BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **CHARLES T. COOK** From dismissal from the position of Employment Program Representative with the Employment Development Department at Visalia	)	SPB Case No. 97-4596 **BOARD DECISION** (Precedential) **No. 99 - 03** March 9, 1999

APPEARANCES: Michael D. Hersh, Attorney, California State Employees Association, on behalf of appellant, Charles T. Cook; Andrew B. Pollak, Staff Counsel, Employment Development Department, on behalf of respondent, Employment Development Department.

BEFORE: Florence Bos, President; Richard Carpenter, Vice President; Ron Alvarado and Lorrie Ward, Members.

DECISION

Respondent, Employment Development Department (Department), dismissed appellant, Charles T. Cook, for making repeated offensive and unwelcome sexual comments to a co-worker. The State Personnel Board (SPB or Board) initially adopted a Proposed Decision by the administrative law judge (ALJ) sustaining the dismissal. The Board, however, granted appellant's petition for rehearing to review whether the Department violated appellant's Skelly rights by failing to give him copies of all materials upon which the adverse action was based when it served the Notice of Adverse Action (NAA).

In this Decision, the Board finds that, although the person who made the ultimate decision to take adverse action did not personally review an Equal Opportunity Employment (EEO) Report relative to the sexual harassment complaint alleged against

appellant, since the Department stipulated that its staff counsel based the NAA upon witness statements included in that report, that report constituted "materials upon which the action [was] based" and should have been served upon appellant with the NAA. The Department's failure to provide the EEO Report with the NAA violated appellant's Skelly rights, entitling him to an award of backpay.

The Board also sustains appellant's dismissal, concluding that it is the just and proper penalty for the proven misconduct.

BACKGROUND

Factual Summary[1]

(Employment History)

The Department appointed appellant as an Employment Program Representative on May 1, 1980. He has no prior adverse actions.

In approximately 1992, appellant was counseled after he made comments of a sexual nature to two co-workers, Karen Jones (Jones) and another woman. The two women complained about appellant's comments to Joe Quiroz (Quiroz), a supervisor in the Department's Visalia office at the time. Quiroz met with appellant and told him about the complaints that had been made by the two women and who the complainants were. Appellant admitted to Quiroz that he had discussed sexual matters of a personal nature with the women. Quiroz told appellant that he must stop making such comments

[1] The factual summary is taken substantially from the Proposed Decision.

and that further comments of a sexual nature could lead to charges of sexual harassment and adverse action being taken against appellant.[2]

(March and April 1997 Incidents)

In March 1997, Jones had a private conversation with another employee in the Department's break room in its Visalia office. Appellant was also in the break room but not included in the conversation. Jones described to her co-worker, whom she also identified as a friend, the difficult birth of her third child. She explained how she had excessive tearing and that the physician took almost one hour to repair the tearing.

A few weeks after this conversation, in approximately late March or early April, appellant told Jones that he had overheard the discussion in the break room and that all he could think about was "burying his face in her pussy and kissing it all over." Jones told appellant that his comments were disgusting and that he should not talk to her in that manner. Appellant told Jones that he was sorry.

During approximately the first week of April 1997, Jones told appellant that she had worked in the yard all weekend and that her muscles were sore. Appellant told Jones that he would like to rub her all over. Jones responded that appellant had promised her he would not talk to her in that manner but he continued to do it. Appellant again stated that he was sorry.

On April 14, 1997, while at work, appellant told Jones that he liked her new haircut and ran his fingers up the back of her neck. Jones froze. She testified that she

[2] At all times relevant to the adverse action, appellant and Jones both worked in the Visalia office of the Department.

felt nauseated and could not talk. Later that day she told appellant that his touching her gave her a sick, ugly feeling and made her feel nauseated. Appellant said he was sorry.

