The court has granted a writ in this case. Judge Robie agreed that the conduct did not constitute sexual harassment but found that the board erred in not finding discourtesy and/or other failure of good behavior. Precedential decision is ordered set aside and case is remanded to SPB to reconsider its action in light of the court's decision. Appealed to court of appeal 5/7/99. Oral argument scheduled for 2/18/00. March 6, 2000, the Court of Appeal for the Third Appellate District reversed the trial court decision granting the petition for writ of mandate filed by the Department of Social Services in the case of Cagle Moore (1993) SPB Dec. No. 96-12, thereby reinstating the Board's decision in the case.

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 34846
	)	
CAGLE L. MOORE	)	**BOARD DECISION**
	)	(Precedential)
	)	
From demotion from the position of Disability Evaluation Administrator III to Associate Government Program Analyst with the Department of Social Services at Los Angeles	)	**NO. 96-12**
	)	August 7-8, 1996

Appearances: Loren McMaster, Attorney, on behalf of appellant, Cagle L. Moore; John Pierson, Staff Counsel, Department of Social Services, on behalf of respondent, Department of Corrections.

Before: Lorrie Ward, President; Floss Bos, Vice President; Ron Alvarado, Richard Carpenter and Alice Stoner, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board granted both the appellant's and the Department's Petitions for Rehearing in the appeal of Cagle Moore (appellant). Appellant was demoted by the Department of Social Services from the position of Disability Evaluation Administrator III (DESA III) to Associate Governmental Program Analyst (AGPA) with the Department of Social Services at Los

Angeles (Department). Appellant appealed his demotion. The Administrative Law Judge (ALJ) who heard appellant's appeal issued a Proposed Decision which modified appellant's demotion to a thirty (30) days' suspension. The Board adopted the ALJ's Proposed Decision.

In its Petition for Rehearing, the Department contends that, since appellant is a managerial employee, the ALJ should have used the burden of proof set out in Government Code § 19590 which asserts that in a disciplinary action taken pursuant to section 19590, "the disciplined managerial employee shall have the burden of proof." The Department also contends that the ALJ applied the wrong test in his sexual harassment analysis.

For his part, the appellant argues that, because of its silence at hearing, the Department is estopped from arguing that the burden of proof set out in section 19590 applies. The appellant also contends that no penalty is warranted.[1]

After a review of the entire record, including the transcript, exhibits, and the written arguments of the parties, the Board adopts the ALJ's Proposed Decision to the extent it is consistent with the discussion below, but revokes the penalty taken against appellant.

FACTS

As noted above, the Board has adopted the factual findings of the ALJ. In addition, the Board makes the following additional factual findings necessary to the disposition of the case.

[1]Appellant also argued that section 19590 is unconstitutional. According to Article 3, § 3.5 of the California Constitution, administrative agencies, such as the SPB, have no power to declare a statute unconstitutional, therefore we will not address this claim.

Appellant has been employed by the Department of Social Services since July 1, 1978. He has served as a Disability Evaluation Systems Administrator I, a Staff Services Manager I and a Disability Evaluation Administrator II, all non-managerial positions. On July 31, 1987, appellant was appointed to the position of Disability Evaluation Administrator III, a position designated as managerial pursuant to Government Code § 3315.

At the start of the hearing, after some introductory matters, the ALJ stated "All right. Respondent has the burden of proof. Mr. Pierson [do] you wish to proceed?" Without objection, John Pierson, the Department's attorney, called his first witness and presented his case-in-chief. Both parties filed closing briefs. Neither mentioned the burden of proof. The ALJ wrote his Proposed Decision and submitted it to the Board. In his Proposed Decision, the ALJ evaluated the evidence pursuant to a preponderance of the evidence standard.

