

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by) SPB Case No. 36329
)
 MERLE E. BETZ, JR.) **BOARD DECISION**
) (Precedential)
) (as modified)¹
From official reprimand in the)
position of Coastal Program) **NO. 96-10**
Analyst II with the California)
Coastal Commission at Ventura) August 7-8, 1996

Appearances: Michael Hersh, Attorney, California State Employees Association, on behalf of appellant, Merle E. Betz, Jr.; Dorothy F. Dickey, Deputy Chief Counsel, on behalf of respondent, California Coastal Commission

Before: Lorrie Ward, President; Floss Bos, Vice President; Ron Alvarado, Richard Carpenter and Alice Stoner, Members.²

DECISION

This case is before the State Personnel Board (SPB or Board) after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the matter of the appeal of Merle E. Betz, Jr. (appellant) from an official reprimand in the position of Coastal Program Analyst II with the California Coastal Commission (Commission). Appellant was officially reprimanded for writing a memorandum to one of the Commission's staff attorneys which contained several allegations of wrongdoing concerning an

¹This decision has been reissued to redact from the decision name of the private attorney referenced in the memorandum. The attorney is referred to herein as the "attorney for the city."

²Richard Carpenter recused himself from both the decision to consider the Department's Petition for Rehearing and from consideration of this decision as amended.

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attorney in private practice who represented the city and that attorney's dealings with members of the Commission staff. The Commission investigated the allegations contained in the memorandum and determined that none were valid.

In his Proposed Decision, the ALJ found that the Commission had a policy requiring employees to report alleged wrongdoing solely by going through the assigned chain-of-command and, further, that the substance of appellant's memorandum was not protected by law. Accordingly, the ALJ concluded that the official reprimand should be sustained.

The Board rejected the ALJ's decision, asking the parties to brief the issue of whether an employee may be disciplined for going outside the chain of command by raising concerns of wrongdoing with a department's staff counsel. After reviewing the record in this case, including the transcript, exhibits and the written arguments of the parties³, the Board finds that, under the circumstances of this particular case, the appellant should not be subject to discipline for his actions. On that basis, we revoke appellant's official reprimand.

FACTUAL SUMMARY

At the time of the incident, appellant had worked for the Commission for approximately 15 years. Prior to his work for the Commission, he had worked as an Planner for the City of Oxnard. Appellant has no record of prior disciplinary action.

³ There was no request by either party for oral argument.

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In February of 1993, appellant wrote a letter to a Richard Maggio, Director of Community Development for the City of Oxnard. The letter provided the appellant's comments to his review of the city of Oxnard's application to amend their Local Coastal Program (LCP). A while later, after the letter was sent, a fellow Commission staffperson showed appellant a copy of this same letter with handwritten changes and comments all over it. The letter had a "post-it" note on it, revealing that the letter had been sent from someone at the city of Oxnard's Planning Department to the attorney for the city. Appellant was upset because he was not privy to these suggested revisions and was not asked for his input about the changes. He was upset that he was taken "out of the loop," and further upset because he believed that the attorney for the city had improper influence upon the Commission. Sometime later, he found out that he had been taken off of the project.

Not only was appellant concerned about the city of Oxnard's proposal and, specifically, the city attorney's involvement, he also became concerned about various other problems he saw within the Commission. In a letter dated July 18, 1994, appellant wrote to Tami Grove (Grove), one of his supervisors, expressing disappointment over being removed from a different project (a project involving contact with another member of the city attorney's law firm), the growing problems he saw with how lawyers and political pressure were wrongfully impacting the Commission's

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decisions, and raising concerns about various office problems and procedures.

Soon after sending the letter to Grove, appellant made a telephone call to the Legal Division at the Commission, asking to speak to the attorney who handled questions of conflicts of interest.⁴ He was told that attorney would be Cindy Cima (Cima) and appellant left a message for her. When Cima called appellant back, he explained that he was interested in information on the attorney for the city and her general business before the Commission. Cima gave appellant what little information she had concerning the attorney for the city, informing appellant that she was aware of the fact that the attorney for the city represented the Commission about two years ago in litigation in which she (Cima) was also involved, which litigation had ultimately settled.