On April 15, 1997, Jones drove into the Department parking lot after lunch and handed appellant a Christian devotional book, which she had ordered for him and his wife. Jones believed that the book might help appellant get closer to God. She explained to him that it might help him if he read the book. Appellant said that he would. Appellant told her that he felt he had to suffer and hurt inside for his sexual problems. Appellant said that he was in love with Jones. She told him that he was not, but that he had a "lustful spirit." She also told him not to say this to her. Jones told appellant that "he needed to clean up his act or he would go to hell."

On April 17, 1997, appellant called Jones at her home and told her that he was in love with her. She told him that "this had to stop. You have a lustful spirit and you need to get on your knees and pray for God to forgive you." Jones told appellant not to call her anymore.

On April 18, 1997, appellant brought a bouquet of flowers to work that had been picked by his wife for him. He attempted to give the flowers to Jones. She refused and again told him to stop his comments. Appellant told her, once again, that he was in love with her. She said "no." Appellant then asked if he could call her at home as he had learned something from the devotional book that Jones had given him that he believed helped him and his wife.

On April 19, 1997, appellant called Jones at her home. Her son, Doug, answered. She took the phone from Doug. Appellant and Jones talked about their

children. He told her that he felt like she was the only one who could save his marriage by going to bed with him to see if "he could get up and keep it hard." Jones asked appellant if she had ever given him any indication she would entertain such a thought. He told her no, but persisted by saying that she was the only one who could save his marriage. Jones and appellant began yelling at each other: she told him not to call her again; he said "please, you've got to help me, you can help me." Jones hung up on him.

Immediately after hanging up, Jones told her son Doug that she did not wish to accept any more calls from appellant. Without his mother's knowledge, Doug subsequently called appellant and emphatically told him never to call her again. The next day at work, appellant told Jones, "Do you think I'm afraid of Doug?" Jones believed that appellant was threatening violence against her son. Appellant testified that he asked Jones that question not to intimidate either Jones or Doug, but, instead, to indicate to Jones that he did not appreciate being threatened by Doug. The Board finds that appellant's question to Jones about her son does not constitute a threat of violence against Doug. It does, however, indicate that appellant may not have intended to comply with Doug's request that appellant stop bothering his mother.

Procedural Summary

The Department dismissed appellant based on the repeated offensive and unwelcome sexual comments to Jones, both in and outside of the workplace. The NAA also alleged that appellant violated the Department's zero tolerance policy for violent behavior by making a threat against Jones's son. The Department contends that this

misconduct constituted cause for discipline under Government Code § 19572, subdivisions (l) immorality; (m) discourteous treatment of the public or other employees; (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 appellant; and (w) unlawful discrimination.

(Skelly Issues)

At the beginning of hearing, appellant asserted that he was denied his due process Skelly rights when the Department failed to provide him with all the materials upon which the adverse action was based prior to his termination, specifically an Equal Employment Opportunity report dated September 15, 1997 entitled "Sexual harassment complaint of Karen Jones against Charles (Terry) Cook" (EEO Report). The parties stipulated to the following facts regarding this issue:

> The adverse action was prepared by Counsel for respondent, Andrew Pollak (Pollak). Pollak based the facts set forth in the Notice of Adverse Action solely on witness statements found in the Equal Employment Opportunity Report dated September 15, 1997 entitled "Sexual harassment complaint of Karen Jones against Charles (Terry) Cook." The appointing power, Patricia Chappie [Chappie], Chief Human Resources Services Division, relied solely on the adverse action document in making her decision on whether or not to take adverse action against appellant.

ISSUES

1. Did appellant's alleged misconduct constitute cause for discipline?

2. What is the just and proper penalty for the proven misconduct?

3. Did the Department violate appellant's Skelly rights when it failed to give him a copy of the EEO Report when in served the NAA upon him?

