| DARRIN HARPER<br>v.<br>CALIFORNIA DEPARTMENT OF TRANSPORATION<br><br>Appeal from Dismissal | Case No. 20-0978<br><br>**BOARD RESOLUTION AND ORDER** |
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**BEFORE**: Kathy Baldree, President; Vice President; Shawnda Westly, Lauri Shanahan, and Kimiko Burton, Members.[1]

The State Personnel Board (the Board) on March 4, 2021, carefully considered the Proposed Decision filed by the Administrative Law Judge (ALJ) in the appeal by Appellant, Darrin Harper, Case Number 20-0978, from the penalty of dismissal by the California Department of Transportation (Respondent).

**IT IS RESOLVED AND ORDERED** that the findings of fact, determination of issues, and the Proposed Decision of the ALJ are adopted by the Board as its Decision in the case on the date set forth below. The Board has further designated the adopted Proposed Decision as a Precedential Decision of the Board, pursuant to Government Code section 19582.5.

In this case, Appellant, a CalTrans Highway Maintenance Worker, submitted to a drug test upon his return to duty after an extended leave of absence. The urinalysis test revealed the presence of delta 9 – tetrahydrocannabinol (THC) in his system, which establishes that Appellant had, at some prior point in time, inhaled or ingested marijuana or a marijuana-infused substance. There were no allegations in the Notice of Adverse Action (NOAA), nor proof at the evidentiary hearing, that Appellant was under

[1] Member Mona Pasquil Rogers was recused from this matter.

the influence of marijuana when he reported for duty or on standby for duty or that he possessed or used marijuana while on duty or on standby. Under these circumstances, a positive urinalysis test for marijuana, without more, does not justify discipline under any of the charges in the NOAA.

We recognize that the cultivation, possession, use and sale of marijuana remains prohibited under federal law as a Schedule I drug under the Controlled Substances Act. (21 U.S.C. §§ 812, subds. (b)(1), and (c)(d)(1), and § 841, subd. (a).) California, however, no longer criminalizes recreational marijuana use. In 2016, the voters of the State of California passed Proposition 64 and enacted the Control, Regulate and Tax Adult Use of Marijuana Act ("AUMA") legalizing, among other things, the possession and use of less than an ounce of marijuana by persons over 21 years of age or older. (Health & Saf. Code, § 11362.1.) AUMA followed earlier legislation like the Compassionate Use Act of 1996 and the Medical Marijuana Regulation and Safety Act of 2015 that legalized the medicinal use of marijuana. With this legislation, marijuana use is now no different from the personal consumption of wine, beer, or other alcoholic beverages. It is a social and recreational activity that is legal and permissible in California.

The limited probative value of Appellant's positive marijuana test is that he had used marijuana at some point in time before he reported to work. Even though Respondent did not contend that Appellant was under the influence or impaired when

he reported to work, it is important to note here that the positive test does not create nor establish any legal presumption of impairment.[2]

Respondent, however, contends that, by virtue of designating Highway Maintenance Workers as "safety sensitive" employees under California Code of Regulation, title 2, section 599.961[3], testing positive for marijuana as a safety sensitive employee is a basis for discipline. Section 599.961 provides the basis for when a particular position may be designated as a "sensitive" position. It is section 599.960 that provides the prohibition pertinent to the use, possession, or being under the influence of illegal or unauthorized mind-altering substances. As discussed in the adopted proposed decision, however, the prohibitions under section 599.960, subdivision (b), only extend to state employees while they are on duty or on standby for duty. It is intended to ensure a safe workplace not to serve as a bar to marijuana use or alcohol consumption.

The adopted proposed decision is narrowly drawn to only apply to classifications that have been designated as sensitive positions by agencies of the State of California and must follow the prohibitions found in section 599.960, subdivision (b). This decision does not apply to positions that are federally regulated where persons employed in those regulated positions are prohibited from any drug use including marijuana. (See

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[2] At present, the Board is unaware of any statutory standard in California as to the concentration of THC in a person's system to indicate a presumption of impairment.

[3] Under section 599.961, appointing authorities with approval from the Department of Human Resources (CalHR) would identify positions where drug or alcohol-affected performance could clearly endanger the health and safety of others and request its designation as "sensitive positions" or "safety sensitive" as identified by the parties.

14 C.F.R. part 120 (pilot/air traffic control controlled substance testing[4]); 49 C.F.R. part 382 (commercial motor vehicle driver controlled substance testing.[5])

Similarly, this decision does not impact peace officers who are expressly prohibited from using any mind-altering substance regardless of its legality. "To protect the public and ensure the safety and security of its correctional institutions, the state must ensure that its peace officers do not use illegal drugs, or misuse prescription drugs, unauthorized or other illegal mind-altering substances *under any circumstances*, and are not under the influence of alcohol while on the job." (Cal. Code of Reg., tit. 2, § 599.960, subd. (e), italics added.) Given the higher standard to which these law enforcement employees are held, their responsibility for the safety of our prisons and our communities, and their duty to enforce all laws, positive tests of a prohibited substance regardless of its legality under California Law is a valid basis for discipline.

Furthermore, nothing in this decision should be interpreted to excuse or shield an employee from discipline if they are impaired or under the influence from marijuana, alcohol, or any other substance while at work or while on standby for work. Such conduct remains prohibited under section 599.960, subdivision (b), and may also violate the employing department's workplace policy.

