BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 32106
	)	
HUGH P. CAMPBELL	)	**BOARD DECISION**
	)	(Precedential)
	)	
From termination of Career Executive Assignment III with the Office of the State Architect at the Department of General Services at Sacramento	)	**NO. 94-18**
	)	June 7, 1994

Appearances: Dennis F. Moss, Attorney, Professional Engineers in California Government for appellant Hugh P. Campbell; Teresa L. Boron-Irwin, Attorney, Department of General Services for respondent, Department of General Services.

Before: Carpenter, President; Ward, Vice President; Stoner, Bos and Villalobos, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Hugh P. Campbell (appellant or Campbell) from his termination from the position as a Career Executive Assignment III with the Office of State Architect at the Department of General Services at Sacramento (respondent or Department). The written notice of termination did not set forth the reasons for the termination, but merely outlined appellant's

rights and options with respect to his right of return.[1] The ALJ affirmed appellant's dismissal.

Appellant appeals his dismissal arguing that his letter to the Building Standards Commission was protected speech under the First Amendment. Appellant also argues that the Department failed to follow the rule governing termination of a Career Executive Assignment.

After a review of the entire record, including the transcripts, exhibits, and the written arguments of the parties, the Board sustains the appellant's dismissal.

FINDINGS OF FACT[2]

Employment History

The appellant was employed by OSA in April of 1975 as a Senior Structural Engineer. In March of 1985, appellant was appointed a Principal Structural Engineer. Appellant's Career Executive Assignment III commenced June 5, 1987.

The CEA Position

Appellant was an employee of the Office of the State Architect (OSA). This Unit is part of the Department of General Services. The appellant's duties in his Career Executive Assignment III were those of the Chief Structural Engineer. He was supervised by the State Architect. As Chief

[1] Appellant was verbally informed he was being terminated "due to administrative changes."

[2] The Factual Summary is adapted from the ALJ's Proposed Decision.

Structural Engineer, Campbell was responsible for the statewide implementation of The Field Act, an act designed to provide for the structural integrity of schools within the State. The OSA, through its Structural Engineering branch, handles plan checking and oversees construction inspection of all public schools, whether the construction is new construction or remodeling.

Appellant's duties at OSA included the coordination of plan review for hospital and other essential building projects. He was responsible for the management of four area offices and supervised 120 employees. He was responsible for the promulgation and adoption of technical and administrative regulations relating to design and construction of buildings within the jurisdiction of the OSA. He was responsible for the investigation, evaluation and preparation of written reports concerning earthquake damage to buildings. He reviewed and proposed legislation regarding engineering registration and practice. Appellant, on behalf of OSA, developed interpretation of laws and rules within OSA jurisdiction.

Appellant was also responsible for appearances before various boards and commissions on behalf of OSA.

The BSC Meeting

At a June 8, 1992 meeting of the Building Standards Commission (BSC), an issue arose concerning the efforts of OSA to increase the fees charged to school districts for the services provided by OSA. The fees were those provided pursuant to Education Code § 39146-39147, a portion of the Field Act.

BSC is a State Commission with 10 to 12 members appointed by the Governor pursuant to Health and Safety Code Section 18920 et seq. OSA had submitted the fee increase to the BSC for their approval. The fee request was in the form of a proposed regulation. The appellant did not attend the BSC meeting of June 8, 1992. One of appellant's subordinates, Dennis Bellet, was at the meeting.

During the meeting, Commissioner Storchheim, a new member of the BSC, questioned Bellet about the necessity of increasing the fee to school districts. Storchheim asked Bellet "when was the last time your office has done a management or efficiency study that shows us that you are effective, efficient and that these fees are actually needed?" Bellet replied, "I don't know the last time that was done, I just don't have that information." Storchheim then queried the Chair of the BSC, Mr. Canestro by asking "is this

appropriate for me to go through my issues here on this?" The Chair replied, "Please do, that's what we are here for."

Storchheim then placed his perception of the issues on the record. He set forth what he believed were the differences in fees charged by local government for review of plans for construction in contrast to fees charged by OSA. Storchheim cited examples of construction projects where local government fees were lower than OSA's. Storchheim also stated that the local school districts were having fiscal problems and that, before he would support a fee increase, he felt OSA should do an efficiency or management study.