According to appellant, Cima seemed to be interested in appellant's questions and said she would speak with the Chief Counsel.⁵ Cima did not tell appellant that the phone call was improper or that she could otherwise not speak with him. Without prompting from Cima, however, appellant decided to follow up this

⁴ Appellant contends that the call was made several days after writing his memorandum to Grove. Cindy Cima, the lawyer he contacted testified that, according to her notes, the call was made the same day, July 18.

⁵ Cima contends she said very little to appellant during this conversation, basically just telling him what she knew about the attorney for the city and the attorney's association with the Commission.

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telephone call with an informal memorandum to Cima about two weeks later. Cima did not answer the memorandum, but immediately forwarded it to her supervisor, the Chief Counsel. The memorandum addressed appellant's concerns over possible improprieties in the relationship between officials at the city of Oxnard and Commission officials and, in particular, the actions of the attorney for the city:

The following is my informal elaboration on our conversation of about a week ago. I was discussing the way we handled the Oxnard Shores LCP amendment about a year ago. The reason that I have become interested in this is because Tami Grove indicated that some group met and decided that my reasons for rejecting the City submittal were not valid. I was never told of this. This is new information that has caused me to open up my thoughts on something that has, obviously, been bothering me for a long time.

The following goes over the conduct of [the attorney for the city], which I was previously emphasizing. Things go beyond this, however, as I have seen from my review. I believe that there is undue influence from those outside and inside which have sidestepped the normal review process for an amendment to a LCP. In trying to cut down the background, I realize the situation involves a lot more people than her who are trying to set aside, and have set aside, the policy of the Coastal Act. Having heard [the attorney for the city] speak several times on shoreline protection, I had lot of respect for her. Now I wonder where she is coming from and would think that she would have more serious concerns with proper shoreline protection. I believe she in conjunction with a number of Coastal Commission staff behaved in a rude and unprofessional manner.

Before I started working in detail on the City of Oxnard submittal, I talked to the previous staff member assigned to the City, Virginia Johnson. She told me that the City had always had a special relationship with the Commission. I had seen over the years that the staff had allowed them to do things contrary to the Coastal Act,

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such as convert agricultural land and intensify development in Oxnard Shores without structural security or shoreline protection. I had lived near Oxnard Shores for several years and seen residences tumble into the ocean, and had worked for the City of Oxnard for five and one half years. If anyone would have been involved in behind the scenes deal cutting, including use of lobbyists and members of the State legislature, it would have been Oxnard.

I had worked on permits for the Commission in Oxnard Shores in the mid-1980s and thought that we were moving in the right direction by assuring greater structural integrity or better shoreline protection. We were looking at the FEMA design manual and Nancy Cave was aware of my concerns. A recent speech by Ralph Faust emphasizes the need to have either greater structural integrity or better shoreline protection. Why then in Oxnard Shores have we allowed inadequate design--weak piling systems, lack of integration of pilings systems with the remainder of the structure, partial construction on a sandy beach on slab foundation, etc?

...

...Nevertheless, I went to Gary Timm before I worked on the amendment and got assurances that I could review the amendment as I saw fit relative to the Coastal Act and our regulations. He assured me that we would use a "straight arrow" approach. I then called Linda Locklin and Diane Landry and was able to find nothing from the old settlement agreement for Oxnard Shores that conveyed any special handling in this manner. This left me still with the impression that, regardless of what Virginia Johnson said, that Oxnard was to be treated in the same manner as any other LCP amendment.

I sent the City numerous comments about their submittal. Instead of the City contacting me, [the attorney for the city] wrote directly to Linda Locklin in the form of a FAX of my comments and, I assume, there must have been other conversations or written communications. Neither [the attorney for the city] or anyone else from the City contacted me, although they did go to Locklin in the Santa Cruz office. There was later a critique by Linda Locklin, and I wrote a written response to her and sent it to numerous staff. No one responded in the staff to this later set of comments. A couple of months later, I had been thinking it was on the back burner. Then, waiting for the City response to come in, I saw that the

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item had been reassigned to someone else and the item was on the agenda for approval as submitted. This was by way of seeing a copy of the staff report approval as submitted. I had never been told of the reassignment.