In closing, the Board notes that it does not take a position on whether using marijuana is a good thing or a bad thing. The voters have spoken and legalized it in the State of California. Given that reality, State Agencies are powerless to discipline

[4] Specifically 14 C.F.R. § 120.17: no "individual shall perform for an employer, either directly or by contract, any air traffic control function while that individual has a prohibited drug, as defined in this part, in his or her system."]

[5] Specifically 49 C.F.R. § 382.213: "No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any non-Schedule I drug . . . . "

employees, like Appellant, whose test showed only that marijuana had been ingested or used sometime in the past, but that Appellant was not under the influence of marijuana while on duty.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order, and I further certify that the attached is a true copy of the Administrative Law Judge's Proposed Decision adopted as a Precedential Decision by the State Personnel Board at its meeting on March 4, 2021.

Suzanne M. Ambrose
SUZANNE M. AMBROSE
Executive Officer

| DARRIN HARPER<br>v.<br>CALIFORNIA DEPARTMENT OF TRANSPORTATION<br><br>Appeal from Dismissal | Case No. 20-0978<br><br>Proposed Decision |
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## STATEMENT OF THE CASE

This matter came on regularly for hearing before State Personnel Board (SPB) Administrative Law Judge Amy Friedman, on December 2, 2020, via Webex videoconferencing. The matter was submitted at the conclusion of the hearing on December 2, 2020.

Appellant, Darrin Harper (Appellant), was present and represented by Justin Crane, Attorney at Law, Myers Law Group APC.

Respondent, California Department of Transportation (Respondent or Caltrans), was represented by Saralin Allin, Staff Services Manager I, Caltrans.

Respondent served a Notice of Adverse Action (NOAA) on Appellant dismissing him from his position as a Caltrans Highway Maintenance Worker, effective July 27, 2020. Respondent alleges that Appellant, an employee assigned to safety sensitive duties, failed a mandatory drug test.

Appellant asserts that he was unlawfully ordered to submit to the drug test because he does not perform any safety sensitive functions at work.

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## ISSUES

The issues to be resolved are:

1. Did Respondent prove the charges by a preponderance of the evidence?
2. Did Respondent unlawfully direct Appellant to submit to a return-to-work drug test?
3. If Respondent proved the charges by a preponderance of the evidence, does Appellant's conduct constitute legal cause for discipline under one or more of the following subdivisions of Government Code section 19572: (d) inexcusable neglect of duty; (e) insubordination; (o) willful disobedience; (t) other failure of good behavior either during or outside of duty hours, which is of such a nature that it causes discredit to the appointing authority or the person's employment?
4. If Appellant's conduct constitutes legal cause for discipline, what is the appropriate penalty?

## FINDINGS OF FACT

A preponderance of the evidence proves the following facts:

1. Appellant commenced his state service on March 18, 2019, as a Caltrans Highway Maintenance Worker with Respondent.
2. Appellant has no previous formal disciplinary actions.
3. Pursuant to the classification specifications, Caltrans Highway Maintenance Workers "do miscellaneous laboring work in connection with the maintenance of the State highways and bridges including litter pickup, traffic control, tree maintenance, and maintenance of safety roadside rest areas; and do other

related work." They also "operate vehicles requiring a Class C driver license, such as light trucks, automobiles, highway maintenance, bridge maintenance, emergency service, construction, or landscape equipment." The specifications require possession of a valid and unrestricted Class C driver license, without any special endorsements.[1] Caltrans Highway Maintenance Workers are not required to have a commercial driver license.

4. Pursuant to California Code of Regulations, title 2, section 599.960, subdivision (b):

> [N]o State employee who is on duty or on standby for duty shall: (1) Use, possess, or be under the influence of illegal or unauthorized drugs or other illegal mind-altering substances; or (2) Use or be under the influence of alcohol to any extent that would impede the employee's ability to perform his or her duties safely and effectively.

Under subdivision (c) of section 599.960:

> Employees serving in sensitive positions shall be subject to drug and alcohol testing … when there is reasonable suspicion that the employee has violated subsection (b). In addition, when such an employee has already been found in violation of subsection (b) through the adverse action or medical examination processes under the Civil Service Act [Citations.] as a result of substance testing under this article, or by the employee's own admission, the employee may be required to submit to periodic substance testing as a condition of remaining in or returning to state employment. Unless otherwise provided in the settlement of an adverse action the period for this testing shall not exceed one year.

[1] A Class C driver license does not permit the holder to operate commercial vehicles, or any vehicle weighing over 26,000 pounds. (Veh. Code, § 1284.9, subd. (b)(3).) A commercial driver license and appropriate endorsement is required to operate a commercial motor vehicle. (*Id.* at § 15275.) Commercial vehicles include double trailers, tank vehicles, and vehicles designed to carry ten or more persons. (*Id.* at §§ 15210, 15278.) Special license endorsements authorize drivers to operate some particular types of vehicles, such as tank vehicles and vehicles transporting hazardous materials. (See, e.g., *id.* at § 15278.)

The purpose of section 599.960, as declared in subdivision (a), is "to help ensure that the state workplace is free from the effects of drug and alcohol abuse."