ISSUES

1. Was the demotion of appellant from DESA III to AGPA appropriate under section 19590?

2. Applying the appropriate standard, was cause for discipline established?

DISCUSSION

What burden of proof is applied in a disciplinary action taken pursuant to Government Code § 19590

In a disciplinary action taken against a state employee covered by the Ralph C. Dills Act (Ch 10.3) commencing with Government Code § 3512, Div. 4, Title 1 and brought under Government Code § 19570, the Department carries the burden of proving the charges by a preponderance of evidence. [Lyle Q. Guidry (1995) SPB Dec. No. 95-09]. In 1982, the legislature enacted Government Code § 19590[2] as part of an article entitled "Tenure of Managerial Employees". Section 19590 created an exception to the ordinary tenure and disciplinary rules for state employees by codifying a separate procedure to apply in disciplinary actions against managerial employees.[3]

Section 19590 provides in pertinent part:

> Notwithstanding Article 1 (commencing with Section 19570), persons who have been designated as managerial employees under Section 3513 from the beginning of their current appointment, but whose positions are not in the career executive category, shall hold their appointments subject to the following adverse action process:

[2]Hereinafter all statutory references will be to the Government Code.

[3]As originally enacted, section 19590 applied only to demotions. [See Stats 1982, Chapter 985, Sec. 2] In 1983, substantial changes were made to Article 4 which made section 19590 et seq. applicable to all disciplinary actions taken against managerial employees. Since the earlier version is not relevant to the case at hand, this analysis focuses on section 19590, as amended.

> (a) The employee may be demoted, dismissed, or otherwise disciplined under this section for any of the causes specified in Section 19572. . .
>
> (c) . . .The decision of the board to modify the action of the appointing power pursuant to this subdivision shall be taken only if the board determines, after hearing, that there is no substantial evidence to support the reason or reasons for disciplinary action, or that the action was taken in fraud or bad faith. In any such proceeding, the disciplined managerial employee shall have the burden of proof. Subject to rebuttal by the employee, it shall be presumed that the action was free from fraud and bad faith and that the statement of reasons in the notice of disciplinary action is true. (emphasis added).

Thus, unlike an action taken pursuant to section 19570 wherein the appointing power carries the burden of proof, in a disciplinary action taken pursuant to section 19590, the managerial employee carries the burden of proof.

Was the demotion of appellant from DESA III to AGPA appropriate under section 19590?

The Department asserts that it purposely and properly took this action pursuant to section 19590. Section 19590 provides in part that "persons who have been designated as managerial employees . . . from the beginning of their current appointment . . . shall hold their appointments subject to the adverse action process [set out in 19590]." Thus, section 19590 gives notice to employees who accept managerial positions that they hold these positions subject to the adverse action process described in section 19590.

A person who accepts a managerial appointment does not, however, relinquish his or her right to any permanent civil

service status attained in his or her previous civil service positions or

to the due process protections that attach to that status. In other words, while an appointing power may take advantage of the standards set forth in Government Code § 19590 to remove a manager from a managerial classification, an appointing power may not rely on section 19590 to deprive the employee of the civil service status of a formerly held classification.

In the instant case, before appellant was promoted to the permanent managerial position of DESA III, he had permanent civil service status in the non-managerial position of DESA II. Had appellant remained in the DESA II position, appellant could not have been demoted for disciplinary reasons unless the Department proved cause for discipline against him by a preponderance of evidence. By accepting an appointment to a managerial position in July of 1987, appellant did not relinquish either his right to his former position or, prior to demotion from that former position, the right to a hearing in which the Department carried the burden of proof.[4] Thus, while the Department could have relied on section 19590 to demote appellant from his DESA III position to his former position as DESA II, the Department erred in relying on section 19590 to demote appellant past two higher level non-

[4]This interpretation is consistent with section 19593 which exempts from Article 2 managers whose appointments took effect prior to January 1, 1984. Section 19593 acknowledges that managers who, prior to the passage of Article 2, had already achieved permanent civil service status as managers could only be demoted pursuant to the more rigorous burden of proof standard applicable to actions taken under section 19570.

managerial positions to the AGPA position. To effect such a demotion, the Department was bound to rely on section 19570 et seq.[5]

Despite the Department's reference to section 19590 in the Notice of Adverse Action, we find that this action should have been properly brought under section 19570 et seq. A review of the transcript indicates that, at the hearing, both the parties and the ALJ conducted themselves as if the action was being taken pursuant to section 19570 and as if the burden of proof lay with the Department. Thus, the Department's error of referencing section 19590 caused no prejudice to the appellant.

Did the Department carry its burden?

Having found that at the hearing the Department was required to prove the charges by a preponderance of evidence, we find that the Department failed to carry its burden.