DISCUSSION

Sexual Harassment

Under Government Code § 19572(w), an employee may be disciplined for "[u]nlawful discrimination, including harassment, on the basis of … sex … against the public or other employees while acting in the capacity of a state employee." Since the meaning of the term "harassment on the basis of sex" is not defined in the statute, the Board has referred to the legal standards that have been applied by courts when reviewing claims under Title VII of the Civil Rights Act of 1964[3] and the Fair Employment and Housing Act[4] to determine whether conduct constitutes grounds for discipline under Government Code § 19572(w).[5]

The United States Supreme Court in Meritor Savings Bank v. Vinson ("Meritor") (1986) 477 U.S. 57, following the "Guidelines on Discrimination Because of Sex" (Guidelines)[6] issued by the Equal Employment Opportunity Commission (EEOC), ruled that "sexual harassment" was a form of sex discrimination prohibited by Title VII. Relying upon the EEOC Guidelines, the Court in Meritor recognized two general categories of sexual harassment: quid pro quo sexual harassment and hostile work environment sexual harassment.

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[3] 42 U.S.C. §§ 2000e et seq.

[4] Government Code § 12940(h).

[5] R[redacted] P[redacted] (1996) SPB Dec. No. 96-14, p. 3; W[redacted] J. M[redacted] (1995) SPB Dec. No. 95-13, p. 17; R[redacted] J[redacted] (1993) SPB Dec. No. 93-18, p. 9.

[6] 29 C.F.R. § 1604.11(a)

The EEOC Guidelines define hostile work environment sexual harassment as follows:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature ... when such conduct has the purpose or effect of, unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.[7]

The Supreme Court in Harris v. Forklift Systems, Inc. (Harris) (1993) 510 U.S. 17, held that, to establish hostile work environment sexual harassment, a complainant must show that a fellow employee's conduct was "severe or pervasive enough to create an objectively hostile or abusive work environment - an environment that a reasonable person would find hostile or abusive."[8] In addition, the victim of the conduct must subjectively perceive the environment to be abusive.[9] According to the Supreme Court, whether the work environment is "hostile" or "abusive,"

> can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.[10]

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[7] Id.

[8] Id. at p. 21. The Ninth Circuit in Ellison v. Brady (9th Cir. 1991) 924 F.2d 872, 880 stated that the test is whether a "reasonable woman would consider [the conduct to be] sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment."

[9] Id. at pp. 21-22.

[10] Id. at p. 23.

In this matter, appellant made numerous offensive sexual comments to Jones over a period of about one month. Each time appellant made these comments, Jones indicated to appellant that they were offensive and unwelcome. She told him at various times that his comments were, "disgusting" and gave her a "sick ugly feeling," that he had "a lustful spirit," that "he needed to clean up his act or he would go to hell," and that the statements had to stop. Despite Jones's numerous protestations, appellant's misconduct continued.

Appellant's repeated sexual comments to Jones in spite of her consistent protestations were inappropriate and abusive. Such recurrent conduct was subjectively offensive to Jones and would have been objectively offensive to a reasonable woman. Appellant's misconduct was sufficiently frequent, severe, humiliating and offensive so as to create a hostile working environment for Jones. Appellant's inappropriate touching of Jones's neck and his comment regarding Jones's son contributed to this hostile environment.

Appellant contends that since Jones remained friendly to him and did not immediately report his misconduct to a supervisor, she, in essence, permitted appellant's misconduct to continue and escalate. The Board rejects appellant's contention that Jones was in any way responsible for his reprehensible behavior. The proper inquiry for the Board is whether appellant's advances toward Jones were offensive and unwelcome, not whether she remained friendly to appellant and did not

immediately report him.[11] Since the Board has found that Jones made clear to appellant that his sexual comments were offensive and unwelcome, the fact that she remained friendly to him and did not immediately report his misconduct to a superior is not relevant.

Appellant's offensive, unwelcome sexual comments to Jones were sufficiently severe and pervasive to alter the terms and conditions of Jones's employment and create a hostile working environment. The Board finds that appellant's conduct constituted sexual harassment pursuant to Government Code § 19572(w).