5. Respondent identified the position of Caltrans Highway Maintenance Worker as safety sensitive, and that classification was designated as safety sensitive by the California Department of Human Resources (CalHR).[2]

6. Upon Appellant's hiring, on March 4, 2019, Caltrans Area Superintendent Aldo Estrada (Estrada) told Appellant that his position was safety sensitive, and provided Appellant with a Safety Sensitive Employee/Driver Certification form (Certification Form). The Certification Form informed Appellant that "[e]mployees serving in safety sensitive positions are subject to drug and alcohol testing as specified in CalHR section 599.960–599.966. Title 49 of the Code of Federal Regulations requires that any individual who performs federally-defined safety-sensitive duties specific to a commercial motor vehicle is subject to drug and alcohol testing as defined in 49 CRF, Parts 40 and 382."[3] On the Certification Form, Appellant indicated that he had a valid driver license, but did not have a commercial driver license and "will not be performing safety-sensitive functions for Caltrans specific to the operation of a commercial motor vehicle." Appellant also acknowledged receipt of Deputy Directive DD-08 and the Caltrans Safety Sensitive Employee Handbook

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[2] An agency may identify the positions under its jurisdiction that are safety sensitive, subject to approval by CalHR. (Cal. Code Regs., tit. 2, § 599.961, subd (b)(1).)

[3] These federal regulations apply to persons who operate commercial motor vehicles. (49 C.F.R. § 382.103, subd. (a).) Under the federal regulations, commercial vehicles include those weighing over 26,000 pounds, designed to transport 16 or more persons, and any vehicle transporting hazardous materials. (*Id.* at § 382.107.)

(Safety Sensitive Handbook). Appellant signed the Certification Form on March 4, 2019.

7. Deputy Directive DD-08 was Caltrans's Drug-free Workplace policy. That policy prohibited Caltrans employees from, among other things, "possessing, using or consuming alcohol or illicit drugs in the workplace, or being impaired by alcohol or an illicit drug in the workplace." The policy also declared that employees "are prohibited from reporting for or returning to duty when impaired from the effects of alcohol, prescription medications, and/or recreational or illicit drugs, including marijuana." The employee responsibilities delineated in the policy included the following mandates:

> Refrain from consuming intoxicants during work shift, including marijuana.
>
> Report for and return to duty free of drug and alcohol impairments.
>
> [Employees] [a]re prohibited from operating state vehicles when not completely recovered from the effects of alcohol or drug use.
>
> When performing "safety sensitive" functions, submit to mandatory, post-accident, random, return to work, reasonable suspicion or follow-up drug and/or alcohol testing….

8. Part 1 of the Safety Sensitive Handbook concerns drug and alcohol testing. Its purpose is "to provide Caltrans employees with information pertaining to the drug and alcohol testing process…. The [provided] information is not intended to take the place of or supersede any existing laws, rules or regulations…." The first item included in Part 1 of the Handbook was a copy of the Drug-Free Workplace policy.

9. The Safety Sensitive Handbook informed Appellant that "[w]hen a safety-sensitive employee has been inactive from performing safety-sensitive functions for 30 days or more, they will have to take and pass a drug test before returning to safety sensitive functions," and that such return-to-work testing is required of all safety-sensitive employees "based on the Memorandum of Understanding that governs drug and alcohol testing for Caltrans." The Safety Sensitive Handbook also stated that employees returning to work will not be permitted to perform safety sensitive functions until Caltrans receives notice of a negative test result. Additionally, "Any … safety-sensitive employee found engaging in drug and/or alcohol related prohibited conduct shall be immediately removed from performing safety-sensitive functions. Caltrans will take adverse action up to and including dismissal against any … safety-sensitive employee who engages in conduct prohibited by State and Federal law."

10. The Safety Sensitive Handbook informed Appellant that should he fail or refuse a drug and alcohol test, "you will receive an adverse action separating you from State service." But, the Safety Sensitive Handbook also described a process, "decided based upon the particular circumstances," for employees who engage in prohibited conduct being offered stipulated settlement agreements allowing them to retain their employment. Per the Safety Sensitive Handbook, stipulated settlement agreements will not be offered to employees with less than one full year of service as a permanent state employee.

11. Appellant was provided with a duty statement for the position of Caltrans Highway Maintenance Worker. According to the duty statement, Appellant's responsibilities included cleaning and clearing culverts and drains, cutting and removing vegetation, planting and fertilizing vegetation, and maintaining irrigation. Appellant was required to operate manual and power tools, such as shovels, rakes, pitchforks, handsaws, chainsaws, weed eaters, hedge trimmers, and hay blowers. Appellant's duties also included traffic control tasks, such as placing traffic message boards and signs to instruct drivers, operating a pilot car, and flagging duties. The duty statement also admonished Appellant that he "must exercise judgment in making decisions relative to the safe operation of vehicles and equipment. Poor decisions or actions could jeopardize the safety of the employee, coworkers, the traveling public, and could damage state and private property."
12. Appellant's supervisor was Maintenance Supervisor Alfred Lang (Lang). Appellant worked on a crew with several other individuals. Appellant's duties included working at Caltrans Maintenance Yards, as well as field work on public highways. The crews used Caltrans vehicles, such as pick-up trucks, for transportation to job sites in the field. Lang spent about half his time working with the crew under his supervision, and half his time completing other duties at the Maintenance Yard.
13. As a new Caltrans employee, Appellant was required to complete on-the-job training with larger vehicles. For example, Appellant operated a front-loader under direct supervision at the Maintenance Yard, to familiarize himself with

the vehicle. During the course of his duties, Appellant drove Caltrans pick-up trucks, a one-ton dump truck, and a mower. Appellant was frequently assigned to duties such as manually picking up trash and completing janitorial-type cleaning at the Maintenance Yard.