(Allegations Concerning Susan Kimura)

In the Notice of Adverse Action, the Department alleged that appellant's relationship with a subordinate female employee, Susan

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[5]This interpretation is consistent with section 19591 which provides:

> Any employee demoted pursuant to Section 19590 shall, as specified by Section 19140.5, have the right to be reinstated to his or her former civil service position.
>
> This code section clarifies that appellant has return rights to the DESA II position.

Kimura, created a hostile work environment for other employees in that his relationship created an appearance of favoritism. The specific allegations included such charges as working behind closed doors for long periods of time, taking irregular lunch breaks with Kimura and, at the end of the work day, leaving the office at the same time as Kimura. Even if proven, these allegations, without more, are not cause for discipline. The mere fact that people work closely together, have lunch together or leave work at the same time is not cause for discipline. There was no showing that appellant and Kimura were not working or that they were inefficient in their work. In addition, there was no showing that Kimura and appellant had anything but a close working relationship.

The Department charged appellant with sexual harassment based on his showing favoritism toward Kimura by inappropriately reprimanding three different subordinate employees. This charge fails for a number of reasons. First, there was no evidence that appellant was having a sexual relationship with Kimura. Second, even if appellant and Kimura were involved with each other, favoritism by itself cannot support a sexual harassment claim. Proskel v. Gattis 41 Cal. App. 4th 1626, 1630. Third, even if favoritism was enough to support a sexual harassment claim, there is no basis for a finding of favoritism: the reprimands taken against subordinate staff were not inappropriate. One of the reprimands was a request for common courtesy directed to an

employee who, after not getting the immediate attention she wanted, told appellant, "Cagle, you expect me to kiss your ass..." A second reprimand was directed to a subordinate who disregarded a note given to her from Kimura who was acting on appellant's behalf. The "reprimand" was a reminder to the employee that she was not at liberty to disregard appellant's orders. The final reprimand was directed to a Unit Manager who made derogatory statements to Kimura about appellant and told Kimura that rumors about her relationship with appellant were interfering with the Unit Manager's unit's productivity. The reprimand itself addressed only the Unit Manager's penchant for publicly and loudly criticizing appellant. In addition, each reprimand was reviewed by appellant's supervisor and approved.

We dismiss all charges arising out of appellant's work relationship with Kimura.[6]

(Allegations Concerning Grace Pena)

The Department argues that the ALJ used the wrong test in assessing whether appellant created a hostile work environment for Grace Pena. The Department alleges a series of interactions

[6]In addition, after review of the evidence presented at hearing, we find that there is no substantial evidence in the record to demonstrate that appellant's actions concerning the Kimura allegations are cause for discipline. The charges of inappropriately disciplining three employees were groundless. Thus, even if these charges had been brought under section 19590, we would have dismissed them as being unsupported by substantial evidence in the record.

between Pena and appellant which it claims would have created a hostile work environment for an reasonable woman. The list included a hug prior to Pena's leaving for vacation in the Philippines; two or three requests by appellant that Pena come have coffee with him; an accepted invitation to dinner; the suggestion that Pena could get her sister a "gag" gift at an adult store; appellant's offer to give Pena a ride to a wedding to which both had been invited; and the remark that appellant enjoyed having mental intercourse with Pena.

The ALJ found that Pena was "more sensitive than the reasonable woman" when Pena was offended by appellant's invitation to coffee. We agree. Pena testified that when appellant asked her to coffee, she declined. She testified that appellant did not react to her declining his invitation; he just accepted it and left. She testified about her response:

> I was very offended. I was - - I didn't know what to do. What I did was I called my friend because I can't believe what just transpired. Here's this person that I looked up to. [H]e was my mentor and he asked me out for coffee after all these years. And I've known him as a father figure. Because what just happened -- so I called my friend and I called my friend Evelyn Dercline. [S]he works there and I said to her this is an emergency. [I]t's urgent. [P]lease come up to the 12th floor in the employee's room. Not just in my office because I don't want him to see her coming up. And then we went to the employee's room. I said you won't believe what Cagle just asked me.

Pena testified that as soon as appellant asked her to coffee, she began looking for another job.