Other Causes for Discipline

Appellant's offensive sexual comments to Jones also constituted cause for discipline under Government Code § 19572, subdivisions (m) discourteous treatment of the public or other employees, and (t) other failure of good behavior.[12]

Since we have found that appellant's question about Jones's son did not constitute a threat of violence, we dismiss the charge that appellant willfully disobeyed the Department's zero tolerance policy for violent behavior in violation of Government Code § 19572(o).

Penalty

We turn next to the issue of the appropriate penalty under all the circumstances. When performing its constitutional responsibility to review disciplinary actions,[13] the

[11] See Meritor, 477 U.S. at p. 68.

Board is charged with rendering a decision that is "just and proper."[14] To render a decision that is "just and proper," the Board considers a number of relevant factors when assessing the propriety of the discipline imposed by the appointing power. Among the factors the Board considers are those specifically identified by the California Supreme Court in Skelly v. State Personnel Board (Skelly) as follows:

> ...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in [h]arm to the public service. (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence.[15]

The harm to the public service in this case is clear. Appellant's repeated comments of a sexual nature created a hostile environment for Jones and subjected the Department to potential civil liability for appellant's misconduct.

Although appellant has no prior adverse actions and has been employed by the Department since 1980, these factors do not serve to mitigate the penalty given the seriousness of his misconduct.

The likelihood of recurrence is high for several reasons. First, as noted above, appellant had been previously warned by Quiroz that comments of a sexual nature were inappropriate and should not be made in the workplace to Jones or anyone else.

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[12] Since we have determined that appellant's offensive, unwelcome sexual comments constituted cause for discipline under Government Code § 19572, subdivisions (m), (t) and (w), we do not need to reach the issue of whether they also constituted cause for discipline under subdivision (l) immorality.

[13] Cal. Const. Art. VII, § 3(a).

[14] Government Code § 19582.

[15] (1975) 15 Cal.3d 194, pp. 217-218.

Despite this warning, appellant persisted in harassing Jones. Second, although Jones repeatedly told appellant that his comments were offensive and unwelcome, appellant continued to harass her. Finally, the ALJ found that appellant, at the hearing, did not appear remorseful for his misconduct. Accordingly, the penalty of dismissal is appropriate in this case.

Skelly Issues

Appellant contends that the Department violated his Skelly rights by failing to provide to him a copy of the EEO Report when it served the NAA upon him.

As set forth above, during the hearing before the ALJ, the parties stipulated that the Department's staff counsel drafted the NAA based upon the facts set forth in the witness statements included in the EEO Report. The parties also stipulated that Chappie, the ultimate decision maker, reviewed only the NAA before making her decision to take adverse action. The Department contends that since Chappie did not personally review the EEO Report before she made her decision to take adverse action, the Department was not required to serve the EEO Report on appellant when it served the NAA.

In Skelly, the California Supreme Court set forth the following notice requirements that a public employer must fulfill to satisfy an employee's pre-removal procedural due process rights:

> As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either

orally or in writing, to the authority initially imposing discipline.[16] (Emphasis added.)

Pursuant to Skelly, the Board enacted Rule 52.3, which provides, in pertinent part:

(a) Prior to any adverse action . . . the appointing power . . . shall give the employee written notice of the proposed action. This notice shall be given to the employee at least five working days prior to the effective date of the proposed action. . . . The notice shall include:

(1) the reasons for such action,
(2) a copy of the charges for adverse action,
(3) a copy of all materials upon which the action is based,
(4) notice of the employee's right to be represented in proceedings under this section, and
(5) notice of the employee's right to respond.... (Emphasis added.)

The Board has distinguished between the "materials upon which the action is based" referred to in Skelly and Board Rule 53.2, which must be provided to an employee with a notice of adverse action before discipline becomes effective, and the materials that may be "relevant to the adverse action" referred to in Government Code § 19574.1, which are subject to discovery sometime after the effective date of discipline. As the Board has explained, the materials that must be disclosed prior to the effective date of the adverse action are all the materials relied upon by the ultimate decision maker when making the decision to take adverse action against an employee.[17] In contrast, the materials that are subject to discovery after the effective date of discipline may encompass a far broader array of materials.

