake v. State Personnel Board* (1972) 25 Cal. App.3d 541, 550-51.)

Conduct which may not meet the minimum standard for a finding of sexual harassment may be chargeable as cause of discipline as discourteous treatment under Section 19572, subdivision (m). (*Jose L. Flores Jr.* (1994) SPB Dec. 94-24 at p. 4.)

**(n) Improper Political Activity**

Neither the courts nor the Board have set forth the elements of improper political activity under Government Code section 19572, subdivision (n). However, an employee's use of state property, such as a state-issued vehicle, phone, or laptop to engage in political activities may be analogous to the facts in *Stanson v. Mott* (1976) 17 Cal.3d 206, wherein the California Supreme Court held that the Department of Parks and Recreation's use of public funds to promote a bond issue to acquire future park and historical facilities was an improper expenditure of public funds. (See also *People v. Sperl* (1976) 54 Cal.App.3d 640 [finding misappropriation of public funds where county car and driver were furnished to political candidate, his staff, and family]; *People v. Battin* (1978) 77 Cal.App.3d 635 [holding use of county employees to perform tasks in aid of defendant's personal political campaign amounted to improper use of public moneys] (superseded by statute on other grounds, as stated in *People v. Conner* (1983) 34 Cal.3d 141, 147.)

**(o) Willful Disobedience**

In order to establish willful disobedience under Government Code section 19572, subsection (o) an employer must show that an employee knowingly and intentionally violated a direct command or prohibition. (*Ethel Warren* (1999) SPB Dec. No. 99-09 at p. 10; *Jeffrey Crovitz* (1996) SPB Dec. No. 96-19.)

"A proper construction of section 19572 impels the view that... willful [disobedience] requires proof of intent or willfulness. The latter elements imply that the person knows what he is doing and intends to do what he is doing." (*Coomes v. State Personnel Board* (1963) 215 Cal.App.2d 770, 775.)

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Failure to follow known departmental policy constitutes willful disobedience under Government Code section 19572, subdivision (o). (*Anthony M. Beatrice* (1995) SPB Dec. No. 95-11 at pp. 4-5.)

**(p) Misuse of State Property**

Legal cause for discipline under Government Code section 19572, subdivision (p) is established in those situations where state property is stolen or is intentionally used for an improper or non-state purpose, often, but not always, for personal gain. Misuse of state property may also connote improper or incorrect use, or mistreatment or abuse of state property. (*Nhut Minh Nguyen* (1999) SPB Dec. No. 99-01 at p. 4; *Robert Boobar* (1993) SPB Dec. No. 93-21 at p. 5; see also *Wilson v. State Personnel Board* (1976) 58 Cal.App.3d 865.)

**(q) Violation of This Part or Board Rule**

No cases define this subsection.

**(r) Violation of section 19990**

Appellant is charged with a violation of Government Code section 19572, subdivision (r). That section provides that an employee may be disciplined for violating the prohibitions against incompatible activities set forth in Government Code section 19990. Section 19990 provides that a state employee shall not engage in any activity which is inconsistent, incompatible, in conflict with, or inimical to, his or her job duties as a state employee. It also grants each appointing power the right to determine which activities are incompatible with state employment. The employer, however, is required to provide notice of the prohibited behavior before discipline may be imposed. (See *Jeffrey Crovitz* (1996) SPB Dec. No. 96-19.)