Bellet replied to Storchheim's concerns by indicating that local government guidelines relative to a fee schedule varied and some localities charged fees higher than those set by OSA. Bellet was questioned by Commissioner Ward about the necessity of the fee increase and whether the request would be classified as an "emergency." Bellet replied by discussing workload staffing and budget cuts which had affected OSA. Commissioner Storchheim again raised the issue of an efficiency study. Commissioner Hansen raised an issue relative to surplus funds. Bellet explained the surplus fund. There was further discussion by the Chair of the BSC, Canestro, with Bellet responding to questions regarding the requested fee increase. Thereafter, the BSC tabled the

request by OSA for a fee increase until their next meeting in August 1992.

The Correspondence

Subsequent to the June 8, 1992 meeting of BSC, appellant wrote a letter to Richard Conrad, the Executive Director of the BSC. A copy of the letter was sent to Dennis Bellet. Copies of the letter were also sent by the appellant to the commissioners of the BSC.

In the letter, the appellant stated that he listened to the tape of the June 8, 1992, meeting. He further stated that he had a problem with the questions and statements of Commissioner Storchheim and the impact of Storchheim's comments on the vote of the BSC. The appellant expressed an opinion as to the necessity and appropriateness of Storchheim's questions to Bellet about "the fiscal policies of OSA and the record of studies of the operational efficiency...." He indicated that raising the issues without notice was unfair to OSA's representative. The appellant's letter then dealt with the questions raised at the meeting regarding the efficiency audits.

Appellant then reiterated that Storchheim made a "lengthy issue of the cost of OSA plan review compared to that of his own and other local building Departments." Appellant indicated that Storchheim's comments reflected the position of

the California Local Building Officials (CALBO). This is an organization composed of building officials. Appellant indicated CALBO wants to remove public school construction plan review from OSA and return it to local building departments.

Appellant noted that "These policy statements were not relevant to the issue of an OSA fee increase and should not have been permitted by the Chairman." Appellant then stated:

> As a new Commissioner, Mr. Storchheim, should have been made aware that when he was appointed to the CBSC, he had the responsibility to represent the public in a fair and impartial manner. He should not use the CBSC as a means to further CALBO interests and policies and should not use the meetings as a forum to promote CALBO issues. The Chairman of the CBSC has a responsibility to direct the questions and discussions toward the proposals before the Commission and not allow such misuse of position by one of the members.

The letter then provided an opinion regarding statutory authority for fee setting and recommendations regarding BSC procedure. Appellant expressed his opinion that Storchheim should have researched both sides of the issues by stating that:

> It is obvious that Mr. Storchheim knew what comments he was going to make, what questions he was going to ask and to what purpose his questions were intended to promote before he came to the June 8, 1992 meeting of the CBSC. A fair and open-minded commissioner would have researched both sides of the issues or at least given OSA time to assemble the required data."

Appellant concluded his letter with a summary and a statement that the commission should not be used for the promotion of the policies of the special interest groups from which the commissioners are chosen. Appellant invited Conrad and the commissioners to discuss the matter with him, and he indicated his intention to attend their next meeting.

The letter was written on OSA letterhead and signed by appellant as the "Chief Structural Engineer."

On July 24, 1992, John Canestro responded to appellant's letter. In the letter Canestro stated: "Quite frankly your letter indicates a lack of knowledge of the responsibilities of the BSC or perhaps disdain for the Commission proceedings." Canestro then set forth the Commission's structure and process. Canestro stated that Storchheim is a "recently appointed building official representative to the Commission." Canestro stated that he was "disappointed" that the appellant took the questioning "so personally."

Copies of this letter were sent to the Commission members, Mr. Conrad, the Executive Director of the BSC, and the Undersecretary of the Consumer Services Agency.

The policy committee of the BSC met on August 4, 1992. Storchheim, Conrad, and Canestro attended. The appellant's letter was discussed. At the direction of the policy committee, Conrad wrote a memorandum to appellant's

supervisor, Harry Hallenbeck, the State Architect. The memorandum chronicled the June 8 meeting and the correspondence that ensued.

The memorandum stated that "[t]he Committee felt that [appellant's] letter was inappropriate and contained wrong assumptions ..." It went on to state that appellant's letter indicates an attitude of "disrespect" and "disdain." The memorandum stated that all the commissioners voted in support of the motion to table the fee increase and indicated that the commissioners were surprised and upset with the "vehement and accusatory nature of Mr. Campbell's letter." The letter stated that appellant's accusations are "unfounded and inaccurate."

The memorandum ends with a request that in the future OSA provide an annual report to BSC of OSA's staffing requirements, operating efficiency, and fiscal condition. The letter closed with a request for a response so that the issue could be resolved.