In Ellison v. Brady (9th Cir. 1991) 924 F.2d 872, 879-80 the Ninth Circuit Court of Appeals adopted a reasonable woman standard stating:

> In order to shield employers from having to accommodate the idiosyncratic concerns of the rare hypersensitive employee, we hold that a female plaintiff states a prima facie case of hostile work environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.

As evidenced by Pena's response to being invited to coffee, we find Pena to be the kind of hypersensitive employee that the court had in mind when adopting the reasonable woman standard. We find that a reasonable woman would not have considered appellant's conduct to have been sufficiently severe or pervasive so as to create an abusive working environment.

Once the specter of sexual harassment has been dispelled by a finding that the conduct at issue was not conduct sufficiently severe or pervasive such that a reasonable woman would believe it created an abusive environment, the Board looks to the circumstances of the interaction to determine if the conduct by the alleged perpetrator constitutes discourtesy under Government Code § 19572, subdivision (m). There is not enough in the record to demonstrate that appellant knew or should have known that his attentions caused Pena discomfort. Both Pena and appellant admitted to a long acquaintance which included numerous intimate conversations. Pena considered appellant her mentor. Appellant

hugged Pena when she was leaving for vacation, invited her to coffee a few times, invited her to dinner, made a "gag" gift suggestion and offered her a ride to a wedding. None of these actions appear to be discourteous. In addition, appellant made the unfortunate remark, "I enjoy having mental intercourse with you." The American Heritage Dictionary (2nd ed. 1982) defines "intercourse" as: "1. Dealings or communications between persons or groups. 2. Sexual intercourse." The first and most common usage of the term "intercourse" is not sexual intercourse but verbal communication. No evidence was presented that appellant leered, smirked or insinuated anything when he delivered the remark. Without more, the mere fact that appellant used the word "intercourse" cannot be cause for discipline.

The Department failed to prove that appellant's actions constitute discourtesy. The Department carries the burden of proving discourtesy pursuant to section 19572, subdivision (m). It has failed to do so. This charge is dismissed. For the same reasons, the charge of other failure of good behavior is also dismissed.[7]

[7]The Department also charged appellant with incompetency, inefficiency and inexcusable neglect of duty pursuant to section 19572, subdivisions (b), (c)) and (d). No evidence was presented at hearing to support any charges based on these subdivisions.

CONCLUSION

Having found that the Department failed to carry its burden of proving the charges against appellant by a preponderance of the evidence, we revoke the penalty in its entirety.

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 Proposed Decision of the Administrative Law Judge is adopted as the Board decision in this case to the extent it is consistent with this decision;

2. The demotion of Cagle Moore from Disability Evaluation Services Administrator III to Associate Governmental Program Analyst with the Department of Social Services at Los Angeles be revoked.

3. The Department of Social Services shall reinstate Cagle Moore to the position of Disability Evaluation Services Administrator III and pay to him all back pay and benefits that would have accrued to him had he never disciplined.

4. This matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due appellant.

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

THE STATE PERSONNEL BOARD

Lorrie Ward, President

Floss Bos, Vice President
Ron Alvarado, Member
Richard Carpenter, Member
Alice Stoner, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on August 7-8, 1996.

_____

C. Lance Barnett, Ph.D.
Executive Officer
State Personnel Board

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal By CAGLE L. MOORE From demotion from the position of Disability Evaluation Administrator III to Associate Governmental Program Analyst with the Department of Social Services at Los Angeles	)	Case No. 34846

PROPOSED DECISION

This matter came on regularly for hearing before Ronald S. Marks, Administrative Law Judge, State Personnel Board, on August 30,[8] December 6 and 7, 1994 and February 7 and 8, 1995, at Los Angeles, California. The matter was submitted on March 2, 1995 following receipt of written argument.

The appellant, Cagle L. Moore, was present and was represented by Loren McMaster, Attorney.

The respondent was represented by John Pierson, Staff Counsel, Department of Social Services.

[8]The initial hearing date of August 30, 1994 was converted to a settlement conference and hearing on a Korman motion to dismiss/strike for lack of specificity Leah Korman (1991) SPB Dec. No. 91-04) before Chief Administrative Law Judge Christine A. Bologna and the Administrative Law Judge (ALJ). The parties stipulated that the hearing could proceed before the ALJ notwithstanding his participation in the settlement conference.