Obviously, [the attorney for the city] has a lot of influence since she is working both for the Commission and the City of Oxnard. She is able to influence the Commission staff to have an item treated differently than if it was from some other jurisdiction. Someone in the Commission staff, in my opinion, is making a trade-off and letting go of proper property development standards in Oxnard Shores, possibly in exchange for pro bono work in another part of the coast. I don't know if there is really anything going on here. I have no power or influence in the system.

The saga does not end here. I was recently removed from the Carpinteria Bluffs project after a couple meetings with Margaret Sohagi, a member of [attorney for the city's] firm. I felt that my approach toward what would be acceptable for filing was not in agreement with them.

Did the previous episode with Oxnard Shores influence this? Is there some kind of fraternal relation between attorneys, or with certain land use staff, which supersedes other obligations to conduct things in an above-board and professional manner? There seems to be, in my recent experience, two sets of rules here--above-board and under-the-table and I don't know which to follow. Do the higher-ups in the Commission get to follow a different set of rules?

What we have here is, if not some actual misfeasance or malfeasance, at least the "Appearance of Impropriety"
...

At the hearing, appellant testified that he believed that addressing the memorandum to one of the Commission's attorneys would render it confidential. He further testified that he wrote the memorandum because, although he was unsure if there was an actual conflict of interest or other improprieties, he thought that maybe there was and wanted to get the subject off his chest and get

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another opinion. He thought that a Commission attorney would be a proper party for the receipt of such information. He testified that it was not his intention to make an accusation against the attorney for the city or any Commission employees by the letter or to necessarily have anyone take any action.

After the Commission became aware of the memorandum, it investigated the allegations and found none were valid. Shortly thereafter, appellant was served with an Official Reprimand, citing cause for discipline under Government Code section 19572, subdivisions (d) inexcusable neglect of duty, (e) insubordination (m) discourteous treatment of other employees, and (t) other failure of good behavior.

ISSUES

1. Was the appellant's conduct protected by either Government Code section 8547, the First Amendment to the U.S. Constitution, or Labor Code section 1102.5?
2. Did the Commission have cause to discipline appellant under the subdivisions alleged based upon the evidence in the record?

DISCUSSION

(Government Code section 8547 et seq.)

The appellant makes several arguments to the Board in his defense. First, he cites to Government Code section 8547. We agree with the ALJ's conclusion that this section does not apply to appellant's case. Government Code section 8547 et seq. addresses

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"whistleblowing" by state employees and specifically provides a mechanism by which state employees can file accusations of improper governmental activity with the State Auditor who is charged with investigating the allegations. Section 8547.8 further provides that state employees may file complaints of reprisal or retaliation with the SPB against their employers for intentionally engaging in acts or reprisal, retaliation, threats, coercion or similar acts based upon their disclosure of improper governmental activity. Any person who is found to have intentionally engaged in such acts or reprisal or retaliation is subject to fines, possible imprisonment, and adverse action.

In this case, appellant did not file a complaint with either the State Auditor or the State Personnel Board. Moreover, we do not find, based upon the evidence in this case, that the Commission was intentionally engaging in acts of reprisal or retaliation based upon appellant's memorandum to Cima. Rather, we believe that the evidence reveals that the Commission had a good faith belief that appellant's memorandum to one outside of his chain of command was disruptive enough to the workplace to justify imposing discipline.

While we do not find sufficient cause to discipline appellant for his actions for the reasons stated below, we do not find Government Section 8547 et seq. to be applicable to this case.

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(First Amendment)

Appellant further argues that the First Amendment to the Constitution provides him with protection from discipline in this matter. The First Amendment to the United States Constitution provides that "Congress shall make no law abridging the freedom of speech..." The Fourteenth Amendment makes this provision binding upon the states.

The rights of persons to speak freely on any subject is highly treasured, yet, it is not without exceptions. For example, obscenity is not protected by the First Amendment [Roth v. United States (1957) 354 U.S. 476], nor are "fighting words" or words which incite others to perform violent acts. Chaplinsky v. New Hampshire (1942) 315 U.S. 568.

With respect to the issue of a public employee's right to speak freely in the workplace without retribution by the government, there is a litany of cases which set forth the applicable law, beginning with the landmark case of Pickering v. Board of Education (1968) 391 U.S. 563. In the case of Pickering v. Board of Education, the Supreme Court held that a governmental entity could not discharge one of its employees for speaking her mind in a letter to the editor of a newspaper about topics of public concern because to do so would violate her right of free speech. In determining whether a public employee has been properly discharged for engaging in "speech", Pickering established a

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balancing test, which is still used today. That test requires that courts balance:

...the interests of the [employee] as a citizen in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Pickering v. Board of Education, 391 U.S. at 568.