Appellant's letter of July 8, 1992 also generated objections from the Executive Director of CALBO to both the Director of the Department of General Services and to Anthony Pescetti, the Chief of Staff at OSA. Pescetti was acting on behalf of the State Architect, Harry Hallenbeck, who was on extended sick leave.

Pescetti asked appellant to write a letter of apology to Storchheim. Appellant drafted an apology dated August 10, 1992 and gave it to Pescetti. Pescetti modified the letter and showed his corrections to appellant who was concerned about the changes. Pescetti did not instruct appellant to send the letter as modified. The letter of apology was never sent.

At the time of the above-noted correspondence, appellant had authority to send correspondence to other agencies on behalf of OSA without prior review by Anthony Pescetti or the State Architect.

The Reorganization

In November 1991, the State Architect (Hallenbeck) commenced planning for the reorganization of OSA. Hallenbeck originally proposed that the reorganization commence in November of 1991, and that it be completed by the Spring of 1992. Hallenbeck discussed the reorganization with his staff, appellant, and the Director of the Department of General Services (Lockwood). Hallenbeck and Lockwood agreed on reorganization of OSA in May of 1992.

Under the reorganization plan, appellant's plan checking function was to be merged with the Structural Safety Section of the OSA. The unit was to be identified as the Office of Regulatory Safety Services. The unit was to be headed by an

exempt employee or an employee at the Career Executive Assignment III level. The position held by appellant, Chief Structural Engineer, was to be abolished, along with several other C.E.A. positions.

Hallenbeck originally planned to offer appellant a position in the new organization in the Professional Policy Section. Appellant's position would report directly to Hallenbeck and would deal with the technical aspects of the duties of the position appellant previously held as Chief Structural Engineer.

As of January 14, 1993, the date of the hearing before the ALJ, the reorganization was not scheduled to be completed until July of 1993. The position of Chief Structural Engineer was to be abolished at that time.

The Termination Process

Pescetti discussed the appellant's letter and the attendant complaints with Lockwood, the Director of the General Services Department. In August 1992, Pescetti also called Hallenbeck, the State Architect and told him of appellant's letter and the ensuing complaints. In September 1992, Lockwood called Pescetti and told him that he wanted to terminate appellant's CEA position. Lockwood authorized Pescetti to handle the matter and implement the termination.

After speaking to Pescetti, Lockwood went to see Hallenbeck who was at his home on sick leave. He told Hallenbeck of his decision. Lockwood told Hallenbeck he considered the tone of appellant's letter to be inappropriate. He also spoke to Hallenbeck about the reorganization and the change in appellant's position due to the decision to terminate. Hallenbeck accepted Lockwood's decision to terminate appellant's Career Executive Assignment.

In September 1992, Pescetti spoke to appellant and discussed the termination with him. He informed him of the impending termination. Pescetti told appellant that he had been told to terminate appellant by the Director of the Department of General Services and that the termination was due to administrative changes. The appellant asked Pescetti what would happen. Pescetti said it was up to the Director and State Architect. He told appellant he would be receiving a letter on the subject but he did not know when.

On September 8, 1992, appellant was served with a memorandum notifying him that his CEA appointment was terminated effective September 30, 1992.

ISSUES

1. Did the Department follow the necessary requirements for terminating an employee on Career Executive Assignment as

set out in Title 2, California Code of Regulations, Section 599.990?

2. Was the ALJ correct in finding that appellant's letter to the BSC was protected speech under the First Amendment but that appellant would have been dismissed anyway due to a major reorganization?

3. Did the termination violate appellant's First Amendment right to express a political opinion or State Personnel Board Rule 548.136 which prohibits termination of Career Executive Assignment for such expressions?

DISCUSSION

The Termination Process

DPA Rule 599.990[3] provides:

> In terminating a career executive assignment principles of good personnel management shall be observed through conforming to the following procedures:
>
> (a) The appointing power, in advance of service of written notice of termination of assignment, shall indicate to the employee its intention to terminate the assignment and the employee shall be privileged to discuss the termination with the appointing power.
>
> (b) The appointing power shall serve the employee with written notice of termination of the assignment at least 20 days prior to the effective date of termination and a copy of such notice shall be furnished to the Department of Personnel Administration.

[3] The DPA rules are contained in Title 2 California Code of Regulations.