Evidence having been received and duly considered, the Administrative Law Judge makes the following findings of fact and Proposed Decision:

I

The above demotion effective March 23, 1994 and appellant's appeal therefrom, comply with the procedural requirements of the State Civil Service Act.

II

Appellant has been employed with the Department of Social Services (Department) since July 1, 1978. He attained the position of Disability Evaluation Services Administrator III on April 15, 1987 following successive promotions. He has had no prior adverse actions.

III

The adverse action of demotion from Disability Evaluation Services Administrator III to Associate Governmental Program Analyst was based on appellant's alleged sexual harassment and discourteous treatment of other employees while Branch Chief of the Disability Evaluation Division, Los Angeles East Branch. Legal cause for discipline was based upon alleged violations of Government Code section 19572, subdivisions (b) incompetency, (c) inefficiency, (d) inexcusable neglect of duty, (m) discourteous treatment of the public or other employees, (t) other failure of good behavior during or outside of duty hours causing discredit to

the agency, and (w) sexual discrimination and sexual harassment against other employees.

IV

Gracela Pena (Pena) worked under appellant's supervision as an Office Services Supervisor I from 1989 through 1992.

Pena was approximately 25 years old at the time of the incidents alleged in the Notice of Adverse Action and had known appellant since she was 19. She testified that she looked up to appellant as a father figure and mentor. Appellant had a daughter the same age as her and they often talked about their families.

Pena testified that beginning in 1991 through the time Pena left the Department in 1992, she felt uncomfortable around appellant because she felt that he was developing a romantic interest in her.

V

In April 1991, Pena went on vacation to the Philippines. The day prior to her leaving, appellant came to her desk to talk to her about her planned trip. At the end of the conversation, appellant told her he wanted to say "goodbye." He gave Pena a lengthy hug and she felt his hands go up and down her back. She felt that the hug was unprofessional and it made her feel uncomfortable. However, Pena did not express any disapproval to appellant.

VI

In August 1991, Pena informed employees in the office that her sister was going to be married, and several employees made suggestions as to wedding gifts for Pena to give her sister. Appellant suggested that Pena give her sister a "gag" gift from an adult store he had visited. He told Pena that the store was reputable and that he would often see Mercedes Benz's and Jaguars parked outside.

Pena testified that she assumed that the store was a "Fredrick's of Hollywood" type of store and that appellant was suggesting a gift with a sexual connotation. She was offended by appellant's suggestion but did not tell appellant that she was offended.

VII

At some time during the Summer 1991, appellant and Pena were engaged in a discussion in her office when their conversation was interrupted by another employee. Both Pena and appellant testified that this was a common occurrence when they were discussing business in the office. Appellant suggested to Pena that they go out for coffee sometime to see what it would be like to have a conversation without being interrupted. Pena declined the invitation and appellant asked her if it was because he was Black. Pena replied that the reason was because she came from a very conservative family who would not approve of her going out with her

boss. Pena testified that she did not want to go for coffee with appellant and mentioned her family's disapproval so as not to hurt his feelings.

Pena testified that she was offended by appellant's suggestion that they go out for coffee.

VIII

A few days after appellant suggested going out for coffee with Pena, he came to her office and told her that it would be nice to go out for coffee because he really enjoyed having "mental intercourse" with her. Pena again declined and testified that she was offended by appellant's use of the phrase "mental intercourse." Following this incident, Pena began having sleeping difficulty and "dreaded" coming to work.

IX

In October 1991, Leslie Shirasawa (Shirasawa), an employee who worked with appellant and Pena, was being married in Berkeley, and several employees from the office, including appellant and Pena, were invited to the wedding.

Pena had planned to drive to Berkeley with another female employee and her boyfriend but shortly before the wedding, Pena learned that the employee and her boyfriend were having difficulty with their relationship, and Pena became concerned about her ride. When Pena told appellant about the possibility that she might not be able to go to the wedding, appellant told her that if she were

without a ride, he would be willing to take her to the wedding. Pena testified that she declined appellant's offer because she was concerned about the implications and about what people would think.

X

During the last week in December 1991, appellant suggested to Pena that they and Shirasawa, with whom Pena regularly drove to and from work, all go out to dinner in Century City. Pena told appellant to ask Shirasawa, and that if Shirasawa said "yes," then she would go. Pena was hoping that Shirasawa would tell appellant that she was not interested. However, Shirasawa told appellant that she would like to go out to dinner with them.