14. On or around April 6, 2020, Appellant went off work on EFMLA[4] to care for his children during the COVID-19 pandemic. At some point while he was off work, Appellant ingested marijuana. Appellant was off work for two months, and returned to work on July 6, 2020.

15. Appellant reported to work on July 6, 2020, at approximately 7:00 a.m. When Appellant arrived at the Maintenance Yard, Estrada informed him that he was required to take a drug and alcohol test. Estrada provided Appellant with an authorization form for collecting and testing a urine sample, and explained that Appellant could decline the test, but declining would be considered a positive test. Appellant told Estrada that he wanted to speak with his union. Estrada gave Appellant contact information for the union.

16. One to two hours later, after speaking with union representatives, Appellant informed Estrada that he would proceed with the test. Appellant signed the testing authorization form by marking an "X" on the signature line. Estrada also signed the form.

17. Estrada did not observe anything that lead him to believe Appellant may be under the influence of drugs or alcohol. Appellant appeared normal and unimpaired. Estrada instructed Lang to drive Appellant to the testing facility.

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[4] Emergency Family Medical Leave Act.

18. Before leaving the Maintenance Yard with Lang, Appellant spoke to Estrada a second time. Appellant told Estrada that he was not going to pass the substance test. Estrada reiterated to Appellant that he could refuse the test, but refusal would be considered a positive test. Appellant opted to proceed with the test.

19. Lang drove Appellant to the testing facility, where Appellant provided a urine sample. Appellant signed a form certifying that he provided a urine sample by marking an "X" on the applicable signature line. Lang drove Appellant back to the Maintenance Yard.

20. Lang did not observe anything about Appellant's words or actions that caused him to suspect Appellant may be under the influence of drugs or alcohol.

21. Appellant went home after returning to the Maintenance Yard. He did not return to work after July 6, 2020.[5]

22. Dr. Timothy Elfelt (Dr. Elfelt) reviewed the test results on the urine sample Appellant provided on July 6, 2020. Dr. Elfelt determined that Appellant's urine sample was positive for marijuana. Based on the test results, Dr. Elfelt believed Appellant's marijuana use was "chronic." The testing standards for marijuana are calibrated to preclude exposure to second-hand marijuana smoke from resulting in a positive test. A positive marijuana test does not indicate impairment. There are no standards for correlating marijuana test results to impairment at the time a urine sample was collected.

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[5] Appellant used some available leave, and was absent without pay for some number of days.

23. On or around July 12, 2020, Dr. Elfelt contacted Appellant by phone regarding his test results. Dr. Elfelt informed Appellant his urine sample had tested positive for marijuana, and offered Appellant an opportunity to explain the results. Appellant replied that he was exposed to second-hand smoke from others who used marijuana. Dr. Elfelt informed Appellant that passive inhalation would not cause a positive test result.

24. On July 12, 2020, Dr. Elfelt signed the urine sample submission form that Appellant had signed with an "X" on July 6, 2020, certifying that the sample tested "positive for THC." On July 13, 2020, Dr. Elfelt completed a Medical Review Officer Report stating that the urine sample Appellant provided on July 6, 2020, tested positive for marijuana. Dr. Elfelt submitted the Medical Review Officer Report to Respondent.

25. Respondent served a NOAA on Appellant on July 20, 2020, dismissing him effective July 27, 2020. The entire factual basis for the NOAA reads:

> On July 6, 2020, you failed a mandatory drug test required for employees returning to safety sensitive duties after being on extended leave for a period of thirty (30) days or more.

**CREDIBILITY DETERMINATION**

Testimony at hearing from Estrada, Lang, and Dr. Elfelt conflicted with testimony presented by Appellant. A credibility determination is therefore necessary. A witness's credibility may be determined based on "any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony." (Evid. Code, § 780.) Relevant factors include the witness's demeanor while testifying, ability to perceive or recall, bias or other motive, and attitude toward the pending action, as well as consistency of the

witness's testimony with previous statements, and the existence or nonexistence of any fact the witness testified to. (Evid. Code, § 780, subds. (a), (c), (d), (f)–(j).) When a witness testifies falsely as to some matters, some or all of his other testimony may be disregarded, whether contradicted or not. (*Halagan v. Ohanesian* (1967) 257 Cal.App.2d 14, 21.)

Estrada testified in a plain-spoken and cooperative manner. He demonstrated good recall, and his testimony was consistent. He was not argumentative or evasive during cross-examination, and did not exhibit any bias for or against Appellant. Estrada testified that upon Appellant's hire, he informed Appellant that his position was safety sensitive, gave Appellant the Certification Form (which Appellant signed), and gave Appellant a copy of the Safety Sensitive Handbook. As to July 6, 2020, Estrada testified that Appellant signed the testing authorization form, and said that he was not going to pass the substance test. Estrada also testified that Appellant did not return to work after July 6, 2020.