The balancing test was deemed necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment. Rankin v. McPherson (1987) 483 U.S. 378, 384. This balancing test is to be applied, even where the employee's discipline is not as serious as a discharge. Chico Police Officers' Assn. v. City of Chico (1991) 232 Cal.App.3d 635.

The threshold question in applying the balancing test is whether the speech touches upon a matter of "public concern." Rankin v. McPherson, 483 U.S. at 384. The high Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values" and is "entitled to special protection." Connick v. Meyers (1983) 461 U.S. 138, 145. Whether a particular statement or form of speech is of "public concern" or not is a question of fact and is determined by the content, form and context of a given statement, as revealed by the whole record. Id. at 147. First Amendment protections are triggered even if only some part of a communication addresses an

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issue of public concern. [Hyland v. Wonder (9th Cir. 1992) 972 F. 2d 1129, 1137. See also Connick, 461 U.S. at 149.]

Appellant's memorandum addressed an alleged conflict of interest by an outside attorney and possible legal improprieties by Commission staff, issues which we believe to be, at least in part, a matter of public concern. A finding that appellant's speech touched upon a matter of public concern, however, does not end the inquiry. Discipline is still permissible if the right of the employee to comment on matters of public concern is outweighed by the state's interest in the efficient operation of the employers' duties.

In Rankin v. McPherson (1987) 483 U.S. 378, the U.S. Supreme Court discussed the state interest element as follows:

In performing the balancing test, the statement will not be considered in a vacuum: the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose. We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise. [Id. at 388 (citations omitted).]

The Court explained "the state interest element of the test focuses on the effective functioning of the public employer's enterprise." (Id.) The Court summed up the test as determining whether the speech in question constitutes an "[i]nterference with

work, personnel relationships or the speaker's job performance" and

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concluded that "avoiding such interference can be a strong state interest." Ibid.

Given the time, place and manner in which appellant spoke, we cannot say that the memorandum, sufficiently interfered with the Commission's work or employees' relationships to override the strong interest in appellant's freedom to speak on matters of public concern. Appellant intended the memorandum to be a confidential communication to the Commission's internal staff attorney. The document evidences appellant's intent of trying to ascertain whether there was a legitimate basis for his belief that there was a possible violation of laws or legal principles.

(Labor Code section 1102.5)

Even assuming we were not to find, however, that appellant's speech in this case was protected by the First Amendment, we would nevertheless find that he was protected from discipline as a matter of public policy stemming from Labor Code section 1102.5. Labor Code section 1102.5 provides, in pertinent part:

(a) No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation.

(b) No employer shall retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation.

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Labor Code section 1102.5 applies to state employees under Labor Code section 1106. The ALJ determined in his proposed decision, however, that this section was inapplicable to the instant facts as appellant did not disclose the information to a government or law enforcement agency for a law enforcement purpose, but rather to a fellow employee for a non-law enforcement purpose.

While we agree that Labor Code section 1102.5 may not, by its wording, apply to a situation where an employee discloses possible wrongful activity to a fellow employee, at least one court has found that the public policy underlying this code section prohibits disciplining an employee under such circumstances.

In Collier v. Superior Court (1991) 228 Cal.App.3d 1117, a former employee of a record manufacturer brought an action against the manufacturer for wrongful termination alleging that he was wrongfully terminated in retaliation for reporting to higher management possible illegal conduct occurring within the company. In discussing whether or not Labor Code section 1102.5 applied to Collier's situation, the court stated:

Labor Code section 1102.5, subdivision (b), which prohibits employer retaliation against an employee who reports a reasonably suspected violation of the law to a government or law enforcement agency, reflects the broad public policy interest in encouraging workplace "whistleblowers," who may without fear of retaliation report concerns regarding an employer's illegal conduct.

This public policy is the modern day equivalent of the long-established duty of the citizenry to bring to public attention the doings of a lawbreaker. (citation omitted.)