Appellant, Pena and Shirasawa went to dinner at Houston's restaurant in Century City after work. Appellant drove his car and Pena and Shirasawa drove in Shirasawa's car. They each paid for their own dinners.

After dinner they spent approximately 30-45 minutes browsing through the Century City shopping mall before leaving.

Pena and Shirasawa both testified that appellant did not engage in any inappropriate remarks or conduct during the evening. Pena did not indicate to Shirasawa, either driving home or at any time afterward, that she felt uncomfortable about going out to dinner that evening.

XI

A few days after the dinner in Century City, appellant said to Pena, "Now that you see I don't bite, would you be comfortable going out, just the two of us?" Pena told appellant that she did not wish to go out with him. After this discussion, appellant did not invite Pena to have coffee or dinner with him again.

XII

Several witnesses testified that Pena was childish, flirtatious and immature. Pena described herself as having been raised in a very conservative, old-fashioned family. She did not believe in premarital sex. She did not believe in dating her boss. She considered going for coffee during the work day as a date. In describing her reaction to appellant asking her to go for coffee, Pena testified, "I can't believe he said that." She began looking for another job immediately after the first time he asked her to go for coffee.

XIII

During the time appellant was employed as Branch Chief, Susan Kimura (Kimura) was an Operations Analyst. She acted in the capacity of appellant's Administrative Assistant. In her working relationship with appellant, she often spent up to six hours per day in appellant's office usually with the door closed. They would frequently go to lunch together and leave the office at the same time. There were long-standing rumors throughout the office as

well as other offices of the Department that appellant and Kimura were having an affair. Both appellant and Kimura testified that they were not romantically involved.

Deputy Director Robert Sertich (Sertich) called appellant in September 1991 to discuss the rumors. Appellant denied any romantic relationship with Kimura. Sertich did not instruct appellant to take any action regarding the rumors but thereafter appellant left the door open more often during meetings with Kimura and made an effort to have other employees join them when he and Kimura went to lunch.

XIV

On February 24, 1992, Kimura instructed Poppy Rubin (Rubin), a unit manager, to return a telephone call to a claimant. Kimura was not Rubin's supervisor. Rubin had spoken to the claimant on several occasions and had just recently spoken with him and believed that it was not necessary to call him again. She spoke to her supervisor, Tawn Sinclair (Sinclair), about Kimura's instruction and was told by Sinclair not to return the call. However, a day or two later, Sinclair told Rubin that she had discussed the matter with appellant and he still wanted her to return the call, which she then did.

On March 5, 1992, appellant sent Rubin a memorandum (memo) entitled "Reminder" criticizing her for refusing to follow his instructions. When Rubin called appellant to explain why she had

not called the claimant, appellant told her, "I don't think you understand how seriously I take this. Susan gave you an order. An order from Susan is the same as an order from me."

XV

On February 25, 1992, Helen Stanley (Stanley), a unit manager, went to Kimura's office to discuss the rumors about appellant and Kimura. Stanley testified that "it seemed like no matter what floor you went to there was gossip that there was something going on between Kimura and Cagle."

Stanley told Kimura that she had come to inquire if the rumors concerning her and appellant were true. Kimura told Stanley that the rumors were not true.

Stanley then began discussing some extra work that appellant had agreed to take which would have required unit managers to have their own caseload. Stanley expressed disapproval of this decision and stated to Kimura that appellant was just trying to make himself look good in the eyes of Sertich, but that he should realize that Joe Carlin, another employee with whom Stanley presumed appellant was competing, was the "chosen one" and there was nothing that appellant could do to change that.

Kimura testified that she reported Stanley's visit and comments to appellant but denied that she told appellant that Stanley had discussed the rumors concerning their relationship.

Appellant discussed Stanley's comments and attitude with Sinclair, Stanley's supervisor. Appellant suggested that the three of them meet to discuss the matter. Stanley told Sinclair that she would not agree to meet if appellant was just going to pound on the table as she alleged he had done in a previous meeting that appellant had with her when he had reprimanded her for being openly critical of him.

Because Stanley would not agree to meet with him and Sinclair, appellant gave Stanley an informal reprimand on March 5, 1992 regarding her comments and attitude in Kimura's office.