Lang testified in a direct and good-natured manner. He was cooperative during questioning, and his testimony was not marked by inconsistency or evasiveness. He did not demonstrate any bias for or against Appellant. Lang testified that after returning to the Maintenance Yard on July 6, 2020, Appellant used some leave hours to take the rest of the day off, and that Appellant did not return to work after that day, but used some additional leave and was absent without pay for some time. Lang's testimony was partially corroborated by Estrada. Estrada testified that Lang notified him Appellant wanted to take the remainder of the day off on July 6, 2020. Estrada also testified that he did not see Appellant at work again after that date.

Dr. Elfelt testified in a professional manner. Although he was generally cooperative, he was somewhat reluctant in confirming that he was not aware of any established standards for determining impairment based from marijuana test results. Dr. Elfelt testified that when he spoke to Appellant on the phone, he informed Appellant he tested positive for marijuana, Appellant claimed the positive result was due to passive inhalation, and he explained to Appellant that passive inhalation would not cause a positive test result.

Appellant's demeanor while testifying ranged from congenial to agitated. He occasionally used dramatic language, such as testifying that Estrada and Lang "attacked" him when he arrived at work on July 6, 2020, and "forced" him to take the drug test. Appellant became argumentative with Respondent's representative during cross-examination, causing his own attorney to interject and instruct him to answer the questions posed. Appellant also frequently responded that he did not recall the events at issue, but his recall appeared selective. For example, he claimed to recall the content of the conversations he had with union representatives on July 6, 2020, but asserted he could not recall any part of the conversation he had with Dr. Elfelt on or around July 12, 2020. Some parts of Appellant's testimony were also incredulous, such as his claim that he did not recall Dr. Elfelt telling him his urine sample tested positive for marijuana. Informing Appellant of the test results would have been the primary purpose of Dr. Elfelt's call, and receiving a call about a job-related substance test would be an unusual and important event. It is not reasonable to believe that Appellant would have no memory of Dr. Elfelt informing him of his test results. Overall, Appellant

presented as more intent on avoiding providing information sought by Respondent's representative, than on giving an accurate recount of events.

In his testimony, Appellant denied being notified upon hiring that he was filling a safety sensitive position, denied signing the Certification Form, and denied receiving the Safety Sensitive Handbook. He denied ingesting marijuana, and commenting to Estrada that he would not pass the substance test. Appellant also denied signing the test authorization and sample collection forms, claiming he never signs documents by marking them with an "X." Appellant denied going home early after returning to the Maintenance Yard on July 6, 2020. Finally, Appellant asserted that he worked some number of days after July 6, 2020, and before receiving the call from Dr. Elfelt.

Considering all relevant factors, testimony from Estrada, Lang, and Dr. Elfelt is credited. Appellant's testimony is not credited, aside from adverse admissions and uncontroverted facts.

## OFFICIAL NOTICE

Following submission of this matter at the conclusion of the December 2, 2020 evidentiary hearing, an Order issued on December 17, 2020, reopening the record for consideration of taking official notice of six items, specifically:

1. Code of Federal Regulations, title 49, sections 382.101 to 382.727 (addressing substance testing for commercial drivers);
2. Code of Federal Regulations, title 49, sections 40.1 to 40.7 (also addressing substance testing for commercial drivers);
3. California Code of Regulations, title 2, sections 599.960 to 599.966 (addressing substance testing for sensitive positions);

4. California Health and Safety Code, sections 11357 to 11362.5 (addressing personal marijuana use);
5. California Vehicle Code, sections 12804.9, 15210, 15250, 15275, and 15278 (addressing Class C licenses, commercial driver licenses, and endorsements);
6. The CalHR's listing of Caltrans positions designated as safety sensitive and subject to substance testing, available on CalHR's website.

Respondent filed a response on December 21, 2020. Respondent did not oppose taking official notice of items 1, 2, 3, or 6, but objected to items 4 and 5 as irrelevant. In opposing noticing items 4 and 5, Respondent noted that Appellant was not charged with possessing marijuana or any licensing issues.

Appellant filed a response on December 23, 2020. Appellant objected to taking official notice of any item for the purpose of using it against him, as it is Respondent's burden to prove any cause for discipline and he would have no opportunity to respond to any adversely used material. Appellant also objected to item 3 as introducing new facts, and to item 6 as not properly noticeable.

Official notice may be taken of federal and state statutes and regulations. (Cal. Code Regs., tit. 2. § 58.10; Gov. Code, § 11515; Evid. Code, §§ 451, subd. (a), 452, subds. (a), (b).) Official notice may also be taken of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Cal. Code Regs., tit. 2, § 58.10; Gov. Code, § 11515; Evid. Code, § 452, subd. (h).)

The parties' objections are overruled as to items 1 through 5, and official notice is taken of items 1 through 5. Statutes and regulations are properly noticeable, and these materials are necessary for a full understanding of the issues presented by the parties, including various exhibits introduced by Respondent (which refer to the federal and state regulations cited in items 1, 2, and 3; marijuana use, addressed in item 4; and licensing issues, addressed in item 5), and the affirmative defense brought by Appellant (which disputes the application of the regulations cited in item 3). Appellant's objection to item 3 as presenting new facts is puzzling, because item 3 does not contain any factual matters, but is a set of regulations. Having put safety sensitive positions, driver license classifications, substance testing, and marijuana use at issue in this matter, objections to considering pertinent statutes and regulations are unpersuasive. It is noted that any specific responses to legal matters contained in this Proposed Decision can be addressed through a petition for rehearing. (Cal. Code Regs., tit. 2, § 17565.)