Even though the statute addresses employee reports to public agencies rather than to the employer and thus does

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not provide direct protection to petitioner in this case, it does evince a strong public interest in encouraging employee reports of illegal activity in the workplace. (citation omitted.) (Id. at 1123.)

The Collier court further reasoned:

If public policy were strictly circumscribed by this statute to provide protection from retaliation only where employees report their reasonable suspicions directly to a public agency, a very practical interest in self preservation could deter employees from taking any action regarding reasonably founded suspicions of criminal conduct by coworkers... (Ibid.)

We agree with the Collier court that there exists a strong public policy in prohibiting state employers from taking disciplinary action against employees who report legitimate suspicions of wrongdoing in a good-faith manner to persons within their department who they reasonably believe may be able to assist them in ascertaining whether wrongdoing actually exists.

[Sufficiency of Evidence to Support Discipline
Under Subdivisions (d), (e), (m), and (t)]

Even assuming we were to reject appellant's legal defenses as set forth above, we nevertheless would find insufficient evidence to sustain appellant's official reprimand under the causes of discipline cited by the Commission.

Inexcusable neglect of duty, as used in subdivision (d) has been defined as:

[A]n intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty. Ulysses Washington (1993) SPB Dec. No. 93-10, at page 6 citing Gubser v. Department of Employment (1969) 271 Cal.App.2d 240, 242.

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In this case, we do not find that appellant either intentionally or with gross negligence violated any known official duty owed to the Commission. Although the Commission repeatedly states in its argument, and the ALJ found, that the Commission had a "policy" concerning reporting alleged violations of law or wrongdoing strictly through one's chain of command, the record contains no evidence that such a policy existed or was communicated to appellant. On the contrary, Thomas Crandall, Acting District Director, testified only to the effect that it was "common knowledge" that one report allegations of wrongdoing directly to one's supervisor and that there was no particular guidance. Gary Timm, District Director, testified only that concerns of wrongdoing should be raised strictly through the chain of command. Finding that the Commission failed to establish the actual existence of a regulation, policy or directive distributed or otherwise communicated to appellant on this issue, combined with our finding above that the memorandum was written in good faith to a person who appellant reasonably believed was an appropriate person with whom to communicate his concerns, we decline to find that appellant was inexcusably neglectful of a known official duty in writing the memorandum to Cima.⁶

⁶ We take particular note that appellant's concern involved the issue of a conflict of interest by an attorney. It makes sense that he might first go to an attorney at the Commission to get feedback on his concerns.

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Similarly, we find that appellant committed no insubordination towards anyone at the Commission. To find an employee insubordinate, we must find at least one incident of mutinous, disrespectful or contumacious conduct by the employee under circumstances where the employee has intentionally or willfully refused to obey an order a supervisor is entitled to give and entitled to have obeyed. R ██████ S ██████ (1995) SPB Dec. No. 95-02 at page 10.

Again, the Commission failed to prove that appellant was directed that allegations of wrongdoing were to be made directly only through the chain-of-command and intentionally violated such an order. Accordingly, this cause for discipline cannot be upheld.

Finally, we consider the Commission's charges of (m) discourteous treatment of other employees, and (t) other failure of good behavior. While allegations of illegal conduct or wrongdoing made in bad faith or slanderously publicized might qualify as discourteous treatment of other employees or the public, neither is the situation here. Since we have concluded that appellant wrote to the Commission's attorney in a good faith belief that there was possible wrongdoing involving lawyers and legal representation, that the information was relayed in a manner that the appellant thought would be confidential, we do not find that appellant's actions constituted a failure of good behavior.

CONCLUSION

We believe that appellant's manner of communicating his concerns of wrongdoing to the Commission's staff attorney, under these circumstances, was protected by law and public policy. Even if we were to find the communication was not legally protected, we would nevertheless conclude there is insufficient evidence in the record to support the imposition of discipline against appellant under the causes for discipline charged.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code section 19582, it is hereby ORDERED that:

1. The Official Reprimand taken against Merle E. Betz, Jr. in his position as Coastal Program Analyst II is revoked.

2. This opinion is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5. The Board's decision in Merle E. Betz, Jr., SPB Case No. 36329 is hereby set aside and depublished.

THE STATE PERSONNEL BOARD

Lorrie Ward, President

Floss Bos, Vice President

Ron Alvarado, Member

Alice Stoner, Member

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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 Boar