Sinclair testified that she was in agreement with the reprimand because it was based upon a long history of anti-management criticisms by Stanley.

XVI

On November 6, 1991, Lila Mazo (Mazo) went to appellant's office to inquire as to whether her staff would be working overtime that evening since some of them needed to make arrangements with babysitters. Mazo could not direct this inquiry to her supervisor, Sinclair, since she was out of town.

When Mazo entered appellant's office, he and Kimura were having lunch. As Mazo began the discussion about overtime, Kimura left the office.

Appellant began walking around the office with his hand on his chin. He asked Mazo if she had checked with Sinclair and when Mazo

told appellant that Sinclair was in San Diego, he just continued to walk around the office. Mazo was becoming impatient and upset that she was not receiving an answer to her question and told appellant, "Look Cagle, I'm not going to kiss your butt."

Appellant then ordered Mazo to leave his office. Later she came back to his office to apologize but appellant told her that if she did not leave immediately he would call the State Police and the guard that was on duty downstairs.

One or two days later, Mazo received an informal written reprimand for her discourteous behavior.

Since the written reprimand also reflected that a copy was sent to her personnel file, Mazo made several telephone calls to the Personnel Office to ascertain whether it was proper for the memo to be placed in her personnel file. In these calls, she misrepresented that the inquiry was being made on behalf of one of the employees under her supervision.

On November 18, 1991 appellant gave Mazo another informal written reprimand for the misrepresentations she made to the Personnel Office, and because she did not pursue her questions about the informal reprimand through her supervisor.

At the request of Sinclair, Mazo provided appellant with a written apology in which she promised that it would not happen again.

* * * * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT, THE ADMINISTRATIVE LAW JUDGE MAKES THE FOLLOWING DETERMINATION OF ISSUES:

In Anthony G. Gough (1993) SPB Dec. No. 93-26, the State Personnel Board defined sexual harassment as meeting one of the following three criteria:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of the individual's employment;

2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

3. Conduct which has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive work environment.

In the instant case, it was alleged that the third criteria was satisfied because appellant's conduct created an intimidating, hostile or offensive work environment for Pena.

Whether the acts complained of created an intimidating, hostile or offensive work environment must be determined by the totality of the circumstances with the following factors to be considered: (1) the nature of the unwelcome sexual acts or words (generally, physical touching is considered more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the

offensive conduct occurred; and 4) the context in which the sexually harassing conduct occurred. (T[redacted]. W[redacted] (1994) SPB Dec. No. 94-20, citing Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590, 610 fn.8.)

Although Pena felt intimidated by appellant's conduct and was offended by it, her perception does not, by itself, establish sexual harassment. The courts have held that the standard to be applied is that of a "reasonable woman" (i.e. an objective as well as subjective test.) (Harris v. Forklift Systems, Inc. (1993) 510 U.S._____, 114 S. Ct. 367, 370, 126 L.Ed.2d 295; Ellison v. Brady (9th Cir. 1991) 924 F.2d 872, 879.) Pena appeared to be much more sensitive than the average "reasonable woman." She was described by several witnesses as immature and childish. She had a sheltered upbringing in the Philippines. Her reaction to the invitations by appellant was extreme. For Pena to say that she "couldn't believe it" when appellant suggested going somewhere for coffee, and for her to immediately look for new employment because of that invitation, demonstrates that she is obviously more sensitive than a reasonable woman presented with an invitation from her supervisor to have coffee sometime. Such invitations are not highly unusual in the work place and do not, without some evidence of prior refusals, constitute sexual harassment. (Robert F. Jenkins (1993) SPB Dec. No. 93-18.)

Respondent must therefore establish that appellant's conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment for a "reasonable woman." (Ellison v. Brady, supra.)

The totality of the circumstances do not demonstrate that appellant's conduct was either "severe" or "pervasive" in nature.

Appellant gave Pena a lengthy hug when she was leaving for vacation, suggested going out for coffee on two occasions, told her he enjoyed having "mental intercourse" with her, went to dinner with her, offered to give her a ride to a wedding in Berkeley, and suggested an adult "gag" gift for her sister's wedding. These acts cannot be considered "severe" in offensiveness, nor were they "pervasive" in that they constituted seven separate incidents over a period of approximately nine months.