As to item 6, Appellant's objection is sustained and item 6 is not noticed.[6] Whether or not CalHR has approved the position of Caltrans Highway Maintenance Worker as safety sensitive is properly noticeable as a fact capable of ready, reliable determination through information routinely published by CalHR (much like the specifications for Appellant's classification). However, item 6 is a factual matter rather than a legal one, and thus Appellant's inability to respond to that item during the evidentiary hearing is potentially prejudicial. Unlike legal disputes, factual matters cannot necessarily be adequately addressed through a petition for rehearing.

[6] Although official notice is not taken of information published by CalHR, testimony presented at hearing otherwise sufficiently established that the classification of Caltrans Highway Maintenance Worker was properly identified and approved as a safety sensitive position.

## AFFIRMATIVE DEFENSE

As an affirmative defense, Appellant argues that Respondent lacked authority to require him to submit to the return-to-work drug test on July 6, 2020, because he did not conduct safety sensitive duties as a Caltrans Highway Maintenance Worker. Appellant asserts that as a new employee, he did not operate large machinery on or near public highways, but was assigned duties such as picking up trash at the Maintenance Yard. Respondent contends that Appellant was properly tested because his position was designated as safety sensitive.

An affirmative defense is "an assertion by one party raising facts and arguments that, if true, will defeat the other party's claim, even if all allegations in the … Notice of Adverse Action are true." (Cal. Code Regs., tit. 2, § 51.2, subd. (c).) The party asserting an affirmative defense has the burden of proving that defense. (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1668.)

A position may be identified as safety sensitive when: (1) the duties of the position "involve a greater than normal level of trust, responsibility for or impact on the health and safety of others," (2) "errors in judgment, inattentiveness or diminished coordination, dexterity or composure while performing their duties could clearly result in mistakes that would endanger the health and safety of others," and (3) employees in the position "work with such independence, or, perform such tasks that it cannot be safely assumed that mistakes such as those described in subsection (2) could be prevented by a supervisor or another employee." (Cal. Code Regs., tit. 2, § 599.961, subd. (a).) Each agency may identify the positions under its jurisdiction that meet these standards for designation as safety sensitive, subject to approval by CalHR. (*Id.* at § 599.961,

subd. (b)(1).) Employees in safety sensitive positions are subject to drug and alcohol testing. (*Id.* at § 599.960, subd. (c).)[7]

Respondent presented testimony at hearing from Staff Services Manager I Sheila Jones that Caltrans designated the position of Caltrans Highway Maintenance Worker as safety sensitive, and that CalHR has deemed the position safety sensitive. Appellant did not present any contrary evidence disputing Respondent's identification of the position as safety sensitive or CalHR's approval of the position as safety sensitive. Rather, Appellant argues that regardless of such formal designation, Appellant was not subject to drug testing because his actual, day-to-day duties did not include safety sensitive functions. Appellant did not cite any legal authority in support of his position.

The evidence at hearing established that Appellant completed some tasks that could endanger himself and others if not performed properly and attentively, like driving a dump truck and a mower on or near public highways. The evidence also established that Appellant was commonly assigned duties that would not appear to meet the definition of safety sensitive, such as manually picking up trash and completing janitorial-type cleaning at the Maintenance Yard. The evidence thus demonstrated that Appellant's actual duties changed day-to-day and did not always, or even frequently, involve potentially dangerous tasks.

Regardless, Appellant's affirmative defense must fail for two reasons. First, it is inconsistent with the plain language of section 599.960. That section authorizes

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[7] The drug and alcohol testing provided for in section 599.960 is reasonable suspicion testing—that is, testing triggered by "the good faith belief based on specific articulable facts or evidence" that an employee is under the influence while on duty or on standby for duty. (Cal. Code Regs., tit. 2, §§ 599.960, subds. (b), (c), 599.962, subd. (a).) According to the Safety Sensitive Handbook Respondent entered into evidence, a return-to-work substance test is required of all safety sensitive employees based on the governing Memorandum of Understanding. Appellant did not challenge Respondent's general authority to require return-to-work testing for safety sensitive employees.

substance testing for "[e]mployees serving in sensitive *positions*." (Cal. Code Regs., tit. 2, § 599.960, subd. (b).) It does not restrict testing to employees who are actively engaged in safety sensitive tasks. (*Ibid.*) Where the governing language is clear and unambiguous, it controls as written. (*Cal. Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698.) Because the *position* of Caltrans Highway Maintenance Worker was designated as safety sensitive, Appellant was in a safety sensitive position at all times, and accordingly subject to substance testing. Second, statutory constructions leading to absurd results should be avoided. (*Cal. Correctional Peace Officers' Assn. v. California* (2010) 189 Cal.App.4th 849, 857.) A position may be designated as safety sensitive if the duties of the position meet the applicable standards. (Cal. Code Regs., tit. 2, § 599.961, subd. (a).) But, it is untenable that a position's safety sensitive status should vary day-to-day based an individual employee's actual assignments for that particular day. Under such a scheme it would be exceedingly difficult to determine which individual employees are properly considered safety sensitive at any particular time, and thus exceedingly difficult for Respondent to effectively manage its safety sensitive employees with respect to section 599.960.

Appellant's affirmative defense is denied.