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[16] 15 Cal.3d at p. 215.

[17] J[redacted] K[redacted] (1997) SPB Dec. No. 97-06; L[redacted] G[redacted] (1997) SPB Dec. No. 97-04; Sharp-Johnson (1995) SPB Dec. No. 95-14; Government Code § 19574.

The Board made clear in its decision in D[redacted]. J[redacted][18] that, in appropriate cases, the Board will conclude that a Skelly violation has occurred when a notice of adverse action is not accompanied by documentation that an appointing power must necessarily have relied upon when deciding to take adverse action, even though the ultimate decision maker may not have personally reviewed that documentation. In J[redacted], the Board found that the failure of the Department of Motor Vehicles to provide an employee with a copy of an EEO report constituted a Skelly violation since it was "inconceivable that the Department's decision to take adverse action against [the employee] was made without consideration of the EEO report" and the "documents which the Department asserts it relied upon were clearly insufficient to form a basis for discipline."

While the NAA in this case contained factual and legal charges against appellant, it did not include any "materials upon which the action [was] based." As in J[redacted], the adverse action in this case was clearly based upon information gleaned from the EEO Report. The Department, in essence, conceded that the EEO Report constituted the material upon which action was based when it stipulated that its staff counsel relied upon that report when he drafted the NAA.

Although she did not personally review the EEO Report, the ultimate decision maker obviously impliedly delegated review of that report to her staff counsel who relied upon it to prepare the NAA. Thus, in essence, the Department's staff counsel performed

[18] (1996) SPB Dec. No. 96-01, p. 17.

for the ultimate decision maker the review of the EEO Report upon which the adverse action was based. An ultimate decision maker may not effectively divest an appointing authority of its Skelly obligation to provide to an employee who is being disciplined "all the materials upon which the action is based" merely by delegating review of those materials to a staff person. Since the adverse action in this case was based upon the EEO Report, the Department should have provided that report to appellant with the NAA. The Department's failure to provide the EEO Report to appellant when it served the NAA constituted a Skelly violation. As a result, appellant is entitled to backpay from the effective date of his dismissal to the date of the filing of this decision.[19]

CONCLUSION

The Board hereby sustains appellant's dismissal. In light of the Department's Skelly violation, the Board awards appellant backpay from the effective date of his dismissal to the date of this decision.

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[19] During the hearing before the ALJ, the Department suggested that any Skelly violation should be deemed to have been cured when the Department provided the EEO Report to appellant during discovery. In J[redacted], we found that an award of backpay from the effective date of discipline to the date of the Board's decision was appropriate even when a department has provided the materials upon which the action was based during discovery. As the Board stated,

> ...the Department's liability for back pay did not terminate when it furnished the EEO report to appellant prior to the SPB hearing. By failing to provide the report prior to the Skelly hearing, the Department deprived appellant of his constitutional right to fully respond to the charges prior to the imposition of discipline.

SPB Dec. No. 96-01 at p. 21.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The dismissal of Charles T. Cook from the position of Employment Program Representative with the Employment Development Department at Visalia is sustained.

2. The Employment Development Department shall pay to Charles T. Cook all backpay and benefits that would have accrued to him had his Skelly rights not been violated, commencing November 10, 1997 through March 9, 1999.

3. This matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing upon written request of either party in the event the parties are unable to agree as to the backpay, benefits and interest due Charles T. Cook under the provisions of Government Code § 19584.

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

STATE PERSONNEL BOARD[20]

Florence Bos, President
Richard Carpenter, Vice President
Ron Alvarado, Member
Lorrie Ward, Member

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[20] Member William Elkins did not participate in this decision.

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on March 9, 1999.

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Walter Vaughn
Executive Officer
State Personnel Board

[Cookdec]