Pescetti was ordered to implement Lockwood's decision to terminate appellant. Pescetti, acting upon those instructions, discussed the impending termination with appellant telling him that the termination was due to administrative changes. Appellant asked what would happen. Pescetti told appellant he did not know but that appellant would get a letter.

Appellant was given 20 days written notice. This process of both prior verbal and written notice fulfills the requirements of section 599.990.

Improper Motivation

Appellant claims his termination violates SPB Rule 548.136 which provides that a terminated CEA

> ...may appeal to the State Personnel Board upon grounds that the termination was effected for reasons of age, sexual preference . . marital status, race, color, national origin, ancestry, disability. . . religion, or religious opinions and affiliations, political affiliation, or political opinion. After hearing the appeal, the board may affirm the action of the appointing power, or restore the affected employee to the career executive assignment.

Appellant contends that his termination was taken in retaliation for the correspondence that he sent to the BSC on July 8, 1992 which included statements which appellant characterizes as political opinion. Thus, appellant argues, his termination violates his First Amendment right of free speech.

In Mt. Healthy City Board of Ed. v. Doyle (1977) 429 U.S. 274, the Supreme Court developed the following three part test for determining whether an employee was terminated in retaliation for the exercise of First Amendment rights:

1. The employee must show that the relevant conduct was constitutionally protected; and,

2. the employee must show that the conduct was a "substantial" or "motivating" factor in the decision to terminate. If the employee meets this burden, then

3. the Department must show by a preponderance of the evidence that the decision to terminate the employee would have been reached even in the absence of the protected conduct.

In upholding appellant's termination, the ALJ found that appellant's conduct was constitutionally protected and was a substantial factor in the decision to terminate, but that, in the face of a major reorganization, the department would have reached the decision to terminate even in the absence of the offending speech.

The Board disagrees with the ALJ's finding that appellant's letter to the BSC was protected speech. It is true that "[a] public employee does not relinquish his First Amendment rights to comment on matters of public interest by virtue of government employment." (Connick v. Myers (1983) 461

U.S. 138.) However, an employee's First Amendment rights are not absolute. A government entity may seek to discipline or discharge an employee for speech even if the First Amendment is implicated. (Id.) For the reasons set out below, the Board finds that appellant's letter to the BSC was not speech protected by the First Amendment.

The Board also finds that the reorganization did not coincide with the termination of appellant and, therefore, could not have been an alternative reason for the discharge.

Balancing Test

When a government employee is terminated or otherwise disciplined for conduct cognizable under the First Amendment, a review of the government's action requires a "balancing between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." (Id. at 146.)

Matter of Public Concern

In his letter to the BSC, appellant made four main points. He opined that it was unfair to raise issues with the OSA representative without giving prior notice of an intent to raise these issues. He indicated his belief that Storchheim, a new commissioner, was representing CALBO interests and not

the interests of the public, behavior he characterized as misuse by Storchheim of his position. In addition, appellant criticized the Chairman for allowing Storchheim to raise issues that appellant felt were irrelevant to the issues before the Board. Finally, he lectured the new Commissioner concerning his duties.

Not all these issues qualify as matters of public concern. As the Court stated in Connick v. Meyers:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. (461 U.S. at 146).

However, First Amendment protections are triggered even if only some part of a communication addresses an 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 letter addressed the alleged misuse of a position of power, an issue which is clearly a matter of public concern.[4]

[4] John Canestro, a Vice Chair at BSC, wrote to appellant that his charge of misuse of power indicated a lack of knowledge of BSC's responsibilities. Canestro noted that Storchheim was appointed as the building official representative. The implication is that it is perfectly proper for Storchheim to voice issues of concern to building officials. See Health and Safety Code § 18920 (a) and (e). However, the truth or falsity of appellant's charge does not decide the First Amendment issue. Courts have found that a certain amount of inaccuracy in the content of the speech must be tolerated. (See Pickering v. Board of Education (1968) 391 U.S. 563, 570-72.)

A finding that appellant's speech touched upon a matter of public concern, however, does not end the inquiry. Appellant's termination may still be upheld if the right of an employee to comment on matters of public concern is outweighed by the state's interest in the efficient operation of its duties.

State Interest

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. at 388.) 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 concluded

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

In Rankin v. McPherson, the Court examined the state interest in the dismissal of McPherson, a clerical worker employed in the Harris County, Texas, Constable's office. On March 30, 1981, McPherson and her fellow workers heard over the radio of the attempted assassination of President Ronald Reagan. In a private conversation concerning Reagan's cutbacks of Medicaid and food stamp funds, and the effect of these cutbacks on Afro-Americans, McPherson told a co-worker who was also her boyfriend, "shoot, if they go for him again, I hope they get him." McPherson's remark was overheard by another co-worker who reported it to the Constable who dismissed McPherson.