## **PRINCIPLES OF LAW AND ANALYSIS**

The appointing authority bears the burden of proving by a preponderance of the evidence not only that the employee committed the acts alleged, but that those acts constitute legal cause for discipline. (*Cal. Corr. Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1153.) The causes for discipline charged against Appellant are sustained upon a preponderance of the evidence, or dismissed, as follows:

Inexcusable Neglect of Duty

Inexcusable neglect of duty is the intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty. (*E.W.* (1999) SPB Dec. No. 99-09, p. 19.) To establish that an employee inexcusably neglected a duty by violating a policy, the employer must show that: (1) it had a clear policy, (2) the employee had notice of the policy, and (3) it intended to enforce the policy. (*E.D.* (1993) SPB Dec. No. 93-32, p. 9.) Notice of a clear policy, however, is unnecessary for conduct that is obviously wrong. (*Id.* at pp. 8–11; see also *Merle E. Betz, Jr.* (1996) SPB Dec. No. 96-10, pp. 15–16.) "Gross negligence" rather than "simple negligence" is determined primarily by assessing the seriousness of the harm, or potential harm, to the public stemming from the employee's negligence. (*J.A. / M.L.* (1996) SPB Dec. No. 96-17, p. 8.)

Under California Code of Regulations, title 2, section 599.960, and Respondent's Drug-Free Workplace policy (DD-08-R6), Appellant had a duty to submit to substance testing. Appellant fulfilled that duty when he supplied a urine sample for a return-to-work substance test on July 6, 2020. The evidence proved that the urine sample Appellant submitted tested positive for marijuana. From that result, it is apparent that Appellant ingested marijuana while he was on leave. However, it is unclear what duty Appellant thereby allegedly violated. At hearing, Respondent's representative asserted that section 599.960 prohibited Appellant, as a safety sensitive employee, from using marijuana entirely. Not so. Section 599.960 commands that no state employee "use, possess, or be under the influence of illegal or unauthorized drugs or other illegal mind-altering substances." (Cal. Code Regs., tit. 2, § 599.906,

subd. (b)(1).) But, it does not purport to completely ban substance use by state employees. Rather, that prohibition applies only while state employees are "on duty or on standby for duty." (*Id.* at § 599.960, subd. (b).) The express purpose of section 599.960 is "to help ensure that the state workplace is free from *the effects of drug and alcohol abuse*." (*Id.* at § 599.960, subd. (a).)

Similarly, Respondent's Drug-Free Workplace policy prohibits reporting for duty, or returning to duty, while under the influence of any recreational or illicit drugs (including marijuana), as well as using or being impaired by any illicit drug while in the workplace. Respondent's policy does not, however, attempt to ban any and all off-duty substance use. Nor is it inherently obvious that Appellant should have refrained from any marijuana use while off duty. Much like alcohol, marijuana use is regulated but legal under California law for adults over age 21.[8] (Health & Saf. Code, § 11362.1.)

It is abundantly clear that Appellant had a responsibility to report for duty on July 6, 2020, free from any impairment caused by marijuana use. But, it is not apparent that Appellant was prohibited from reporting for duty after having ingested marijuana and fully recovered from any impairment caused by his marijuana use.[9] Because Respondent failed to demonstrate that Appellant violated a known duty, the charge of inexcusable neglect of duty is dismissed.

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[8] Personal marijuana possession and use is lawful for persons over age 21, although regulated in terms of place and manner. (Health & Saf. Code, §§ 11357, 11362.3.) Unlawful personal marijuana use is an infraction punishable by fines, community service, and education programs. (*Id.* at §§ 11357, 11362.3, 11362.4.)

[9] Appellant was not charged with reporting for duty while under the influence, nor was there any evidence that Appellant was impaired when he reported for work on July 6, 2020.

Insubordination

To prove insubordination, an employer must demonstrate that an employee engaged in mutinous, disrespectful, or contumacious conduct under circumstances where the employee has intentionally or willfully disobeyed an order or instruction that a supervisor is entitled to give and have obeyed. (*Flowers v. State Personnel Bd.* (1985) 174 Cal.App.3d 753, 760; *Richard Stanton* (1995) SPB Dec. No. 95-02.)

Respondent failed to prove that Appellant disobeyed any valid order or instruction from his supervisor. As an initial matter, the NOAA does not specify what order or instruction Appellant allegedly defied. Moreover, the evidence proved that Appellant followed his supervisor's instructions and submitted to the substance test on July 6, 2020. Appellant's request to speak to union representatives before deciding whether or not he would comply was not disrespectful or mutinous. The charge of insubordination is dismissed.

Willful Disobedience

Willful disobedience occurs where an employee knowingly and intentionally violates a direct command, prohibition, or policy. (*E.W.* (1999) SPB Dec. No. 99-09, p. 21; *R.H.* (1993) SPB Dec. No. 93-22, p. 6.) For the same reasons discussed above concerning inexcusable neglect of duty and insubordination, Respondent failed to prove that Appellant engaged in willful disobedience. That charge is dismissed.