Activities and enterprises deemed to fall in these categories shall include, but not be limited to, all of the following:

- (a) Using the prestige or influence of the state or the appointing authority for the officer's or employee's private gain or advantage or the private gain of another.
- (b) Using state time, facilities, equipment, or supplies for private gain or advantage.
- (c) Using, or having access to, confidential information available by virtue of state employment for private gain or advantage or providing confidential information to persons to whom issuance of this information has not been authorized.
- (d) Receiving or accepting money or any other consideration from anyone other than the state for the performance of his or her duties as a state officer or employee.
- (e) Performance of an act in other than his or her capacity as a state officer or employee knowing that the act may later be subject, directly or indirectly to the control, inspection, review, audit, or enforcement by the officer or employee.
- (f) Receiving or accepting, directly or indirectly, any gift, including money, or any service, gratuity, favor, entertainment, hospitality,

loan, or any other thing of value from anyone who is doing or is seeking to do business of any kind with the officer's or employee's appointing authority or whose activities are regulated or controlled by the appointing authority under circumstances from which it reasonably could be substantiated that the gift was intended to influence the officer or employee in his or her official duties or was intended as a reward for any official actions performed by the officer or employee.

(g) Subject to any other laws, rules, or regulations as pertain thereto, not devoting his or her full time, attention, and efforts to his or her state office or employment during his or her hours of duty as a state officer or employee.

(Govt. Code, § 19990.)

Outside employment which is inconsistent or incompatible or in conflict with state duties to the extent the public interest would be likely to suffer is cause for disciplinary action. (4 Op.Atty.Gen. 202 (1944).) **(s) Refusal to Take and Subscribe any Oath or Affirmation...**

There are no Precedential Board Decisions on refusal to take an oath.

**(t) Other Failure of Good Behavior**

Other failure of good behavior under Government Code section 19572, subdivision (t) requires more than mere misconduct. The misconduct must be of such a nature as to reflect upon the employee's job. In other words, (1) the "misconduct must bear some rational relationship to [the employee's] employment and (2) must be of such character that it can easily result in the impairment or disruption of the public service." (*Dennie L. Melton* (1995) SPB Dec. No. 95-10 at p. 4, citing *Yancey v. State Personnel Board* (1985) 167 Cal. App.3d 478, 483.) "It is apparent that the Legislature was concerned with punishing behavior that had *potentially destructive consequences*." (*Yancey*, at

p. 483, quoting *Stanton v. State Personnel Board* (1980) 105 Cal.App.3d 729, 739–740, emphasis in original.)

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The courts have consistently recognized that a peace officer brings discredit to her employer under Government Code section 19572, subdivision (t) by violating laws that she is employed to enforce. (*Gordon J. Owens* (1992) SPB Dec. No. 92-11 at p. 2.)

**(u) Any Negligence, ..., Resulting in the Death of a Patient of a State Hospital..**

There are no cases reported under Government Code section 19572, subdivision (u).

**(v) Use of Unauthorized Material for Target Practice**

There are no cases reported under Government Code section 19572, subdivision (v).

**(w) Unlawful discrimination,...**

Refer to the Fair Employment and Housing Act (Gov. Code § 12900, et seq.).

**(x) Unlawful Retaliation...**

Unlawful retaliation under Government Code section 19572, subdivision occurs when an employee unlawfully retaliates against another employee who reports information to an appropriate authority concerning an actual or suspected violation of any law occurring on the job. (*Jeffrey Crovitz* (1996) SPB Dec. No. 96-19.) Section 19572 does not define retaliation, nor did the Board in *Crovitz*, *supra*, wherein the appellant was charged with retaliation on the grounds that he

attempted to intimidate a coworker for reporting his personal engineering work to management by blocking her means of egress from her office. The Board dismissed the retaliation charge because the department failed to prove that the coworker was, in fact, intimidated by the appellant. The coworker testified to being uncomfortable with appellant being in her cubicle, but acknowledged that appellant was congenial as usual. (*Corvitz, supra*, at p. 11.)

Given that the Government Code does not define retaliation, the case law regarding retaliation claims under the Fair Employment and Housing Act (FEHA) (Govt. Code § 12900 et. seq.) is instructive. In order to establish a prima facie case of retaliation under FEHA, a complainant must show that (1) she engaged in protected activity, (2) the employer subjected her to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's actions. (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.) An adverse employment action for purposes of retaliation must have "a detrimental and substantial effect on the [complainant's] employment." (*McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 386–387.)