The Court found that, although McPherson made the comment at work, there was no showing that the comment interfered with the office's functioning, discredited the office or demonstrated a character trait that made McPherson unable to perform her work, Finally, the Court held that because McPherson "serve[d] no confidential, policy-making, or public contact role, the danger to the agency's successful functioning from [McPherson]'s private speech is minimal." The Court found that the state's interest did not outweigh McPherson's free speech interest and found her dismissal to be

improper.

Applying the Court's analysis to the present case, we find the state interest to be clearly substantial. Appellant is a CEA, an employee on Career Executive Assignment. Government Code § 18547 defines Career Executive Assignment as:

> ...an appointment to a high administrative and policy influencing position within the state civil service in which the incumbent's primary responsibility is the managing of a major function or the rendering of management advice to top-level administrative authority.

The effective functioning of OSA depends on a good working relationship with the various boards and agencies which have authority to approve or disapprove OSA's activities. Among appellant's duties is the duty to appear before the BSC in order to explain and/or advocate on OSA issues.

Appellant's comments were made in his capacity as Chief Structural Engineer. The comments generated a number of separate responses from the BSC. A Vice Chair, John Canestro, wrote to appellant criticizing the factual basis of appellant's letter and noting how personally appellant had taken BSC's action. The Board Policy Committee found it necessary to discuss the letter and directed that one of its members write to complain about the impropriety of the letter

as well as the incorrect assumptions underlying appellant's opinion. Clearly, the BSC, individually and as a group, were upset with appellant's statements. Likewise, the Director of Calbo complained to both the Director of General Services and to Anthony Pescetti, the Acting Chief Architect and appellant's immediate supervisor.

The disturbance was not limited to individuals and organizations outside of OSA. Pescetti ordered appellant to prepare an apology. Mr. Lockwood, the Director of General Services, determined that the letter was inappropriate.

Unlike the content of McPherson's offensive speech which the Supreme Court found to be far removed from any issues concerning the effective functioning the Constable's office, the content of appellant's speech directly concerned his day to day functions as a confidential employee.

In Rankin, the Court found that McPherson's statement created no danger of discredit to her employer because the statement was a private statement to a single co-worker uttered in an office area to which the public had no access. In contrast, appellant addressed his letter to Richard Conrad, the Executive Director of BSC. He sent copies of the letter to all the commissioners of the BSC. The letter was written on OSA stationery and signed by appellant using his OSA, CEA title.

Appellant's conduct went beyond the mere expression of his private views. Appellant used his CEA position to accuse board members of impropriety. Thus, the danger of discredit to OSA is significant.

Finally, unlike McPHerson, a low-level public employee who expressed a personal view on a matter of public concern that did not directly relate to her employment, appellant served as a confidential employee whose duties included policy- making and public contact. Comments such as appellant's, made in the capacity of his Career Executive Assignment, have the potential to severely impair OSA's functioning.

Striking the Balance

The position of the fulcrum of the balancing test moves from side to side in relation to the content of the speech. (Connick, 461 U.S. at 150). As the Court explained in Rankin, "The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails." (Rankin, 378 U.S. at 390).

Appellant, a CEA in a position of authority and power, failed to carry with him the burden of caution appropriate to such an employee. His CEA position requires that he understand the import of his words, the implication of his use

of OSA stationery to utter those words, and the weight that his position in the OSA organization places on the words and tone he uses. This he failed to do.

Appellant's means of expressing his opinion was inappropriate and not subject to First Amendment protection. On balance, OSA, a public agency, has adequate reason not to permit such expression by its Chief Structural Engineer.

Since we find that appellant's speech was not constitutionally protected, we need not reach the issue of whether appellant would have been terminated notwithstanding his speech.

CONCLUSION

For all of the reasons set forth above, the Board sustains the department's dismissal of appellant from his CEA position.

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 termination of Hugh P. Campbell from his Career Executive Assignment III at the Office of the State Architect by the Department of General Services at Sacramento is sustained;

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

THE STATE PERSONNEL BOARD

Richard Carpenter, President
Lorrie Ward, Vice President
Alice Stoner, Member
Floss Bos, Member
Alfred R. Villalobos

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on June 7, 1993.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board