Other Failure of Good Behavior

Proving a charge of other failure of good behavior that discredits the department or the appellant's employment requires more than a simple showing of misconduct. (*D.M.* (1995) SPB Dec. No. 95-10, p. 9.) The conduct must be (1) rationally related to

the appellant's employment, and (2) of a type that could easily impair or disrupt the public service. (*Ibid.*; *Stanton v. State Personnel Bd.* (1980) 105 Cal.App.3d 729, 739–740.) The purpose of this cause for discipline is not to create a catch-all provision for punishing unintentional misconduct, but to punish potentially destructive behavior. (*D.M.*, *supra*, 95-10, at pp. 8–9; *S.K.* (1998) SPB Dec. No. 98-05, p. 7, citing *Warren v. State Personnel Bd.* (1979) 94 Cal.App.3d 95, 104.)

The substance test conducted on July 6, 2020, was related to Appellant's employment. It was administered due to Appellant holding a safety sensitive position with Respondent. Appellant's conduct, however, was not sufficiently destructive so as to constitute misconduct. The NOAA charged Appellant with failing the return-to-work substance test. While the evidence demonstrated that the urine sample Appellant supplied on July 6, 2020, tested positive for marijuana, the evidence did not establish that Appellant was under the influence on July 6, 2020. Appellant's positive test reliably established only that at some point before returning to work following a two-month leave, Appellant ingested marijuana. There was no allegation or evidence that Appellant had not fully recovered from any impairment caused by his off-duty marijuana use by the time he reported to work on July 6, 2020. The charge of other failure of good behavior is dismissed.

<u>Penalty</u>

The challenged penalty here is dismissal. As Respondent failed to prove any cause for discipline against Appellant by a preponderance of the evidence, no penalty is warranted. Appellant's dismissal must accordingly be revoked.

It bears noting that the result in this case is based on the individual allegations and evidence presented here. This result is not intended to communicate that substance testing for safety sensitive employees can never justify cause for discipline. Where test results are indicative of impairment, cause for discipline will certainly lie. Also, positive test results could warrant removing employees from the aspects of their duties that justify identifying their position as safety sensitive.[10] Duty restrictions could impair or disrupt operations and thus constitute cause for discipline. Additionally, no opinion is expressed regarding what consequences may be imposed based on circumstances not arising here, such as refusing to submit to substance testing, receiving repeated positive test results, receiving positive test results relating to the use of illegal substances, or receiving positive test results as the holder of a commercial driver license. In a similar vein, the penalty for any proven misconduct must be based on a determination of what is just and proper given the relevant factors. (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 218.) Although Respondent's Safety Sensitive Handbook mandates dismissal as the consequence for positive test results, Respondent's determination on the matter does not bind the SPB in reviewing disciplinary matters pursuant to its Constitutional authority. (Cal. Const., art. VII, § 3, subd. (a); *T.G.* (1992) SPB Dec. No. 92-18, p. 6.)

Substance testing for safety sensitive employees is a serious matter. The purpose of such testing is to protect employees and the public by helping to ensure that employees tasked with potentially dangerous duties are not suffering from the effects of

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[10] Respondent did not opt to restrict Appellant's duties, but to swiftly dismiss him based on the positive test results. It would be inappropriate to speculate here in the first instance as to what restrictions Respondent may have imposed and what impact any restrictions may have had on Appellant's execution of his duties.

substances while at the workplace. It is not difficult to imagine the harm that could result if Caltrans employees operated large machinery while under the influence. But Appellant testing positive for marijuana on one occasion following a two-month leave of absence from work does not, alone, indicate that Appellant's continued employment poses such an intolerable risk of danger that he must be dismissed from state service.[11]

As a final note, Appellant is admonished that as an employee in a safety sensitive position, it is imperative that he discharge his duties properly and while free from impairment. Declining to read policies, handbooks, and other directives provided to him will not excuse him from his responsibilities as an employee. He is obliged to follow lawful instructions from his superiors concerning substance testing. And game-playing tactics like signing the pertinent substance testing forms with an "X" rather than his name and feigning lack of recall did not serve him well in this proceeding, and will not serve him well in the future as a civil servant.

## CONCLUSIONS OF LAW

1. Respondent did not unlawfully direct Appellant to submit to a substance test.
2. Appellant's conduct does not constitute legal cause for discipline under Government Code section 19572, subdivisions (d) inexcusable neglect of duty; (e) insubordination; (o) willful disobedience; or (t) other failure of good behavior.
3. Absent legal cause for discipline, the penalty of dismissal must be revoked.

[11] The controlling regulations do not mandate dismissal of safety sensitive employees for positive substance test results. (Cal. Code Regs., tit. 2, §§ 599.960–599.966.) The only consequence directed by the regulations is additional substance testing. (*Id.* at § 599.960, subd. (c).) And indeed, by providing for stipulated settlement agreements following violations, even Respondent's Safety Sensitive Handbook indicates willingness to continue employment following a positive substance test (albeit only for employees with more than one year of permanent service).

## ORDER

The California Department of Transportation's dismissal of Appellant Darrin Harper from his position as a Caltrans Highway Maintenance Worker is **REVOKED**.

Respondent is to pay Appellant all back pay, benefits, and interest, if any, that would have accrued to him had he not been dismissed from his position as a Caltrans Highway Maintenance Worker. This matter is referred to the Chief Administrative Law Judge and shall be set for hearing on written request of either party, within one year of the effective date of the SPB's decision, in the event that the parties are unable to agree as to the salary and benefits due Appellant.

DATED: January 21, 2021

Amy Friedman
Administrative Law Judge
State Personnel Board