Moreover, Pena never told appellant that she felt offended by his behavior or invitations. Although failure to express disapproval would not necessarily render the conduct "welcome," her failure to express any feeling of discomfort to appellant is relevant as to whether appellant had reason to know that his invitations were bothersome to her. (Robert F. Jenkins (1993) SPB Dec. No. 93-18, citing Bundy v. Jackson (D.C. Cir. 1981) 641 F.2d 934.)

Even though appellant's conduct did not constitute sexual harassment under Government Code section 19572 subdivision (w),

appellant's lengthy hug while running his hands up and down Pena's back and telling her he enjoyed have "mental intercourse" with her was inappropriate. This conduct toward a subordinate constitutes a failure of good behavior and discourteous treatment of another employee under Government Code section 19572, subdivisions (m) and (t), respectively. (C[redacted] C[redacted] (1994) SPB Dec. No. 94-21; T[redacted] [redacted]. W[redacted] (1994) SPB Dec. No. 94-20.)

Respondent contends that the reprimands given by appellant to Rubin, Stanley and Mazo were motivated by appellant's desire to punish them for upsetting Kimura. It is alleged that this conduct constituted sexual harassment because it created an intimidating, hostile or offensive working environment. Although respondent is correct in its contention that such conduct would constitute sexual harassment (Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590; T[redacted] [redacted]. W[redacted] (1994) SPB Dec. No. 94-20), the evidence falls short of establishing the alleged motive.

Although Kimura was involved to some degree in each incident, there were also legitimate reasons for appellant to reprimand these employees. Rubin was reprimanded for failing to follow instructions appellant gave to her through Kimura. Stanley was reprimanded for openly criticizing appellant's management decisions which, as noted in the written reprimand, she had done in the past, and following her refusal to meet with appellant and Sinclair to discuss the issue. Mazo was reprimanded for discourteous behavior

toward appellant and for misrepresentations to the Personnel Office.

Each of the reprimands were discussed with the employees' immediate supervisor and Deputy Director Sertich. Sertich testified that he did not recall telling appellant that any of the reprimands were inappropriate, although in his discussion with appellant concerning the written reprimand given to Mazo, he told appellant that he should be very careful how he approaches employees "on that kind of thing."

Furthermore, the incident that would have caused the greatest affront to Kimura, Rubin's failure to follow instructions given by Kimura, resulted only in a written "reminder," whereas the other two incidents resulted in "informal written reprimands." Additionally, appellant was more of a recipient of the offensive conduct by each of the employees than was Kimura.

Although Kimura's presence at each incident raises speculation as to appellant's motive, the evidence is not sufficient to find by a preponderance of the evidence that any of the three employees was reprimanded because she had upset Kimura. Accordingly, there is no basis for finding that appellant's conduct toward Rubin, Stanley and Mazo violated Government Code section 19572 subdivision (w).

Respondent's allegations that appellant violated Government Code section 19572, subdivisions (b) incompetency, (c) inefficiency, and (d) inexcusable neglect of duty were based upon

appellant's alleged sexual harassment of Pena and alleged creation of a hostile work environment as a result of his relationship with Kimura. Since the factual allegations were not established by a preponderance of the evidence, legal cause for discipline under these subdivisions are not sustained.

Since only the lengthy hug in which appellant ran his hands up and down Pena's back, and his comment that he enjoyed "mental intercourse" with her would be sufficient grounds for discipline under subdivisions (m) and (t), it is believed that a 30 days' suspension will convince him that his behavior toward female employees must be corrected immediately. (See C[redacted] C[redacted], supra.)

* * * * *

WHEREFORE IT IS DETERMINED that the adverse action of demotion of appellant Cagle L. Moore effective March 23, 1994, is hereby modified to a 30 days' suspension. Said matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary, benefits, and interest, if any, due appellant under the provisions of Government Code section 19584.

* * * * *

(Moore continued - Page 18)

I hereby certify that the foregoing constitutes my Proposed Decision in the above-entitled matter and I recommend its adoption by the State Personnel Board as its decision in the case.

DATED: June 5, 1995.

RONALD S. MARKS
Ronald S. Marks,
Administrative Law Judge,
State Personnel Board.